

IMPACT OF COVID-19 PANDEMIC TO THE PAYMENT OBLIGATIONS TO BANKS AND FINANCIAL INSTITUTIONS; A PERSPECTIVE FROM INDONESIAN LAWS AND REGULATIONS

Gunawan Widjaja

Gunawan Widjaja, Universitas Indonesia, UPN Veteran Jakarta. Email:
widjaja_gunawan@yahoo.com

Abstract: COVID-19 pandemic has caused difficulties; among them was financial distress. This situation has led to the issue of force majeure. The research aims to discuss the effect of the pandemic COVID-19 to payment to banks and other financial institutions in Indonesia, as to whether a force majeure event has happened and how to deal with it. This research is descriptive-analytical, normative legal research. It used secondary data, available for the public, consisted of primary legal sources and secondary legal sources with tertiary legal sources as a supplement. Data obtained through the literature study were analyzed qualitatively. The researcher conducted triangulation to maintain the validity and reliability of data. Result finds out that the COVID-19 pandemic cannot be automatically used as force majeure reason concerning financial obligations. The Government of the Republic of Indonesia has issued Government Regulation in Lieu of Law No.1 Year 2020 that provides contingency plans for financial institutions to handle the COVID-19 pandemic situation, which allowed banks and financial institutions to offer payment relaxation.

Keywords: COVID-19 pandemic, force majeure, payment obligations.

1. Introduction

It was half a year ago since coronavirus was found to infect humans. However, it is only in late March 2020, President of the Republic of Indonesia declared the status of public health emergency based on President Decree No.11 Year 2020 (PD11-2020) (PRI, 2020a). Together with the issuance of the PD11-2020, the Government of the Republic of Indonesia also issued Government Regulation No.21 Year 2020 regarding Large Scale Social Distancing to Accelerate the Handling of Corona Virus Disease 2019 (COVID-19) (GR21-2020) (GRI, 2020a) and Government Regulation in Lieu of Law No.1 Year 2020 regarding State Financial Policy and Financial System Stability to Handle Corona Virus Disease (COVID-19) Pandemic and/ or to Face Threat that Endangers National Economics and/ or Financial System Stability (GRiL01-2020) (GRI, 2020b).

Before the issuance of GR21-2020, in practice, the Government of the Republic of Indonesia has encouraged voluntary social distancing. With the enactment of the GR21-2020, social distancing has become a must. Social distancing was meant to limit certain activities of people in a particular community within a specific area, which was suspected that person in that area had been infected and/or contaminated with COVID-19, to prevent the spreading of the disease or contamination. One of the effects of the compulsory Large Scale of Social Distancing (LSSD) based on GR21-2020 was that people could not work from the office as usual. There were limitations in almost all industries, especially in real sectors, which may also influence financial sectors. The direct impact of LSDD has been perceived in society, where many people have lost their buying power. People have almost lost their income. Those who used to work were send home with less payment; some even get laid off. Those who worked independently were suffering from the effect of LSDD. Things must be conducted through e-facility (GRS, 2020a).

Following those regulations, the President of the Republic of Indonesia, in early April, issued another President Decree No.12 Year 2020 regarding Determination of non-natural Disaster of COVID-19 Spreading as National Disaster (PD12-2020 (PRI, 2020b)). PD12-2020 was derived from Law No.4 Year 1984 regarding Infectious Disease Epidemic (RI, 1984) and Law No.24 Year 2007 regarding Disaster Management (RI,2007). The PD12-2020 was, in fact, totally used two different laws as the basis of promulgations. Ever since the enactment of the PD12-2020, there were many rumors, statements event opinions that stated or even recommended that the existence of PD12-2020 is the moment of Force Majeure. Moreover, there was a compelling statement to annul or cancel contracts signed and concluded before the issuance of the PD12-2020 or before COVID-19 was known to be pandemic. Those statements were terrible for economic growth; not only will they increase un-performance in loans but also the collapse of financial institutions.

This research aims discuss the conception of force majeure event; the relation between the existence of the COVID-19 pandemic situation in Indonesia as to whether it can be seen as a force majeure event in Indonesia; the effect of the determination of PD12-2020 concerning the payment obligations to banks and other financial institutions in Indonesia based on prevailing and current Indonesian laws and regulations.

2. Literature review

The 6th edition of Black's Law Dictionary (Black; 1990) stated that:

force majeure—French for "superior force"—as an event or effect that can be neither anticipated nor controlled. The term is commonly understood to encompass both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).

In the 8th edition of Black's Law Dictionary (Garner, 2004):

A Force Majeure clause. A contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled."

The explanation given in both the 6th edition and 8th edition of Black's Law Dictionary indicated that force majeure is beyond the control and cannot be anticipated before. Both also referred to the impossibility or impractical of performing an obligation.

Force Majeure was not an English legal term under English Law. Under English Law, the existence of force majeure depends on the terms in the contract, as to whether it contained force majeure terms. There should be a definition of a force majeure event, and the impact and implications when the force majeure event occurred (Debevoise & Plimpton, 2020).

In Japan, there was no specific definition given for force majeure. Based on the "freedom to contract" principle, the parties in a contract are free to set up their force majeure clause. In general force majeure clause in Japanese contract will include:

- a. Existence of an event beyond the reasonable control of the performing party;
- b. Such an event cannot be avoided or mitigated by taking reasonable efforts;

c. The event resulted in a breach of the performing party (Hogan Lovells, 2020).

Regulations about obligations in Indonesia are regulated in the Indonesian Civil Code (ICC) (Subekti and Tjitrosudibio, 2008), which was based on the old Dutch Civil Code. The term "*force majeure*" in French or "*overmacht*" in Dutch can be found in Article 1245 ICC, which stated that:

The debtor needs not to compensate for costs, damages, or interests if Force Majeure or an accident prevented him from giving or doing an obligation, or because of such reasons, he committed a prohibited act.

From the provision above, force majeure refers to a situation that makes an obligor cannot fulfill his/her obligation. In the usual case, any person who cannot fulfill his/ her obligation shall pay costs, damages, and compensations. If a Force Majeure causes the incapability of the obligor to perform his/ her duties, then he/ she cannot be imposed to pay the costs, damages, or interests. However, there is no explanation of what force majeure is. If the article 1245 ICC was read further, it said that force majeure could be read as:

1. an event beyond the control of the obligor that made the obligor cannot perform his/ her obligation; *or*
2. a circumstance beyond the power of the obligor that if the obligor performs his/ her duty, he/ she is considered to do something unlawful (Satrio, 1999) (Muljadi and Widjaja, 2004).

If we look further, article 1244 ICC (Subekti and Tjitrosudibio, 2008) stated that:

If there is any reason for such, the debtor is compensated for costs, damages, and interests if he cannot prove that the non-performance or the late performance of such obligation is caused by an unforeseen event, for which he is not responsible, and he was not acting in bad faith.

The article 1244 also allowing obligor to un-perform his/ her obligations without the obligation to pay compensations, damages, and interests if:

1. there was an unforeseen event (which cannot be predicted before);
2. the happening of the event cannot be contributed to the obligor; and
3. there was no bad faith from the obligor (that made his/ her innocent) (Muljadi and Widjaja, 2004).

Both unpredictable events and uncontrollable events regulated in article 1244 and article 1245 were similar to the meaning of force majeure defined in Black's Law Dictionary.

Force majeure is an event that made default without punishment. It was an excuse or reason for not being punished because of an un-performance of the debtor. It was part of the agreement that formed the contract. In whatsoever circumstances, force majeure cannot be determined by only one party to the contract. It must be agreed between the parties in the contract. Force majeure cannot be declared because of Government Regulations, President Regulation, or any laws and regulations. Force majeure does not raise annulment or cancellation of an agreement, especially terminating the obligations that came with the contracts as based on Article 1338 ICC, "All valid agreements become laws for those who made it. Such agreements cannot be recalled other than by mutual consent, or under reasons stipulated by the law." It means that whenever an agreement can still be

performed, the parties are bound to complete the contract unless there was a condition that made the performance become (nearly) impossible. In such a situation, the implementation will be delayed until the condition ceases (Muljadi and Widjaja, 2003). Obligations must be performed in good faith (Subekti, 2007). It means that issues on force majeure arising from the issuance of Government Regulations, President Regulation, or Decree cannot be accepted. The intention of using Government Regulations, President Regulation, or Decree as force majeure to annul an agreement and to get rid of the obligations is something that cannot be acceptable in Indonesia (Widjaja 2020). In English law, the occurrence of a force majeure event may result in the delay of performance or termination of the contract. It should also be noted that some implementations can still be conducted even a force majeure event has occurred (Debevoide & Plimpton, 2020). In leases agreement, the existence of force majeure did not influence the payment obligation and other monetary obligations (Ballard Spahr, 2020).

3. Methodology

This research is descriptive-analytical. Descriptive meant to elaborate and explain the concept of force majeure event and the regulations that have been issued during the COVID-19 pandemic in Indonesia. An analytical approach used to describe the relationship between the COVID-19 situation and force majeure events connected with the prevailing and currently issued regulations. The analytical process will result in the opinion of the researcher as to whether the published rules concerning the COVID-19 pandemic situation can be used as force majeure concerning the fulfillment of financial obligations to Banks and other financial institutions.

This research also uses the normative legal method. The legal method was used because the research issues involved the understanding of force majeure as legal terms. The researcher will use the legal deductive method to explain COVID-19 as legal phenomena that may cause un-fulfillment of financial obligations.

The research used a qualitative approach. The study explains the phenomena that happened in the Indonesian community during COVID-19. The qualitative approach made data analyzing sharper and more in-depth about the issues raised in this research. The qualitative approach was also in-line with a normative approach used in this research, i.e., to explain the relationship between the COVID-19 phenomena in Indonesia with legal norms of force majeure.

Data used in this research were secondary data, which were data available for the public. Data can be freely accessed by any person that needs verification and validation of the information provided in this research. Since the research was conducted to understand the problems in Indonesia, most of the data were available in Bahasa Indonesia only; however, for the study, the researcher will do the necessary translation whenever it was required to understand the matters and issues being discussed in this research.

Data were obtained through literature research using a literature review. Most of the literature can be obtained through the "google" data machine. Data were chosen according to the relevancy to the research. Keywords used the words "force majeure" and "COVID-19" as the basis for the searching. The results of the research can be divided into two main categories. First was the result that included international definition and concept to force majeure concerning COVID-19. The second was the results relating to force majeure in Indonesia, particularly about the COVID-19 pandemic situation in Indonesia. The researcher also used secondary

data in forms of primary legal sources that consisted of prevailing laws and regulations that were currently enforced in Indonesia, either it was promulgated before or during the COVID-19 pandemic. Secondary legal sources mostly contained doctrines developed by scholars concerning the force majeure concept and conception in Indonesia.

4. Discussion and Conclusion

In Indonesia, given the COVID-19 pandemic itself, as to whether COVID-19 can be declared as force majeure, ICC stated that it must be seen from the conditions. The conditions, as mentioned in article 1244 and article 1245 ICC are:

1. an unpredicted event that made the obligor cannot perform his/ her obligation, which cannot be contributed to the obligor, and the obligor is innocent; or
2. an uncontrollable event that made the obligor cannot perform his/ her obligation; or
3. an uncontrollable event that if the obligor performs his/ her duty, he/ she is considered to do something unlawful.

In the application of points 1 and 2, it could be agreed that the COVID-19 pandemic is an unpredicted or/and uncontrollable event, even the law distinguished between unpredicted and uncontrollable. An unpredicted event referred to a more subjective occurrence that is only unpredicted to only several persons; meanwhile, uncontrollable referred to something that objectively cannot be controlled by most people (Muljadi and Widjaja, 2004). However, COVID-19, as an unpredicted or uncontrollable event, does not necessarily mean that all obligor cannot perform their obligation. On how and when an obligor cannot perform his/ her duties, it must consider the nature of the duties that may be general or specific performances/ services that can only be conducted by a particular person or certain things that can only be produced the like. If there would be replacements in general without making a significant difference in performance, then an event of default would become something unnecessary. Most businesses avoid being declared in default. Once they were in default, it would mean losing their "goodwill" and future in front of their partners. It is why article 1338 paragraph (3) ICC always emphasis on good faith in performance (Muljadi and Widjaja, 2003). As to whether COVID-19 can cause a default in a contract and can be used as a reason to be excused from punishment caused by the default must therefore be concluded after taking thorough the contract. It also means that COVID-19 can be used as a force majeure condition.

On point 3, regarding the performance of obligor that might be considered to be unlawful, let us see the content of GR21-2020. Even GR21-2020's heading is "Large Scale Social Distancing to Accelerate the Handling of Corona Virus Disease 2019". The real regulations that enforce LSSD were in the level of Regional Head Regulation, such as Governor Regulation or Mayor or District Regulation (GRI, 2020a). In Jakarta, for instance, is DKI Jakarta Governor Regulation No.33 Year 2020 regarding Implementation of Large Scale Social Distancing to Handle Corona Virus Disease 2019 (COVID-19) in DKI Jakarta Province (GDKIR, 2020). The regulation never prohibits person/ business to do their business; it only requires people to work at home. Besides the application of the rule is limited on a territorial basis, the length of the condition for LSSD was also determined for a certain period, using 14 days as basic terms with the

possibility of extensions. For DKI Jakarta, it could be read in DKI Jakarta Governor Decree No.380 Year 2020 regarding the enactment of the Implementation Large Scale Social Distancing to Handle Corona Virus Disease 2019 (COVID-19) (GDKID, 2020). From those regulations, it can be said that the issuance of the Government Regulation, President Regulation or Decree, and other rules, except specific Regional Head Regulation, does not prohibit anybody or other legal subjects to do business.

When we refer to payment obligations to banks and financial institutions, we talk about a debtor who owed banks or other non-bank financial institutions (Basheer et al., 2019; Khan et al., 2020; Hassan et al., 2020). They are natural persons with a private loan, consumer loan, mortgage loan, and legal entities with a corporate loan, investment loan, working capital loan, and others. It can be said that many of those individuals and legal entities, which are involved in real sectors, as debtors, are financially hurt because of the COVID-19 pandemic. The financial matters will end up with the capability of those debtors to pay their loans to banks and other financial institutions.

To anticipate the failure of payment, the Government of the Republic of Indonesia has issued GRiL01-2020. The Government Regulation in lieu of Law regulating the State Financial Policy and Financial System Stability to Handle Corona Virus Disease (COVID-19) Pandemic and/ or to Face Threat that Endangers National Economics and/ or Financial System Stability, that involve the relaxations in State Finance. The relaxations were in the field of State Income, including income from taxes, State Spending, including local government finance and spending, and the efforts to handle financial institutions.

Concerning the efforts in handling financial institutions, the Financial Service Authority was given authority to:

- a. provide written order to a financial institution to merge, consolidate, acquire, integrate, and/ or convert;
- b. determine an exception for certain parties from the obligations to disclose in the capital market to prevent and handle financial system crisis; and
- c. determine financial institutions, including banks, to conduct provision regarding the utilization of information technology in conducting General Meeting of Shareholders or other meeting based on prevailing regulations.

To maintain the stability of the financial system that might happen to banks, Bank Indonesia was given authority to, among others:

- a. provide short term liquidity loan based on the Syariah principle to systemic banks or other non-systemic banks;
- b. give particular liquidity loan for a systemic bank which has liquidity problems which do not comply with the requirement in point a. above;
- c. purchase State Bond or State Syariah Bond in the primary market; and others.

Based on the above, BI has issued several Regulations (PBI):

- a. "PBI No.22/4/PBI/2020 regarding an incentive for Banks which Provide Loan for Certain Economic Activities to Support Handling Economic Impact Caused by Corona Virus Pandemic.

- b. PBI No.22/5/PBI/2020 regarding the second amendment of PBI No.19/3/PBI/2017 regarding Short Term Liquidity Loan for Conventional Banks.
- c. PBI No.22/6/2020 regarding the second amendment of PBI No.19/4/PBI/2017 regarding Syariah Short Term Liquidity Loan for Syariah Banks.
- d. PBI No.22/7/PBI/2020 regarding Adjustment of Implementation of Several BI Provisions as Impact of *Corona Virus Disease* 2019 (COVID-19) Pandemic.
- e. PBI No.22/10/PBI/2020 regarding the Fifth amendment of PADG No.20/10/PADG/2018 regarding Statutory Reserved Requirements in Rupiah and Foreign Currency for Conventional Banks, Syariah Banks, and Syariah Business Unit.
- f. PBI No.22/11/PBI/2020 regarding amendment of PADG No.21/22/PADG/2019 regarding Macroprudential Intermediation Ratio and Macroprudential Liquidity Buffer for Conventional Banks, Syariah Banks, and Syariah Business Unit."

Besides the BI Regulations, the Financial Services Authority (OJK) has also issued:

- a. "POJK No.11/POJK.03/2020 regarding National Economic Stimulus as Countercyclical Policy as Impact of the Spreading of Corona Virus Disease 2019.
- b. POJK No.13/POJK.03/2020 regarding amendment of POJK No.38/POJK.03/2016 regarding the Implementation of Risk Management in Using Information Technology by Banks.
- c. POJK No.14/POJK.05/2020 regarding Countercyclical Policy as Impact of the Spreading of Corona Virus Disease 2019 for Non-Banks Financial Institutions.
- d. POJK No.15/POJK.04/2020 regarding Plan and Organization of Public Company General Meeting of Shareholders.
- e. POJK No.16/POJK.04/2020 regarding the Implementation of Public Company General Meeting of Shareholders Electronically.
- f. POJK No.17/POJK.04/2020 regarding Material Transaction and Changing in Business Activities.
- g. POJK No.18/POJK.03/2020 regarding Witten Order to Handle Banks' Problems.
- h. SE OJK No.3/SEOJK.04/2020 regarding Other Conditions as Market Conditions that Significantly Fluctuated in the Implementation of Repurchase of Shares issued by Issuer or Public Company."

Based on those issued regulations that support the sustainability and continuation of banks' operational and financial capacity, currently, banks are lowering the interest rate, extending the period of payment, providing extra facilities, reducing the principal amount, and conducting reorganization in payment, including providing a grace period of payment. It means that the COVID-19 pandemic shall not influence the obligations of debtors to banks and financial institutions. There would be no force majeure conditions as based on non-punishment default. As seen from the efforts conducted by banks, they are trying to make debtors, not in the states of defaults.

REFERENCES

- Basheer, M. F., Hameed W. U., Sabir S. A., & Jehangir, M. S. (2019). ISLAMIC BUSINESS ETHICS AND ISLAMIC BANKS PERFORMANCE IN MALAYSIA: DOES SINCERITY MATTER? . Hamdard Islamicus.42(4). 217-224,
- Black, HC. (1990). *Black's Law Dictionary Centennial Sixth Edition*. St. Paul, Minn: West Publishing Co.
- Ballard Spahr. (2020). Force Majeure and COVID-19. <https://www.ballardspahr.com/-/media/files/alerts/force-majeure-and-COVID-19---03-20.pdf>
- Debevoise & Plimpton. (2020). COVID-19 and Its Impact on English Law Contract. *Debevoise in Depth*. <https://www.debevoise.com/-/media/files/insights/publications/2020/03/20200318-covid19-and-its-impact-on-english-law.pdf>
- Garner, BA. (2004). *Black's Law Dictionary, 8th Edition*, St. Paul, Minn: West Publishing Co.
- Government of the Republic of Indonesia. (2020). *Government Regulation No.21 Year 2020 regarding Large Scale Social Distancing to Accelerate the Handling of Corona Virus Disease 2019*. State Gazette Year 2020 No.91, Supplement No.6487.
- Government of the Republic of Indonesia. (2020). *Government Regulation in lieu of Law No.1 Year 2020 regarding State Financial Policy and Financial System Stability to Handle Corona Virus Disease (COVID-19) Pandemic and/ or to Face Threat that Endangers National Economics and/ or Financial System Stability*. State Gazette Year 2020 No.87, Supplement No.6485.
- Governor of DKI Jakarta. (2020). *DKI Jakarta Governor Decree No.380 Year 2020 regarding the enactment of the Implementation Large Scale Social Distancing to Handle Corona Virus Disease 2019 (COVID-19)*.
- Governor of DKI Jakarta. (2020). *DKI Jakarta Governor Regulation No.33 Year 2020 regarding Implementation of Large Scale Social Distancing to Handle Corona Virus Disease 2019 (COVID-19) in DKI Jakarta Province*.
- Hassan S. G., Waemustafa, W., & Hidthiir M. H. B. (2020). THE FUNDING LIQUIDITY RISK AND BANK RISK: A REVIEW ON THE ISLAMIC AND CONVENTIONAL BANKS IN PAKISTAN. Hamdard Islamicus.43(1). 77-94,
- Hogan Lovells. (2020). The COVID-19 pandemic and Force Majeure Clauses in Japan. https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_03_27_v2_japan_force-majeure-clauses.pdf
- Khan A. B., Basheer, M. F., Iqbal J., & Hatim, M. (2020). Global Financial Crisis 2008-09, macro-economic variables and the performance of FTSE Bursa Malaysia Hijrah Shariah Index: A case of Malaysian Stock Market. Hamdard Islamicus.43(1). 94-99,
- Muljadi, K. and Widjaja, G. (2003). *Contractual Obligation*, Jakarta: Rajawali Pers.
- Muljadi, K. and Widjaja, G. (2004). *Obligations in General*. Jakarta: Rajawali Pers.
- President of the Republic of Indonesia. (2020a). *President Decree No.11 Year 2020 regarding the Determination of Public Health Emergency Corona Virus Disease*.
- President of the Republic of Indonesia. (2020b). *President Decree No.12 Year 2020 regarding Determination of non-natural Disaster of COVID-19 Spreading as National Disaster*.
- Satrio, J. (1999). *The Law of Obligation: General Obligation*. Bandung: Alumni.
- Subekti, R. and Tjitrosudibio, R. (translator). (2008). *Indonesian Civil Code (Burgerlijk Wetboek)*. Jakarta: Pradnya Paramita.
- Subekti, R. (2007). *Contract Law*. Jakarta: Intermasa.

- The Republic of Indonesia. (1984). *Law No.4 Year 1984 regarding Infectious Disease Epidemic*. State Gazette Year 1984 No.20, Supplement No.3273.
- The Republic of Indonesia. (2007). *Law No.24 Year 2007 regarding Disaster Management*. State Gazette Year 2007 No.66, Supplement No.4723.
- The Republic of Indonesia. (2018). *Republic of Indonesia Law No.6 Year 2018 regarding Health Quarantine*. State Gazette Year 2018 No.128, Supplement No.6236.
- Widjaja, G. (2020). President Decree on Corona as National Disaster and Force Majeure for Business. <https://badakpos.com/keppres-corona-sebagai-bencana-nasional-force-majeure-untuk-dunia-usaha/>