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# PKPU Moratorium as A form of Proof of Default

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**KEYWORDS**

Moratorium, PKPU, Force Majeure, Economy, Commercial Court

**ABSTRACT**

The Bankruptcy and PKPU mechanism is the best debt moratorium at this moment because the creditor may estimate the debtor's ability to pay by looking at his good faith and the peace plan's debt moratorium. The surge in commercial court lawsuits and other economic repercussions led to the bankruptcy and PKPU moratorium, which is not the proper solution. If unsure, the moratorium can be reviewed. The moratorium on bankruptcy and PKPU cases is not an effective solution because bankruptcy institutions and PKPU were born from Law Number 37 of 2004, so the idea of a moratorium must go through a legislative process to be in sync with that law, which is difficult and takes a long time. Technically, this moratorium limits commercial courts' competence, requiring legislative and judicial responsibilities to be synchronized. Implementing it will generate several issues.

## INTRODUCTION

The moratorium on bankruptcy and postponement of debt payments (PKPU) is intended to save the business world from the COVID-19 outbreak(Permatasari & Mellynda, 2021). To prevent arrears, quick setup is required. The government can issue a PERPPU on the Bankruptcy Law and PKPU to cover all aspects of this moratorium, including bankers and creditors.(Permatasari & Mellynda, 2021) To avoid a legal vacuum, the preparation of the moratorium and legal institutions should be timed.

If in the decision of bankruptcy declaration by the court, debtors who cannot pay their debts will cause a very broad impact of losses not only for the debtor but also for the state and society because it can affect state revenue in the form of taxes so as to cause losses. Termination of employment for employees and workers that can affect the welfare of the community(Lane, Berecki-Gisolf, Iles, Smith, & Collie, 2021). Debtors who are bankrupted by a small percentage of creditors may be able to restructure and become a healthy corporation(Becker, Hege, & Mella-Barral, 2020).

The Ministry of Law and Human Rights reported 1,122 PKPU and Indonesian bankruptcy applications on December 10, 2021. The reasons for the bankruptcy of PKPU and the moratorium. First, global policy directions such as the World Bank that help lenders and borrowers work together(Siregar, 2021). The second scenario is for parties to use PKPU during the COVID-19 pandemic. This condition has a broad impact, including termination of employment (layoffs) if a company is declared bankrupt. This is justified by taking moratorium measures on filing for bankruptcy and PKPU to reduce the bankruptcy rate and prevent entrepreneurs who are still bankrupt from entering the

bankruptcy process. In principle, PKPU is debt restructuring, with PKPU debts that have been stuck in payment require restructuring. Restructuring through the court (PKPU) is carried out because it can simultaneously restructure all debts of debtors. PKPU is a period of mass negotiation or debt restructuring through the Commercial Court facilitated by the PKPU Management and the Supervisory judge. Debt restructuring in the PKPU process involves all creditors and if it succeeds in achieving peace according to the conditions in Article 281 of the Bankruptcy Law, then the peace will be ratified by the court, and this is binding on all creditors, even if some are not present.

If viewed from the debtor's point of view, PKPU is an opportunity to reorganize its debts with legal protection for the sustainability of its business. Meanwhile, from creditors, PKPU is a medium to know that debtors have good prospects to pay off their debts. So, the moratorium on PKPU, how restructuring can be effective and efficient, if you carry out a bilateral restructuring model between debtors and creditors, especially in the case of various creditors, it takes a very long time to negotiate and reach a restructuring agreement.

Due to years of negotiations with many creditors, the PKPU moratorium may hamper the debtor's business. Especially when moral hazard is a kind of deviation. Thus, another problem arises when the moral hazard model or method in conflict of interest is used to utilize the bankruptcy moratorium policy and Suspension of Debt Payment Obligations (PKPU) based on Law Number 37 of 2004 concerning Bankruptcy and Suspension of Payment Obligations. Debt. Therefore, studies are needed to prevent bankruptcy and other defaults caused by the ease of the bankruptcy filing process. Without debt, bankruptcy cases cannot be revisited. Since bankruptcy is the legal process of liquidating a debtor's assets to pay creditors, it cannot exist without debt. Debt leads to bankruptcy. With the bankruptcy moratorium and Suspension of Debt Payment Obligations (PKPU) policy under government control, moral hazard actors will take advantage of this situation to their advantage.

## METHOD

Statutory approaches and conceptual approaches are used in this normative legal research.

1. The first technique is a legal approach that examines applicable laws and regulations.
2. The conceptual approach uses legal principles and doctrines to reveal ideas that lead to legal understandings, concepts, and principles related to the subject matter being discussed. Researchers use these beliefs and doctrines to develop legal arguments to solve problems.

## RESULTS AND DISCUSSION

The Black Law Dictionary defines a moratorium as "Delay in performing an obligation or taking a legally valid or only temporarily approved action.(Thakkar, Makkar, & Goyat, 2022)" A moratorium is a temporary agreement to suspend commitments. First, the Balance Principle in the Bankruptcy Law protects creditors and debtors equally by preventing dishonest debtors from abusing insolvency institutions and institutions(Olujobi, 2021).

The principle of business continuity in the Bankruptcy Law allows companies that promise debtors to survive(Štorha, 2020). The Bankruptcy Law allows companies that do not pay their debts but have good business prospects and cooperative management to restructure their debts and revitalize the company, so bankruptcy is a last resort. The Bankruptcy Law stipulates that debtors can avoid liquidation of their assets in the event that

the debtor is terminated bankrupt(Štorha, 2020). The first way is to apply for PKPU, and the second way is to make peace between the debtor and his creditors after the debtor is declared bankrupt by the Court(Saputra & Luthviati, 2020). However, there are also Government steps regarding the morotorium on PKPU and bankruptcy, which are as follows(Nuriskia & Novaliansyah, 2021):

1. Temporary postponement of bankruptcy and PKPU applications.
2. There is no bankruptcy or PKPU application.
3. Establish a minimum debt value in bankruptcy and PKPU applications.

PKPU is a period of time granted by law by the Commercial Court to creditors and debtors to negotiate a peace plan for all or part of the debt, including reorganization(Yitawati & Sulistiyono, 2021). PKPU is a legal moratorium. PKPU can help debtors avoid bankruptcy. The debtor can only file such an effort before the bankruptcy declaration decision is handed down by the court because Article 229 paragraph (3) of the Bankruptcy Law and PKPU requires that the PKPU application must be decided before the bankruptcy declaration application is filed. According to Article 229 paragraph (4) of the Bankruptcy Law and PKPU, if a PKPU application is filed after the bankruptcy declaration, it must be submitted at the first hearing so that it can be decided before the bankruptcy declaration. In bankruptcy, the receivership controls property and legal deeds, while the debtor cannot. Because bankruptcy begins with the inability to pay, but often becomes the debtor's reluctance to pay his obligations and collectible debts. The debtor, creditor, or any other party permitted by law may file for bankruptcy if the debtor is in such circumstances.

Launching from data Kompas.com - 26/08/2021, "The government is asked to pay close attention to the discourse on PKPU and the Moratorium on Bankruptcy," The government is reviewing the business proposal for a three-year bankruptcy moratorium and postponement of PKPU. This was conveyed by Airlangga Hartanto at the 31st National Working Meeting of the Indonesian Employers Association (Apindo) on Tuesday (24/8/2021). He said bankruptcy and PKPU cases rose to 480 cases in Jakarta, Surabaya, and other courts(Cendhani, Putri, & Tambunan, 2020). Because of the ease of filing PKPU and bankruptcy, the government sees moral hazard(Diza & Wiradirja, 2018). Before issuing regulations related to the moratorium on the Bankruptcy Law, wisdom is needed in seeing fully and thoroughly about PKPU and bankruptcy instruments, that there are no interrelated links and correlations, and that moral hazard with the ease of filing PKPU is currently meaningless. Its relationship with the moratorium must be imposed("Consumer law and policy relating to change of circumstances due to the COVID-19 pandemic," 2020). The delay in the medium-term revision of the DPR Bankruptcy Law in PROLEGNAS will hamper business certainty in Indonesia. Moral hazard does not explain the high number of PKPU applications(Cendhani et al., 2020)Since Nebis in Idem is unknown, creditors can resubmit PKPU applications after they are rejected. Second, statistics from year to year show that PKPU cases end peacefully between debtors and creditors.

The Monetary Crisis that shook Indonesia and other Asian countries led to the Bankruptcy Law and PKPU. Bankruptcy and PKPU are useful in maintaining economic stability because of the legal clarity of the rights of creditors and debtors. Indonesia can soon rise from adversity. To avoid self-execution, a debt moratorium must be agreed. Prevent creditors who have collateral from acting arbitrarily against debtors and other creditors. Avoid dishonest creditors or debtors who offer unilateral rewards. The bankruptcy system and PKPU complete the debt moratorium by considering the wishes of the community and the government. Instead of a moratorium on bankruptcy and PKPU, open as wide as possible to supervise and screen debtors to be responsible and follow the agreement.

Debt restructuring under the Insolvency Act is an amended issue. The pandemic is a hurdle on all fronts, but employers and creditors seeking their rights should also consider it. Thus, the law does not carry out a moratorium, but is given additional restrictions, such as

filing for bankruptcy with a certain value, issuing temporary measures during a pandemic, or a provision that creditors are temporarily not allowed to apply for PKPU. It could also be from the court that is more selective in accepting PKPU applications, then by anticipating the abuse of bankruptcy and PKPU institutions which are ultimately detrimental. Thus, legal certainty of creditors and debtors can be achieved without a moratorium or termination of the Bankruptcy Law.

Proof in terms of default during the pandemic due to overmacht or force majeur Since 2020, debtors and creditors have been fighting the COVID-19 pandemic. The number of reported cases has steadily increased since the first case was discovered in Wuhan, China, in November 2019. Since the COVID-19 pandemic, there has been a lot of debate. Despite much discussion about COVID-19, the WHO declared it a global pandemic. A pandemic is a disease that spreads to many people in many countries at once. In fact, the number of coronavirus cases has increased dramatically and continuously globally. Indonesia and the world are facing new problems due to the global outbreak of corona virus disease 2019 (Covid-19). The COVID-19 pandemic is more than just a health issue. In addition to being a public health crisis, a faltering domestic economy will increase government spending. Civil law states that the debtor's ability to pay creditors will be affected by a decrease in turnover due to decreased demand.

Force majeure to release debtors, Articles 1244 and 1255 of the Civil Code (KUHPercivil) regulate force majeure in agreements. Force majeure regulations focus more on fees, compensation, and interest reimbursement. This provision can still be a guideline for force majeure arrangements. Force majeure clauses, also known as overmacht, can protect debtors from natural disasters (floods, earthquakes, rainstorms, hurricanes), power outages, sabotage, war, military coups, epidemics, terrorism, blockades, embargoes, and more.

Businesses are taking advantage of the global coronavirus pandemic to justify not achieving goals or responsibilities due to situations beyond their control. Many company contracts are automatically changed or canceled. The outbreak of the corona virus has triggered public suspicions, especially among business people who view Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as force majeure. This discussion will also examine force majeure in business contracts during the coronavirus outbreak.

An agreement is a legal relationship between two parties in which one party (creditor) can demand something from the other party (debtor) and the other party must fulfill that demand. If those demands are not met, creditors can sue. In other words, a "default" occurs when a debtor breaks a promise. The Legal Dictionary defines default as negligence, breach of commitment, and contract. Thus, default occurs when a debtor (debtor) neglects to enter into an agreement due to willfulness, negligence, or force majeure (overmacht). "The debtor is declared negligent by a warrant, or by a similar deed, or by virtue of the strength of the engagement itself, i.e. when the engagement results in the debtor being deemed negligent by the lapse of the prescribed time," according to Article 1238 BW of the civil code. The doctrine classifies debtors' defaults (omissions) into four categories:

1. Not doing what he wanted to achieve;
2. Doing what was promised but not as promised;
3. Doing what was promised but too late;
4. Breaking the agreement.

Article 1243 BW stipulates the following default provisions: "Reimbursement of costs, losses and interest due to non-fulfillment of an engagement shall be mandatory, if the debtor, despite being declared negligent, still fails to fulfill the agreement, or if something that must be given or done can only be given or done within a time exceeding the agreed time."
Thus, the legal consequences of default include:

1. Must replace creditors or other parties entitled to receive such achievements (Article 1243 BW);
2. Termination of the Contract accompanied by payment of compensation (Article 1267 BW);
3. Must accept the transfer of risk since the occurrence of default (Article 1237 paragraph (2) BW);
4. Must bear the costs of the case if it is brought to court (Article 181 paragraph (2) HIR);

However, a debtor who is declared in default and asked to punish can provide many justifications. One of them is overmacht. According to Subekti, debtors who are accused of negligence and are required to pay fines can defend themselves by presenting various arguments to avoid the fine. The three defenses are:

1. Menuntut force majeure (overmacht or force majeure);
2. Sue that the debtor (creditor) was negligent (exceptio non adimpleti contractus); and
3. Demand that the creditor waive his right to reimbursement (waiver: rechtsverwerking);

Thus, force majeure or overmacht can prevent debtors from defaulting. Article 1244 BW and Article 1245 BW of the Compensation section of the Civil Code provide for the following conditions of coercion:

"For costs, losses, and interest, debtors should be sanctioned. if he cannot prove that the engagement was not executed or the time was unexpected, for which he cannot be accountable. regardless of his good intentions".

"There is no replacement. lose, interest. if the debtor is prohibited from giving or doing anything that is required or prohibited by coercion or coincidence".

Force majeure compensation reasons. The debtor's reason for filing an overmacht or force majeure defense is to show that the non-fulfillment of what was promised was caused by unforeseen events over which he had no control. Otherwise, the failure or delay of the agreement is not carelessness. Innocent people cannot be punished for negligence. This understanding is very close to good faith.

According to Article 1244 BW, the debtor must pay indemnity costs and interest if he cannot prove that the default was caused by unforeseen circumstances or circumstances beyond his control. If the debtor has bad faith, he still has to pay damages. The debtor also has the burden of proof, so if he cannot prove the excluded reasons, he must pay. So that creditors can ask for compensation to debtors who default without proof. 15 Article 1245 BW releases the debtor from costs, losses, and interest if force majeure or accidental circumstances prevent the debtor from giving or doing something required or doing something prohibited. Similar to the previous article, it outlines how the debtor can avoid paying damages if he fails. Coercion or accident prevents achievement.

If either party can prove that a natural disaster hindered performance, the breach of contract does not apply in business. Many businesses have failed due to the global coronavirus pandemic. The incident was used as an excuse to renege on the agreement. However, claiming force majeure without government policies using Covid-19 is a challenge. Many business people view the accident as force majeure, an extraordinary event that prevents people from achieving their goals. Thus, the business contract is changed or canceled. Due to the coronavirus outbreak, community activities, especially businesses, have been severely affected. Mahfud MD considered that the Presidential Regulation of the Republic of Indonesia Number 12 of 2020 was an error in terminating civil contracts, such as business agreements. He said contract law allows cancellation for force majeure. Speculation is unfounded. It also creates commercial and governmental instability. He also emphasized that the classification of Covid-19 non-natural disasters cannot be used to cancel contracts in force majeure circumstances.

Force majeure can be used to negotiate a cancellation or change of a contract, but it cannot be used as a justification for canceling(Hulzannah, Sriono, & Sagala, 2021). According to Article 1338 BW, any legally binding agreement must be executed as agreed.

As long as the contract is not replaced, it is as binding as the law. Force majeure cannot immediately cancel the contract. The terms of the contract require that if a forced event occurs during execution, the contract can be changed(Januarita & Sumiyati, 2021). Force majeure in contract clauses must also be understood. Force majeure is absolute and relative. Force majeure absolutely prevents a party from achieving its goals. Relative force majeure is force majeure with alternatives that can be replaced, compensated, or postponed. Indonesia is facing a coronavirus public health emergency. The government declared Covid-19 a non-natural disaster. Presidential Decree Number 12 of 2020 is not intended to cause the COVID-19 outbreak (corona pandemic) or cancel contracts. However, the parties may renegotiate due to force majeure under Articles 1244, 1245, and 1338 BW.

## CONCLUSION

Force majeure Force majeure is usually covered by the contract. Force majeure occurs when the debtor fails to fulfill its obligations to creditors due to uncontrollable events such as earthquakes, landslides, disease outbreaks, riots, wars, and so on. Many business people do not regulate disease pandemics such as the coronavirus that we are currently witnessing as force majeure. Covid-19 is a force majeure pandemic. These factors will inevitably interfere with commercial contracts. This may lead to implementation disputes.

The rise of PKPU (Suspension of Debt Payment Obligations) and bankruptcy lawsuits in commercial courts in mid-2020 to 2022 prompted the government to implement a moratorium on the Bankruptcy Law. The Indonesian Employers Association (Apindo) reported 1,298 PKPU and bankruptcy filing processes from 2020 to August 2021 from five commercial courts in Indonesia: Jakarta, Semarang, Surabaya, Medan, and Makassar. The five courts only handled 959 PKPU and bankruptcy cases in 2018–2019. Thus, bankruptcy and PKPU support debt settlement fairly, quickly, openly, and effectively. So Law No. 37 of 2004 concerning Bankruptcy and PKPU is correct (although there are many shortcomings). Even if it wants to be emphasized by government or presidential law by emphasizing technical problems to make bankruptcy and PKPU moratorium as an alternative to debt and credit settlement.

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