



THE APPLICABILITY OF FORCE MAJEURE CLAUSE DURING THE COVID-19 PANDEMIC IN INDONESIA AND FRANCE

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Info Artikel

Masuk: 1 Juni 2021

Diterima: 12 Juli 2021

Terbit: 1 Agustus 2021

Keywords:

Covid-19, International Business Contract, Force Majeure, Indonesia, France

Abstract

The Covid-19 pandemic that has occurred almost all over the world has had a very significant impact on various aspects. In this regard, the pandemic has directly or indirectly affected international trade. International business contracts are one of the essential elements in carrying out an international trade. The covid-19 pandemic that has occurred has resulted in implications and disruption to the ongoing contracts carried out on international scale. The current pandemic has raised a question, whether if the covid-19 pandemic can be classified as a force majeure circumstances or not. Reflecting on these problems, this study will examine the rules and regulations of force majeure from the legal perspective of Indonesia and France as countries that have adopted the civil law legal system. In addition, this study also discusses about the impacts of the covid-19 pandemic on international trade contracts. This study uses normative legal research methods, namely methods based on written regulations and literature that examines aspects of theories, structure, and legal explanations related to the material in this research. The approach used in writing this journal is a comparative approach which is to compare the legal regulations in Indonesia and

France. From the second data sources obtained, it is found that there are some differences between Indonesian and French laws regarding force majeure. The Indonesian civil code does not explicitly mention force majeure, but calls it as a state of coercion. Meanwhile, civil law in France clearly mentions force majeure in the France Civil Code. Related to the covid-19 pandemic which is classified as a force majeure condition, the parties bound in international business contracts can renegotiate the contracts they made.

Kata kunci:

Covid-19, Kontrak Bisnis Internasional, Force Majeure, Indonesia, Prancis

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Abstrak

Pandemi Covid-19 yang terjadi hampir di seluruh dunia memberikan dampak yang sangat signifikan di berbagai aspek. Dalam hal ini, pandemi secara langsung atau tidak langsung mempengaruhi perdagangan internasional. Kontrak bisnis internasional merupakan salah satu elemen penting dalam melakukan perdagangan internasional. Pandemi covid-19 yang terjadi telah mengakibatkan implikasi dan gangguan terhadap kontrak yang sedang berjalan yang dilakukan dalam skala internasional. Pandemi yang terjadi saat ini menimbulkan pertanyaan, apakah pandemi covid-19 dapat digolongkan sebagai keadaan force majeure atau tidak. Berkaca dari permasalahan tersebut, penelitian ini akan mengkaji peraturan perundang-undangan force majeure dari perspektif hukum Indonesia dan Perancis sebagai negara yang telah menganut sistem hukum civil law. Selain itu, penelitian ini juga membahas tentang dampak pandemi covid-19 terhadap kontrak perdagangan internasional. Penelitian ini menggunakan metode penelitian hukum normatif, yaitu metode berdasarkan peraturan tertulis dan literatur yang mengkaji aspek teori, struktur, dan penjelasan hukum terkait dengan materi dalam penelitian ini. Pendekatan yang digunakan dalam penulisan jurnal ini adalah pendekatan komparatif yaitu membandingkan peraturan perundang-undangan di Indonesia dan Perancis. Dari sumber data kedua yang diperoleh, ditemukan beberapa perbedaan antara hukum Indonesia dan Perancis mengenai force majeure. KUHPerdara Indonesia tidak secara

eksplisit menyebutkan force majeure, tetapi menyebutnya sebagai keadaan memaksa. Sementara itu, civil law di Prancis secara jelas menyebutkan force majeure dalam KUHPerdara Prancis. Terkait pandemi covid-19 yang tergolong kondisi force majeure, para pihak yang terikat dalam kontrak bisnis internasional dapat menegosiasikan kembali kontrak yang dibuatnya.

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INTRODUCTION

The covid-19 pandemic, which is currently happening around the world, has claimed many lives. Based on data released by Worldometers, as of June 7st, 2021, Indonesia has 34,379 new cases of covid-19 and is on the third worldwide.¹ The pandemic that has lasted more than 1 year has had a very significant impact on human life.² Many aspects are affected by the covid-19 pandemic, namely aspects of health, economy, education, environment, politics, and others.³ The Minister of Finance of Indonesia, Sri Mulyani Indrawati, stated that the covid-19 pandemic had caused a very extraordinary domino effect.⁴ In addition to taking lives and having a major impact on health aspects, also has a very large impact on increasing poverty rates.⁵ This is due to the limited economic activity during the pandemic, as well as the number of people who have lost their jobs.⁶ The covid-19 pandemic has also had a huge impact on the economic sector in Indonesia.⁷

Based on data from the Central Statistics Agency, it is stated that Indonesia's economic growth in the second quarter of 2020 experienced a minus of 5.32%.⁸ The uncertainty of when the pandemic will end has resulted in a weak investment sector. This can have implications for the cessation of a business or industry and lead to a weakening of the global economy, resulting in a decline in market commodities and cessation of exports from Indonesia to several countries.⁹

¹ Dian Erika Nugraheny. "Update 7 Juli: Kasus Baru Covid-19 Indonesia Tertinggi di Dunia," (2021). (Accessed 2 July 2021).

² Syaifudin, Ahmad, and Elisatin Ernawati. "Indonesia Investment Rules: Kajian Hukum Pemulihan Dan Pengembangan Ekonomi Nasional Dimasa COVID-19." *Journal of Judicial Review* 22.2 (2020): 195-214.

³ Ayunda, Rahmi, Velany Kosasih, and Hari Sutra Disemadi. "Perlindungan Hukum Bagi Masyarakat Terhadap Efek Samping Pasca Pelaksanaan Vaksinasi Covid-19 Di Indonesia." *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8.3 (2021): 194-206.

⁴ Ade Miranti Karunia. "Sri Mulyani: Covid-19 Timbulkan Efek Domino yang Luar Biasa," (2020). (Accessed 2 July 2021).

⁵ Fransisco, Wawan. "Interaktif Masyarakat Terhadap Hukum Dalam Kehidupan Normal Baru Pasca COVID-19." *Journal of Judicial Review* 22.2 (2020): 151-164.

⁶ Antonius Purwanto. "Kemiskinan pada Masa Pandemi Covid-19: Konsep, Potret, dan Strategi Pengentasan," (2021). (Accessed 2 July 2021).

⁷ Disemadi, Hari Sutra, and Ali Ismail Shaleh. "Banking credit restructuring policy amid COVID-19 pandemic in Indonesia." *Jurnal Inovasi Ekonomi* 5.02 (2020).

⁸ Jahawir Gustav Rizal. "Pandemi Covid-19, Apa saja Dampak pada Sektor Ketenagakerjaan Indonesia?" (2020). (Accessed 2 July 2021).

⁹ Chairul Fikri. "Tiga Dampak Pandemi Covid-19 Bagi Perekonomian Nasional," (2021). (Accessed 2 July 2021)

Indonesia is not the only country that is affected in terms of the economy¹⁰, there are other countries that are also at risk of experiencing a recession such as Singapore, South Korea, Japan, the United States, New Zealand, England, and France.¹¹ This pandemic has more or less affected international relations in the economic field, both positively and negatively. Some countries strengthen relations by helping each other and collaborating to deal with the pandemic, but on the other hand it can lead to a global economic political crisis.¹²

In France, the covid-19 pandemic has also had a big impact and caused a crisis.¹³ The economists have also estimated that the impact of containment measures represented a loss of 30 points of monthly GDP per month where the population was confined. If we speak in numbers, this represents a loss of 60 billion euros per month of lockdown. The majority of this figure represents the disruption of consumer habits causing demand to fall. Thus, if people consume less, companies must also adjust their production by lowering their offers in order to maintain themselves during the crisis. To this is added the drop of investment but also that of tourism, restaurant, hotel, and industrial sectors, such as construction, where teleworking is impossible. In response to the drop of the demand in the sectors directly affected by the lockdown, recourse to partial unemployment concern around 5,7 million jobs for a direct cost to public finances of 20 billions of euros. The observation is therefore clear at the level of the economy: a net drop of monthly GDP mixed with a sharp increase of unemployment that the public authorities must counter by offering financial aid to these new "unemployed covid".¹⁴

In addition, the covid-19 pandemic has also directly or indirectly disrupted international trade. In order to prevent the spread of the covid-19 virus, the government has implemented policies in the form of a lockdown or working from home and this has resulted in a reduction in manpower or human resources in production activities. The lockdown policy has forced the government to close airports and harbour as well as other transportation access, thus hampering the process of distributing goods between countries.

Based on a report from the International Air Transport Association, there was a decrease in the quantity of international cargo transportation (belly-hold and freighters) in March 2020 by 23% and resulted in a loss of US\$1.6 billion. In addition, there are other countries that apply export restrictions. This is very difficult considering that Indonesia is still very dependent on imports to meet essential needs during the pandemic such as food, medicine, and health equipment.¹⁵

¹⁰ Disemadi, Hari Sutra. "Fenomena Predatory Lending: Suatu Kajian Penyelenggaraan Bisnis Fintech P2P Lending selama Pandemi COVID-19 di Indonesia." *Pandecta Research Law Journal* 16.1 (2021): 55-67.

¹¹ Junaedi, Dedi, dan Faisal Salistia. 2020. "DAMPAK PANDEMI COVID-19 TERHADAP PERTUMBUHAN EKONOMI NEGARA-NEGARA TERDAMPAK". *Simposium Nasional Keuangan Negara* 2 (1), (2020): 995-1013.

¹² Ferdi Kusno. "Krisis Politik Ekonomi Global Dampak Pandemi Covid-19," *Anterior Jurnal*, (2020): 19(2), 94-102. <https://doi.org/10.33084/anterior.v19i2.1495>

¹³ The Lancet Public Health. "Covid-19 in France: challenges and opportunities," (2021). [https://doi.org/10.1016/S2468-2667\(21\)00054-2](https://doi.org/10.1016/S2468-2667(21)00054-2)

¹⁴ Département analyse et prévision de l'OFCE. "Évaluation au 30 mars 2020 de l'impact économique de la pandémie de COVID-19 et des mesures de confinement en France," (2020). (Accessed 2 July 2021).

¹⁵ Subagio Effendi. "Pandemi dan Disrupsi Perdagangan Internasional," (2020). (Accessed 2 July 2021).

International trade has a very important role in supporting productivity and the economy, namely to encourage the country's economic growth, support national economic stability, help increase the country's foreign exchange through import duties and export-import costs, encourage the advancement of domestic science and technology in the form of globalization, and expand job opportunities.¹⁶

Business contracts are one of the most essential things in carrying out international trade. A contract is a legal relationship between one party and another, where one legal party has the right to the object of the agreement and the other party is obliged to fulfill the obligations in the agreement in accordance with the agreement. International business contracts are the basis of a legal relationship that exists between the parties and will serve as a common guideline for parties from different countries in carrying out international business cooperation. This contract can be divided into several schemes, namely the government and the government, the government and the private sector, and between the private sector and the private sector.

With the pandemic, the contractual balance seems to have been put in some trouble. Indeed, this health crisis has created in the world of international business a real feeling of insecurity among contractors¹⁷. By the reinforcement of cases of force majeure or unforeseen events, the substance of the international contract has been disrupted since early 2020 by the evolution of the virus. In response to this, international contractors have sought ways to adapt and lessen this prejudice.

International contracts undoubtedly constitute the core of the rules of international trade law and its operations. Therefore, when it comes to trade borders, many difficulties arise. These difficulties are characterized by an obvious imbalance appearing during the execution of the contract. Thus, far from the French consensual doctrine of the nineteenth century which considered contractual freedom as being also its own justice¹⁸, contractual corrections in international matters were very quickly tolerated. These ratification have two main objectives: to save the economy of the contract in order to avoid its termination and to allow the restoration of the contractual balance in order to guarantee the initial will of the parties. It is for this reason that the Vienna Convention on the Law of Treaties of 1969¹⁹ recognized the usefulness of such corrections by improving their modalities.

A few questions then arises: a.) What are the impacts of the covid-19 pandemic on international trade business contract law? ; b.) How to enforce the Force Majeure Clause in business contract during the covid-19 pandemic in Indonesia and France?. In a large majority of legal systems, public action to rebalance international contracts has been strongly criticized. This task will therefore fall to private actors who will then be able to consider different approaches. We will speak here of an autonomous, semi-autonomous or non-autonomous approach.

¹⁶ Jimmy Hasoloan. "Peranan perdagangan internasional dalam produktifitas dan perekonomian," *Edunomic Jurnal Pendidikan Ekonomi*, 1(2). (2020): 102-112.

¹⁷ Dimitri Houtcieff. "ETUDE: La force majeure est-elle résistante à la Covid-19? * Rédigée le 16.09.2020," (2020). (Accessed 3 July 2021).

¹⁸ Marine Goubinat. "Les principes directeurs du droit des contrats". Droit. Université Grenoble Alpes, (2016). Français. NNT : 2016GREAD001 . tel-01392405.

¹⁹ Convention de Vienne sur le droit des traités 1969.

RESEARCH METHODS

This study uses normative legal research methods, namely methods based on written regulations and literature that examines aspects of theories, structure, and legal explanations related to the material in this research. The approach used in writing this journal is a comparative approach, which is to compare the legal regulations in Indonesia with the legal regulations in France. The data obtained from the writing of this journal is secondary data obtained from the literature study. The data is in the form of laws and regulations relating to the object of research such as Indonesian Civil Code, Presidential Decree Number 12 of 2020 concerning the Determination of Non-natural Disasters for the Spread of Corona Virus Disease 2019 as a National Disaster, Presidential Regulation Number 59 of 2008 concerning Ratification of the Statute of The International Institute for the Unification of Private Law, French Code Civil, General Agreement on Tariffs and Trade (GATT) Agreement 1994 and Vienna Convention on the Law of Treaties 1969 which are then analyzed using descriptive-qualitative analysis techniques.²⁰

ANALYSIS AND DISCUSSION

Indonesia is a state of law, this is very clearly stated in the 1945 Constitution of the Republic of Indonesia Article 1 Paragraph (3). The state of law means that all aspects of the implementation and administration of the state are regulated in a statutory system. Indonesia is a country that has adopted the Continental European legal system or Civil Law. In addition, Indonesia has also adopted a mixed legal system, namely Customary Law and Islamic Sharia Law.

This can be seen from history, legal politics, legal sources, and sources of law enforcement. The characteristic of Civil Law System is the codification of law. The main principle in the Civil Law System is that the law gains binding power because there are regulations in the form of laws that are systematically arranged. The purpose of the codification is to ensure legal certainty.²¹

Law in Indonesia is divided into two, namely public law and private law. what is meant by public law is the law that regulates relations regarding the public interest, such as criminal law. while private law is the law that regulates the relationship between individuals, such as civil law. There are two types of legal sources in Indonesia, namely material legal sources and formal legal sources. The source of material law is the origin from which the law is obtained, and is closely related to people's beliefs that determine the substance of law. While what is meant by formal legal sources are codified legal sources. Formal sources of law consist of statutes, customs, jurisprudence, treaties, and doctrine.²²

To prevent the overlapping of laws and regulations, Article 7 Paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislations juncto Law Number 15 of 2019 concerning Amendments to Laws Number 12 of 2011 concerning the Establishment of Legislations stipulates that there are 7 types and

²⁰ Prof. Dr. Suteki, S.H., M.Hum dan Galang Taufani, S.H., M.H, *Metode Penelitian Hukum: Filsafat, Teori, dan Praktik.* (Rajawali Pers, 2020).

²¹ Ari Welianto. "Sistem Hukum di Indonesia," (2020). (Accessed 3 Juli 2020).

²² Wibowo T. Tunardy, S.H., M.Kn. "Sumber Hukum Materiil dan Sumber Hukum Formil," (2020). (Accessed 3 Juli 2020).

hierarchies of laws and regulations. The hierarchy consists of: a.) the 1945 Constitution of the Republic of Indonesia; b.) Decree of the People's Consultative Assembly; c.) Government Regulations in Lieu of Laws; d.) Government Regulations; e.) Presidential Regulation; f.) Provincial Regulations; and g.) City Regional Regulations.²³

Just like Indonesia, France has also adopted civil law as their legal system. In other words, it is a written law which refers to provisions codified in various law books. France is also the world champion in this area as its legal system has no less than 82 Codes. However, written and codified law does not represent with normative effect in the country. There are others which are superior to it, such as the Constitution or European Law and some which are inferior like the regulations or the case law.

All these legal norms are generally presented in a pyramid at the top of which sits European law and the French Constitution. More generally, French law can be split into two very distinct axes: private law and public law. Private law represents the law governing a dispute between two private persons where public law governs relations between the French State and other States or natural persons. Thus, there two very different legal matters that constitute public law and private law are all separated between two distinct jurisdictions: the judicial judge who deals with private law and the administrative judge who has jurisdiction if the dispute falls under public law.²⁴

Scope of Force Majeure in Indonesia

In connection with the covid-19 pandemic in Indonesia, the government issued several policies related to handling the pandemic. Presidential Decree Number 11 of 2020 concerning the Determination of Public Health Emergency Corona Virus Disease 2019 (Presidential Decree No. 11/2020) stipulates that covid-19 is a type of disease that can cause a public emergency. In addition, there is also Presidential Decree Number 12 of 2020 concerning the Determination of Non-natural Disasters for the Spread of Corona Virus Disease 2019 as a National Disaster (Presidential Decree No. 12/2020) which states that covid-19 is a non-natural national disaster.

The existence of this policy raises the question whether the covid-19 situation can be qualified as a force majeure in an international business contract. According to International Chamber of Commerce (ICC), force majeure is: "The occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment, where the affected party proves: a.) that such impediment is beyond its reasonable control; b.) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and c.) that the effects of the impediment could not reasonably have been avoided or overcome by the affected party".²⁵

²³ Tri Jata Ayu Pramesti, S.H. "Hierarki Peraturan Perundang-undangan di Indonesia," (2020). (Accessed 3 Juli 2020).

²⁴ Ministère de la Justice. "The French Legal System," (Accessed 4 Juli 2021).

²⁵ Agri Chairunisa Isradjuningias. "Force majeure (overmacht) dalam hukum kontrak (perjanjian) Indonesia," *Veritas et Justitia*, (2015): 1(1). <https://doi.org/10.25123/vej.v1i1.1420>

Article 1338 paragraph (1) of the Civil Code states that "All agreements in accordance with the law apply as law for the parties who make them." The contract that has been made by the parties will form an engagement and legally bind the parties. The parties are obliged to fulfill the contents of the agreement as stated in the agreement they have made. If the content of the agreement are not fulfilled, then the party can be said to have broken a promise or is in default.

The term 'default' in the civil world means that one of the parties: a.) does not carry out the contents of the agreement; b.) carry out the contents of the agreement but not in accordance with the agreement; c.) carry out the contents of the agreement but late; and/or d.) perform an act prohibited in the agreement. The covid-19 pandemic has forced the parties to postpone or not fulfill the contents of the agreement. Default or failure to fulfill the contents on the agreement caused by force majeure is justifiable.²⁶

Another word for force majeure is *overmacht*, which means a state of coercion or an emergency that occurs beyond human ability. This condition causes the debtor in the agreement cannot be blamed for the situation because the force majeure situation is not expected to occur at the time the agreement was made.²⁷ Mieke Komar Kantaatmadja stated that force majeure is a condition which²⁸:

- a. There is a change in a situation that did not occur at the time the agreement was made;
- b. There is a change in a condition that is fundamental to the agreement;
- c. There is a change in a situation that the parties could not have foreseen at the time the agreement was made; and
- d. The changes that occur are radical, which means that these circumstances change the scope of obligations stated in the agreement.

The government in Indonesia is aware that the covid-19 pandemic has provided very significant economic problems for the community, therefore the government has issued several policies to ease the burden on the community. One of them is 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 Corona Virus Disease 2019. The regulation regulates the relaxation of banking credit for debtors who are directly or indirectly affected by covid-19.

Although the clause about force majeure is not included by the parties in the agreement, debtors who have good intentions will still receive legal protection. When it comes to international treaties, Article 62 of the Vienna Convention on the Law of Treaties (the 1969 Vienna Convention) contains the principle of *rebus sic stantibus* which means that a change in fundamental circumstances that cannot be

²⁶ Rizkyana Diah Pitaloka. "KEBIJAKAN PENUNDAAN PEMENUHAN KONTRAK BISNIS DI MASA PANDEMI COVID-19", In *National Conference on Law Studies (NCOLS)* Vol. 2, No. 1, (2020): 435-447.

²⁷ Rizkyana Diah Pitaloka. *Ibid*.

²⁸ Annisa Dian Arini. "Pandemi Corona Sebagai Alasan Force Majeur Dalam Suatu Kontrak Bisnis," *Supremasi Hukum: Jurnal Kajian Ilmu Hukum*, 9(1), (2020): 41-56.

foreseen by the parties can be put forward as a basis for termination or withdrawal from the agreement.²⁹

Besides, there is another principle that can be used as the basis for implementing an international agreement, namely the principle of *pacta sunt servanda* which means that the agreement binds the parties, so that all obligations contained in the agreement must be carried out with the principle of good faith.³⁰ The principle of *pacta sunt servanda* is the basis for the formation of an international agreement that binds the parties, but on the other hand, *force majeure* and the principles of *rebus sic stantibus* are a way to abolish or eliminate the ties of *pacta sunt servanda* to the agreement.

A party is bound to carry out the contents of the agreement, as long as the conditions underlying the agreement remain the same. The Indonesian Civil Code does not adopt the principle of *rebus sic stantibus*, but this principle can be adopted by the parties implementing the agreement. The UNIDROIT Principles of International Commercial Contracts (UPICC) have regulated the conditions of *rebus sic stantibus* and Indonesia has ratified it through Presidential Regulation Number 59 of 2008 concerning Ratification of the Statute of The International Institute for the Unification of Private Law.

Besides, there is a difference between *rebus sic stantibus* and *force majeure*, namely that on the principle of *rebus sic stantibus* there is a fundamental change in the balance of the contract at the time of execution of the agreement, resulting in losses for the parties, while *force majeure* occurs when the agreement is not implemented due to coercive circumstances that occur beyond the expectations of the parties when making the agreement.

In legal theory, *force majeure* is divided into two types, namely absolute and relative. What is meant by absolute *force majeure* is that an event that occurs has absolutely nullified the ability of the parties to fulfill their obligations in the agreement, for example, the destruction of the object of the contract due to a natural disaster. Meanwhile, what is meant by relative *force majeure* is that the events that occur result in a change in circumstances but there are still other alternatives to overcome these problems.³¹ The current covid-19 pandemic can be classified as relative *force majeure*.

There are two possibilities that will occur due to *force majeure*. The legal consequences can be in the form of terminating the agreement, or delaying the fulfillment of obligations. The agreement can end if the impact caused by *force majeure* is permanent, whereas if the impact caused by *force majeure* is temporary, the parties can postpone the fulfillment of obligations in the contract. In other words, if the situation has recovered as before, then the parties are obliged to fulfill the obligations in the agreement.³²

²⁹ Lissitzyn, O. J. "Treaties and changed circumstances (*rebus sic stantibus*)". *American Journal of International Law*, 61(4), (2017): 895-922. <https://doi.org/10.2307/2197343>

³⁰ Lukashuk, I. I. "The principle *pacta sunt servanda* and the nature of obligation under international law," *American Journal of International Law*, 83(3), (2017): 513-518. <https://doi.org/10.2307/2203309>

³¹ Rizkyana Diah Pitaloka. *Op. Cit.*

³² Rizkyana Diah Pitaloka. *Ibid.*

The Indonesian Civil Code does not specifically regulate force majeure.³³ However, there are several provisions that interpret the term force majeure as a state of coercion. There are several regulations regarding force majeure, renegotiation, procedures for reimbursement of costs and compensation as well as other provisions relating to force majeure matters in the Civil Code, namely:

- a. Article 1244 which states “The debtor must be punished to compensate for costs, losses and interest, if he cannot prove that the non-performance of the engagement or the inaccuracy of the time in carrying out the engagement is caused by something unexpected, which cannot be insured against him, even though no bad faith to him.”;
- b. Article 1245 which states “There is no reimbursement of costs, losses and interest, if due to compelling circumstances or due to coincidences, the debtor is prevented from giving or doing something that is obligatory, or performing an act that is prohibited for him.”;
- c. Article 1255 which states “The condition that aims not to do something that is impossible to do, does not make the engagement hanging on it invalid.”;
- d. Article 1338 which states “All agreements made in the accordance with the law apply as law to those who make them.”
- e. Article 1444 which states “If certain goods which are the subject of the agreement are destroyed, cannot be traded, or are lost so that it is not known at all whether the goods are still there or not then the agreement is terminated, provided that the goods are destroyed or lost without the fault of the debtor and before he neglected to hand it over.”;
- f. Article 1445 which states “If the goods owed are destroyed, can no longer be traded, or are lost beyond the fault of the debtor, the debtor, if he has rights or demands for compensation regarding the goods, is obliged to give the rights and claims to the creditor,”;
- g. Article 1545 which states “If certain goods, which have been promised to be exchanged, are destroyed without the fault of the owner, then the agreement is considered void and the party who has fulfilled the agreement may demand the return of the goods he has given in exchange.”;
- h. Article 1553 which states “If the leased item is completely destroyed during the rental period due to an unintentional incident, the lease agreement is null and void by law. If the goods in question are only partially destroyed, the lessee can own it according to the circumstances, will ask for a reduction in price or will ask for the cancellation of the lease agreement, but in both cases he is not entitled to compensation.”;
- i. Etc.

In addition, based on the provisions in Article 1244 of the Civil Code, proof of force majeure is borne by the debtor, so that the debtor will be released from the

³³ Annisa Dian Arini. *Op. Cit.*

obligation to compensate if he proves the elements of force majeure that occurred during the agreement. A contract cannot be canceled unilaterally with force majeure as a reason. In practice, the elements of force majeure must also be proven true in the court.³⁴

The parties need to pay attention to the contents of the clauses in the agreement, whether the agreement contains a force majeure clause, as well as the force majeure limits as agreed by the parties. If the parties do not regulate force majeure in the contract, then the parties will act in accordance with the provisions of the applicable law. Other than that, the Presidential Decree No.12/2020 which state that covid-19 is a national disaster does not necessarily make the presidential decision the basis for canceling or deviating from previously made business contracts. The existence of this presidential decree opens the opportunity for the parties to renegotiate while still being guided by Article 1338 of the Civil Code.

In the event of a dispute caused by a party that does not fulfill its obligations by reason of force majeure, the parties can take litigation or non-litigation routes to solve their disputes. Litigation is a dispute resolution process carried out in court. Meanwhile, non-litigation is a dispute resolution process carried out outside the court, or commonly referred to as Alternative Dispute Resolution (ADR) as regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. ADR can be done by means of consultaion, mediation, negotiation, expert judgement, and conciliation. Through this route, the parties can renegotiate the agreement they have made.³⁵

Scope of Force Majeure in France

Before the 2016 reform of the law of obligations, force majeure was governed by the old article 1218 which defined force majeure as an external, unpredictable and irresistible element. Since 2016, article 1218 is still the seat of force majeure in French Law but its definition has been revised. Article 1218 Code Civil stated that: "There is force majeure in contractual matters when an event beyond the control of the debtor, which could not be reasonably foreseen when the contract was concluded and the effects of which cannot be avoided by appropriate measures, prevents the fulfillment of its obligation by the debtor. If the impediment is temporary, performance of the obligation is suspended unless the resulting delay justifies termination of the contract. If the impediment is final, the contract is automatically terminated and the parties are released from their obligations under the conditions provided for in articles 1351 and 1351-1."

Henceforth, the legislator defines force majeure as an event beyond the control of the debtor, which could not be reasonably foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the execution of its obligation by the debtor. Its invocation allows the debtor to be exempted from any obligation or, if the situation allows it, to postpone the maturity of the obligation in time.

³⁴ Jodi Pratama & Atik Winanti. "FORCE MAJEURE DALAM KONTRAK BISNIS AKIBAT PANDEMI CORONA," *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial*, 8(2), (2021): 266-272. <http://dx.doi.org/10.31604/jips.v8i2.2021.266-272>

³⁵ DSLA Law Firm. "Mengenal Litigasi: Mengenai Penyelesaian Sengketa di Meja Hijau," (Accessed 4 Juli 2021).

The adaptation of such a contractual rebalancing will be considered automatic if the parties provide in their agreement that it will adapt to the circumstances without the will of the parties being required. This adaptation will be considered semi-automatic if it involves the expression of the will of only one of the two parties. Finally, contractual adaptation will be considered as non-automatic if it requires the will of the two parties concerned for its effective implementation.

It is therefore essential for business partners to know what constitutes force majeure and what not with regard to the various international contracts that they will be required to sign. As such, the doctrine, including the doctoral researcher Med Yazid Mazouzi has been led to identify some issues from this subject, two of which will really hold our attention here: 1) How is force majeure defined and what is the place of the Covid in this notion? And 2) What is the place of revision for unforeseen reasons here? . Therefore, we will deal with things as follows. First, we will focus on the automatic nature of the implementation of force majeure in order to adapt the international contract (I) before highlighting the need for a will of all the parties in the event of revisions for unpredictability (II). Here, it will be a question of returning to the qualification and interpretation of force majeure within the international contract (A) before questioning the outcome of this same contract in the event of invocation of such an event (B).

Two qualifications of force majeure can be found in the clauses of the contract. A first qualification makes it an automatic application clause, requiring no will of the parties. These are clauses which establish within the agreement an automatic adjustment process which will adapt the contract according to the evolution of various market parameters (currency inflation, new prices offered by the competition, etc.). These clauses are in reality indexation clauses which take into account a certain economic reality in order to adapt the will of the parties to the realities of the market. It usually changes the amount of the cash obligation based on changes in indices measuring the price of a particular product or service, or the general price level. These clauses have been accused of promoting inflation, so their validity has long been debated. But because of their usefulness, case law has accepted their validity without reservation in international payments ("Taylor V Caldwell" judgment).

A second qualification makes force majeure an adaptation clause of the so-called "semi-automatic" international contract. Indeed, here it is no longer an indexation clause based on a pre-established variable which is in the spotlight, but a real option offered to the party who suffers the disappointment resulting from an unforeseeable event and giving him the right to ask their contracting party to renegotiate / terminate the contract as appropriate.

Here, what truly characterizes force majeure is the impossibility for one of the two parties to the contract to perform its contractual obligation. Therefore, it is now necessary to ask what are the essential components of the invocation of Force Majeure and if the Covid can be considered as such. The French legal order recognizes in domestic law and in the approach of international commercial law that the definition of force majeure falls under article 1218 of the Civil Code.

This article provides that force majeure in contractual matters represents an event beyond the control of the debtor, which could not be reasonably foreseen at

the time of the conclusion during the conclusion of the contract and whose effects cannot be avoided by appropriate measures prevents the performance of its obligation by the debtor. The article also specifies that if the impediment is temporary (such as the restriction of movement during a pandemic, for example), the execution of the contract is suspended in order to preserve the economy of the contract. Conversely, if the impediment is irreversible and final, the contract will be terminated automatically and the parties are released from their obligations.

Therefore, if we follow this legal definition, the Covid alone will not constitute a case of force majeure. Force majeure will actually result from one of the consequences directly related to Covid 19 such as the restriction of movement of people and goods and not from the disease itself. This is what the French courts have concluded: each situation must be assessed on a case-by-case basis, favoring an assessment in concreto (as demonstrated by a trilogy of decisions by the CA of Colmar issued on March 16, 2020).

A question must then be asked: what about the continuity of the international contract in the event of force majeure? As provided for in article 1218 of the Civil Code, two possibilities await a contract affected by force majeure: the termination or suspension of the contract. However, the classical theory of force majeure emphasizes its extinctive effect first and foremost. It is the very nature of the international contract that has led practitioners to favor suspensive effect over extinctive effect.

Indeed, the negotiation of a long-term international contract requires a considerable amount of work which would be reduced to nothing if the only sanction of force majeure were the extinction of the obligations of both parties. Therefore, it seems preferable to favor the continuation of relations between international partners in order to avoid a new human and financial investment in the search for a new contract and to maintain the economy of the contract initially desired by both parties.

In this context, the suspension of the contract seems much more appropriate and allows economic players to have at their disposal a tailor-made tool to best react to unforeseen events rather than having to systematically break the distorted contractual balance. This is how French practitioners in the international field saw the force majeure of the international contract. For them, exactly as in French domestic law, the international contract must lapse as soon as one of its essential elements disappears, making its execution impossible.

Covid-19 Impact towards Force Majeure Conditions in International Trade Law

The covid-19 pandemic and its relation to force majeure not only affect business contracts in Indonesia or France, but also greatly affects international business contracts carried out between countries. At the international level, not all countries have the same classification regarding the covid-19 virus, but in fact many companies in the transportation, energy, shipping and another sectors stated that force majeure has forced them to suspend obligations in their contracts so that they

must do a renegotiation effort to avoid fines or compensation due to delays in the implementation of the contract.³⁶

Basically, there are two levels regarding the impact of covid-19 pandemic on international business contracts. In this case, the first level deals with contracts that are made remotely and deals with physical goods or physical work. While the second level deals with contracts on e-commerce matters. In this regard, there are several types of contracts that are rarely affected by natural phenomenon or force majeure circumstances compared to business contracts in general.³⁷

The impacts caused by the first level circumstances can be in the form of cessation of production, termination of construction, termination of employment, and other things that occur as a result of the lockdown during covid-19 pandemic which was implemented by several countries so as to make the parties unable to fulfill their obligations in the contract.³⁸ The obstacles experienced by the parties in this case are very clear, that the parties come from different countries, and of course each country has its own efforts to stop the spread of the covid-19 pandemic. This is an obstacle for the parties in implementing the contents of the contract that they have agreed on.

In the GATT Agreement it is stated that the aggrieved party has the right to request renegotiation with the aim of changing the terms of the contract. Furthermore, Article 81 of the Vienna Convention states that: "(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract; (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."

The quote of the article means that if the negotiation process does not reach an agreement or fails, the parties can cancel or terminate the contract and the aggrieved party can claim compensation. Basically, there are two ways to settle disputes, namely litigation and non-litigation. Litigation is a dispute resolution route carried out in court, meanwhile non-litigation is a dispute resolution carried out outside the court.

However, dispute resolution in a conventional way, namely litigation, is considered no longer practical to do. Dispute resolution by litigation takes a lot of time and money, while the parties in international business contracts are business people who certainly need a more practical dispute resolution. Therefore, with good

³⁶ Raed Mohamed Fliih Alnimer. "Dialectical Implementation of Contractual Obligation in Light of the Spread of the coronavirus COVID19 Pandemic between Force Majeure and Unforeseen: A Comparative Study." *Journal of Humanities and Social Sciences Studies*, 3(2), (2021): 18-27. <https://doi.org/10.32996/jhsss.2021.3.2.1>

³⁷ Raed Mohamed Fliih Alnimer. *Ibid.*

³⁸ Lukasz Gruszczynski. "The COVID-19 pandemic and international trade: Temporary turbulence or paradigm shift?" *European Journal of Risk Regulation*, 11(2), (2021): 337-342. <https://doi.org/10.1017/err.2020.29>

faith, the parties involved in international business contracts can settle disputes and renegotiate contracts related to force majeure through non-litigation way, either in the forms of negotiations, conciliations, consultations, and others.³⁹

CONCLUSION

The covid-19 pandemic that has occurred almost all over the world has greatly affected various aspects, such as international trade contracts. Many countries have implemented lockdowns to minimize the spread of the covid-19 virus, and this has implications for the delay of the parties in conducting international business contracts. Keep in mind that the parties to an international business contract are two or more individuals domiciled from different countries. There are two types of international business contracts, namely contracts that involve the object of the contract in the form of physical goods or physical work, and contracts that are carried out without involving anything physical.

Contracts that involve physical things tend to be affected by natural phenomena or natural disaster. The existence of the covid-19 pandemic that occurred in Indonesia raises the question whether the covid-19 pandemic is a force majeure or not, and what efforts can be made by the parties regarding this situation. Indonesia and France as countries affected by covid-19 and adopting a civil law legal system both regulate force majeure in their civil code.

The difference is that Indonesian regulations do not specifically mention about "force majeure". Civil law in Indonesia only regulates coercive circumstances which can be concluded as force majeure. Laws in Indonesia and France both agree that the elements of force majeure are that the situation was an unforeseen event and not anticipated by the parties when entering into an international business. If the debtor in an international business contract has an obstacle in fulfilling the contents of the agreement due to covid-19 as a force majeure condition, then the parties can renegotiate the contract. Basically, there are two ways to settle disputes, namely litigation and non-litigation. Litigation is a dispute resolution route carried out in court, meanwhile non-litigation is a dispute resolution carried out outside the court.

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³⁹ Risa Restiyanda. "Penyelesaian Sengketa Dagang Internasional Melalui Mediasi Sebagai Alternatif Penyelesaian Sengketa Pada Pemilihan Hukum dan Forum Kontrak Dagang Internasional," *Aktualita*, 3(1), (2020): 130-146. <https://doi.org/10.29313/aktualita.v0i0.5689>

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