BUSINESS CONTRACTS AFFECTED BY THE COVID 19 PANDEMIC IN ASSOCIATION WITH FORCE MAJURE CONDITIONS

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Abstract

The main problem of writing is that business contracts affected by the Covid 19 pandemic are included in the Force Majure category? Can Re-negotiation be carried out on contracts that experience Force Majure due to the impact of the Covid -19 Pandemic? The discussion of the above problems aims to: reveal that the Business Contracts that have been carried out that are affected by the Covid 19 Pandemic are included in the Force Majure criteria and can seek to re-negotiate contracts that are experiencing Force Majure condition. The author uses qualitative normative juridical research methods, research findings reveal that First, that not all of the business contracts affected by the Covid Pandemic are included in the Force Majure category. Because the condition of Force Majure itself recognizes 2 qualifications, namely Absolute and Relative. Which has different liability consequences for the debtor. Second, Whereas a business contract that experiences a force majeure situation which has an impact on the contract and the implementation of the contract, the parties based on their mutual will can re-negotiate the contract. by rearranging any things according to the new agreement.
Keywords: Business Contract, Force Majure, Re-negotiation.

Introduction

On April 13, 2020, Joko Widodo, the President of the Republic of Indonesia, signed Presidential Decree No.12 of 2020 concerning the Determination of the Corona Virus (COVID19). and cannot be canceled. The parties can renegotiate the contract. The state intervened through OJK Regulation No. 11 / POJK.03 / 2020 concerning the Stimulus of Impact of COVID-19. Regarding this, several notes can be given.

The relationship of a contract, of course, the parties expect that all the contents of the agreement contained in the contract will be fulfilled accordingly. With the hope that business relationships will run smoothly and sustainably. When negotiating a business contract, basically the parties do not plan, or expect, a dispute between them in the future.

In principle, the parties have the right of freedom to enter into a contract with each other and determine the contents and clauses of the contract based on the agreement. This means that the freedom of the parties in making contracts needs to pay attention to the following matters: (**Agus Yudha Hernoko, 2008: P. 103)**

a. Meet the terms of the contract
b. In order to achieve the parties' goals, the contract must have causes
c. Does not contain false causes or is prohibited by law
d. Does not conflict with propriety, habits, morals and general order.
e. Must be carried out in good faith.

Furthermore, in the author's opinion, a legally made contract has binding power and acts as law for the parties making it. Therefore, the parties are obliged to carry out the contents of the contract based on good faith. The contract is valid if it fulfills the validity of the contract.

The terms of the validity of the contract include, among others:

a. There is an agreement between the parties;
b. There is the ability of the parties to enter into a contract;
c. The existence of a certain object of the contract;
d. The contract contains a lawful cause.

In fact, these four conditions are cumulative as well as imperative. Cumulative means that all conditions must be met without exception. Imperative means that all conditions are forcing and cannot be deviated for any reason.

The first two conditions are referred to as subjective conditions, because they involve the subject of the agreement, while the last two conditions are called objective requirements, because they involve the object of the agreement. Failure to fulfill the subjective conditions of the agreement is subject to cancellation, but if the objective conditions are not fulfilled, then the agreement is threatened with

being null and void **(Jacob Hans Niewenhuis, Principal of Engagement Law (Djasadin Saragih's translation) (1985: P.2)**

In fact, according to Salim HS, in the contract it is necessary to include elements in order to fulfill the conditions for which it is called an agreement, namely **(Salim HS, 2010: P. 27)**

a. The existence of a legal relationship, a legal relationship here is a relationship that has legal consequences. The legal effect is the emergence of rights and obligations.
b. The existence of legal subjects. Legal subjects as supporters of rights and obligations.
c. There are achievements. Achievement consists of doing something, doing something, and not doing something.
d. Exist in the field of assets

It was emphasized again by **Elmer Doonan and Charles Foster**, that the parties who have poured out the procedures and conditions for a business transaction in a contract have the following intentions: **(Elmer Doonan & Charles Foster, 2001: P.3)**

a. That the contract intends to provide written evidence regarding the transactions that the parties carry out,
b. That the contract is intended to prevent fraud
c. That the contract intends to define the rights and obligations of the parties

That the contract is intended to regulate in more detail complex business transactions, in order to prevent obstacles in the implementation of the contracts that have been made. Contracts as an instrument of exchange of rights and obligations are expected to take place fairly and proportionally in accordance with the agreement of the parties.

Of course, the terms of the contract are the basic principles of contract law, including the principle of freedom of contract, the principle of consesualism, the principle of binding the contract, and the principle of good faith. And it has been stated in the provisions of Article 1320 jo. 1338 paragraph (1) and paragraph (3) of the Civil Code.

Moreover, if a commercial contract starts at the pre-contractual stage, the contract formation or implementation, the principle of proportionality has the power to create rules in determining the rights and obligations of the parties.

For parties who do not carry out the agreement in the contract can be qualified as having defaulted, as regulated in the provisions of Article 1243 of the Civil Code.

Of course, the party who feels aggrieved due to default can sue the opponent's contract, to court or arbitration according to the agreement.

The aggrieved party requests that the contract continue, with or without a request for compensation, or, the contract is canceled accompanied by a request for compensation. In this case, the plaintiff, as an aggrieved party, has the right to determine its own demands in the petitum of their claim.

The existence of a contract that has been made certainly positions the two parties to have rights and the obligations in the contract are basically reciprocal (reciprocity).

In agreement with the above opinion, **Peter Mahmud Marzuki**, also mentioned the principle of proportionality with the term Equitability Contract, with elements of justice and fairness. The meaning of equitability here shows an equal relationship (equality), impartial and fair (fair), meaning the relationship The contractual process basically takes place proportionately and naturally **(Peter Mahmud Marzuki, 2003: P. 205)**

As for the intent of the legal experts above, the writer is of the opinion, regarding the agreement made that adheres to the Principle of Proposionality, at least that freedom of contract can only achieve a sense of justice if the parties have a position of bargaining power, which is balanced.

Furthermore, what is the right of one party is the obligation of the other party to fulfill it. The rights and obligations of the parties in the contract have generally been confirmed in the form of contract clauses. Of course, matters relating to the form, time, place, stages, and method of payment. The parties are obliged to fulfill the contract agreement in good faith as referred to in Article 1338 paragraph (3) of the Civil Code. Good faith, or, te goeder trouw, is a moral principle in contract law.

This, as explained by Wirjono Projodikoro, divides 2 (two) kinds of goodwill, namely: **(Wirjono Projodikoro, 1992: P. 56)**

a. Good faith when a legal relationship starts. Good faith here is usually in the form of a person's estimate or assumption that the conditions necessary for starting a legal relationship have been met.
b. Good faith when exercising the rights and obligations contained in a legal relationship.

For parties who have a position as creditors, a contract is a contract, which under any circumstances remains binding on the parties. The main interest of the creditor is, of course, demanding contra performance from the debtor, namely after the creditor has given the debtor an achievement.

Of course, there is some truth in the creditor's stance, and the normal circumstances of such an establishment can be fully understood.

However, what about in an abnormal situation, for example because of a disaster, of course at least there will be a different way of looking at the problem. As a result of the disaster, it has caused the parties to the contract, especially the debtor, to be unable to fulfill their due obligations to the creditor.

Obstacle or inability of the debitor to fulfill his obligations due to the occurrence of a disaster can occur by having a permanent nature or only temporary in nature. From a case by case analysis must be carried out and tested contextually and of course it cannot be generalized.

If the obstacle or inability of the debtor to fulfill its obligations to the creditor due to the disaster is only temporary, then after the situation returns to normal, the debtor is still obliged to meet his counter-performance.

Starting from the matters above, several problems arise which can be formulated as follows :

A. **Business contracts affected by the Covid 19 pandemic fall into the Force Majure category?**

B. **Can Re-negotiation be carried out on contracts that experience Force Majure due to the impact of the Covid -19 Pandemic ?**

Discussion

A. Business contracts affected by the Covid 19 pandemic fall into the Force Majure category?

The occurrence of the COVID-19 pandemic has become a major disaster in various countries, including Indonesia, which is very dangerous to human health, causing thousands of casualties, and impacting all sectors of life and the economy whether it can be categorized as a force majeure. The occurrence of business disputes will be assessed as difficult and dilemma situations and can potentially disrupt the business relationship between them. The occurrence of a dispute or dispute will result in estrangement, tension, and even division of business relations between the parties. In turn, energy, time, energy, and costs must be borne by the parties to manage and resolve disputes which will be complicated, long and expensive and tiring.

In every business contract, in general the parties feel the need to include a clause that regulates the possibility of a forceful situation, or force majeure, or what is also known as an overmacht or force majeure.

Force Majure (a state of force) according to Soebekti, a situation can be said to be force majure if the situation is: **(Soebekti, 2001: P.144)**

a. Beyond his power;
b. Be pushy
c. Cannot be acknowledged beforehand

Overmacht or Force majure is the occurrence of such a situation which the parties do not want to occur, because it will have legal effects and consequences on the implementation of the contract.

However, the inclusion of such a clause is still considered important to be written into the contract as an anticipatory attitude towards the possibility of a situation occurring in the future.

Force majeure, force majeure, or what is known as an overmacht, or force majeure is regulated in the provisions of Articles 1244 and 1245 of the Civil Code. This provision basically stipulates that the debtor can be exempted from all costs, losses and interest in connection with the implementation of the contract, as long as the debtor can prove that there is a force majeure.

Based on the agreement, the parties have the freedom to formulate in their contract clauses what matters and how a situation qualifies as a force majeure.

Without a detailed agreement on what matters qualify as a force majeure, the interpretation is left to the judge or arbitrator in the event of a dispute between the parties.

Force majeure basically can be divided into 2 definitions, which are absolute and relative.

Force majeure is absolute, meaning a situation where it is absolutely impossible (impossibility) to implement an agreement as it should be under normal circumstances. For example, natural disasters that cannot be predicted in advance will cause the object of the agreement to be completely destroyed

Relative force majeure is a certain condition that makes it difficult for debtors to implement the agreement. Even if it was to be carried out, the debtor had to make such a big sacrifice that it would no longer be practical if it continued. Thus, causing the execution of the contract to be delayed. (5)

And of course, business contracts affected by the Covid 19 pandemic are included in the Force Majure category. This indicates that, whoever, including the parties to the contract, cannot know and predict with certainty in advance the COVID-19 pandemic will occur.
The parties to the contract also have not contributed in any form to the COVID-19 pandemic. According to the principles of procedural law, the occurrence of the COVID-19 pandemic is basically a documentary document that is known and cannot be denied.
Furthermore, if the parties in their contract clause include an outbreak of disease, endemic or pandemic from the start, as a force management situation, then this will make it easier for the parties and the judge to give an assessment. So, in turn, it does not require a prolonged debate related to the interpretation of force majeure.
For example, the force majeure clause which is generally formulated in detail, among others, reads: "the parties are not responsible or cannot be sued for any delay or failure in the implementation of this agreement which is directly caused by causes or circumstances beyond the control and ability of the parties, such as natural disasters, fire, flood, general strike, war, rebellion, revolution, treason, riot, terrorism, plague / epidemic including but not limited to any order or instruction issued by the government. "
Likewise, the force majeure situation was reaffirmed based on Presidential Decree No. 12/2020 and various other regulations. If the parties to the contract only formulate in general terms, then the interpretation of the force majeure situation is fully determined based on the interpretation of the judge or arbitrator in the decision, where the parties determine which institution will decide the dispute then occur.
However, it is necessary to be careful and careful in assessing a situation as a force majeure. The state of force majeure basically cannot be generalized.
The assessment must be carried out on a case by case basis in accordance with the respective situation and factual conditions. This can be excluded if the parties to the contract that have been mutually agreed upon by the parties have described in detail what qualifies as a force management. This is important so that in the future it happens as stated in the clause, so it is considered to have been proven to be a force majeure situation.
However, if the parties in the force majeure clause only mention in general, or there has been an event completely different from that defined in the force majeur clause in the contract, then the judge or arbitrator has the authority to interpret.
For absolute force majeure, for example with the destruction of the object of the agreement due to a natural disaster, the debtor may use this as an excuse to ask to be exempted from the obligation to carry out the contract and pay fees, losses and interest as agreed in the contract.
Meanwhile, regarding the occurrence of the COVID19 Pandemic, it is classified as a relative force majeure. In the sense that the obstruction of the debtor's obligations is only temporary, namely during the COVID19 pandemic. During the occurrence of COVID19, it resulted in the debtor being hindered by his ability and delayed his opportunity to be able to fulfill his obligations to the creditor.
Therefore, at some point in the future, when the COVID-19 pandemic, officially declared by the Government to have ended, the debtor is still obliged to continue and fulfill the contents of the contract to the creditor.

B. Can Re-negotiation be carried out on contracts that experience Force Majure due to the impact of the Covid -19 Pandemic ?

In connection with the occurrence of a force majeure situation that has an impact on the contract and the implementation of the contract, the parties based on their mutual will may renegotiate the contract. Because of this, the authors argue, that contracts that have been previously made, and cannot be carried out properly due to the force majeure, can be re-negotiated by rearranging any matters according to the new agreement.
The definition of negotiation is the most general dispute resolution process. Negotiating has become part of the activities of human life in everyday life, such as bargaining, prices, settlement times and so on. And negotiation is a form of negotiation that is held directly by the disputing parties without involving a third party in order to find settlement in the dispute at hand **(Fitrotin Jamilah, 2014: P.55)**
The substance of the new agreement in the renegotiation depends entirely on the freedom and agreement of the parties. The new agreement resulting from the renegotiation process is binding on the parties and the parties are obliged to carry out in good faith. Furthermore, if the renegotiation results in a new agreement, then it can be said to be the best effort and achievement. With the understanding, that the parties based on good faith have chosen a way to resolve the problem through peaceful deliberation.
However, in practice it is not entirely easy to bring the parties' agreement to formulate a new contract together. The negotiation process is generally complex. Generally, each party will try to take

advantage of the superiority of its bargaining position to pressure the opposing party to negotiate to accept the concept it offers.

In such circumstances, the debtor has a stronger bargaining position than the creditor. The debtor will try to take advantage of the COVID-19 disaster situation as a reason for a force majeure to free themselves, or at least to delay, the fulfillment of their obligations to the creditors. This is excluded if the parties with good faith and strong will try to renegotiate and formulate a new contract based on the spirit of sharing risks and responsibilities, for the common good.

If the renegotiation process fails to produce an agreement to renew the contract, then the settlement will inevitably lead to a dispute. Will it be resolved in court or through arbitration.

If it is carried out through arbitration, there must be a written agreement between the parties which is stated in the arbitration clause or in the arbitration agreement. The judge or arbitrator through his decision will assess the reasons for the force majeure situation by determining the rights and obligations of the parties.

Conclusion

The author believes that the COVID-19 pandemic cannot be used as an excuse for the debtor to immediately act as a force majeure to cancel the contract. The contract remains valid and binding on the parties.

Whereas the COVID-19 pandemic will only delay the fulfillment of debtors' obligations to creditors. This situation is not meant to completely eliminate the debtor's obligation to the creditor. However, if the debtor uses such reasons to cancel the contract or to completely remove himself from his obligations to the creditor, this indicates that the debtor has bad faith.

In other words, in such a situation, the debtor tries to benefit from the suffering of the creditor, even though it is possible for the debtor to file a cancellation suit. Of course, the court must also not reject the case submitted. The court is still obliged to accept, examine and try cases. The court will examine objectively and impartially about the basis and reasons for the lawsuit and the supporting evidence. The court, through its decision, will carefully assess the reasons for the force majeure used by the plaintiff in his lawsuit, and then determine the rights and obligations of the parties through the ruling.

There is an opportunity for re-negotiation by both parties if the contract has a tendency for force majeure reasons. Usually the debtor will make efforts to take advantage of the COVID-19 disaster situation as a reason for a force majeure. If the parties who have good faith and strong will try to renegotiate and formulate new contracts based on the spirit of sharing risks and responsibilities, for the common good, so that The contract that has occurred can be immediately resolved related to joint rights and obligations. However, if the re-negotiation fails, the only way is through the settlement route through court or through arbitration.

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Motto: Rules should be made, but if they are not obeyed and obeyed, then the rules are useless. Likewise, vice versa.