European Journal of Research Development and Sustainability (EJRDS)
Available Online at: https://www.scholarzest.com
Vol. 3 No. 3, March 2022
ISSN: 2660-5570

CAN FORCE MAJURE CONDITIONS RELATED TO THE COVID-19 PANDEMIC INFLUENCE ON THE ONLINE CONSTRUCTION CONTRACT....?

Hari Sapto Adji
Tompotika Luwuk Banggai University
hari.sapto@ymail.com

Article history:
Received: 13th January 2022
Accepted: 14th February 2022
Published: 25th March 2022

Abstract:
The main problem in writing is that Construction Contracts affected by the Covid-19 Pandemic are included in the Force Majure category?
Can renegotiations 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 Construction Contracts that have been carried out that have been affected by the Covid-19 Pandemic, are included in the criteria for Force Majure and Can renegotiation be attempted on contracts that experience such Force Majure conditions
The author uses a normative juridical qualitative research method, the research findings reveal that
First, that the construction contracts affected by the COVID-19 pandemic are not all 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, that the Construction Contract is experiencing 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. by rearranging any things in accordance with the new agreement.

Keywords: Construction Contract, Force Majure, Re-negotiation

Joko Widodo President of the Republic of Indonesia, on April 13, 2020, has signed Presidential Decree No. 12 of 2020 concerning the Determination of the Corona Virus (COVID19). The parties may renegotiate the contract. The state intervened through OJK Regulation No. 11/POJK.03/2020 regarding the Stimulus Impact of COVID-19. In this regard, 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 properly. With the hope that the business relationship will run smoothly and sustainably. When negotiating a construction contract, basically the parties do not plan, or expect a dispute between them in the future. At least, in principle, the parties have the right to freedom to bind themselves to enter into a contract and determine the contents and clauses of the contract based on an agreement. This means that the freedom of the parties in making contracts needs to pay attention to the following things: **(Agus Yudha Hernoko, 2008: 103)**

a. Meet the terms of the contract
b. In order to achieve the objectives of the parties, the contract must have a cause
c. Does not contain false causes or is prohibited by law
d. Not against propriety, custom, decency and public order.
e. It must be carried out in good faith.

Furthermore, in the author's opinion, a legally made contract has binding force and applies as law to the parties who make it. Therefore, the parties are obliged to carry out the contents of the contract based on good faith. A contract is valid if it fulfills the conditions for a valid contract.

The conditions for a valid contract include, among others: **(Ahmadi Miru, 2007:13)**

a. Agree on those who bind themselves;
b. The ability for the parties to enter into an engagement;
c. A certain thing;
d. A lawful reason.

Indeed, the four conditions are cumulative as well as imperative. Cumulative means that all conditions must be met without exception. Imperative means that all conditions are coercive and cannot be deviated for any reason.

The first two conditions are called subjective conditions, because they involve the subject of the agreement, while the last two conditions are called objective conditions, because they involve the object of the agreement. If the subjective

conditions are not fulfilled, the agreement is threatened with cancellation, but if the objective conditions are not fulfilled, the agreement is threatened with being null and void **(Jacob Hans Niewenhuis, Principal Principles of Engagement Law (translation Djasadin Saragih) (1985: H.2)**

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

a. The existence of a legal relationship, the legal relationship here is a relationship that has legal consequences. The legal consequence is the emergence of rights and obligations.
b. There is a legal subject. Legal subjects as supporters of rights and obligations.
c. There are Achievements. Achievement consists of doing something, doing something, and not doing something.
d. Existence in the field of wealth

Elmer Doonan and Charles Foster reaffirmed that the parties who have stated the procedures and conditions of a business transaction in a contract have the following purposes: (Elmer Doonan & Charles Foster, 2001: 3)

a. That the contract intends to provide written evidence of the transactions that the parties have entered into,
b. That the contract is intended to prevent fraud
c. That the contract intends to establish the rights and obligations of the parties

That the contract is intended to regulate in more detail complex business transactions, in order to maintain obstacles in the implementation of the contract that has been made. The contract as an instrument for the exchange of rights and obligations is expected to take place fairly and proportionally according to 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 consensualism, the principle of binding contracts, 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.

For parties who do not carry out the agreement in the contract, it can be qualified to have defaulted, as regulated in the provisions of Article 1243 of the Civil Code. Default is terminology in civil law which means breaking promises (not keeping promises). Default must be based on an agreement or engagement **(Yahman, 2016:17)**

Of course, the party who feels aggrieved as a result of the default can sue the contracting opponent, to court or arbitration according to the agreement.

The injured party requests that the contract be executed, with or without a request for compensation, or, the contract is canceled accompanied by a request for compensation. In this case, the plaintiff as the aggrieved party has the right to determine their own claims in the petitum of their lawsuit.

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

In line with the above opinion, Peter Mahmud Marzuki, also mentions the principle of proportionality with the term Equitability Contract, with elements of justice and fairness. The contractual process basically takes place proportionally and fairly. **(Peter Mahmud Marzuki, 2003:205)**

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 payment methods. The parties are obliged to fulfill the contract agreement in good faith as stipulated in Article 1338 paragraph (3) of the Civil Code. Good faith or good faith, or, te goeder trouw, is a moral principle in contract law.

For each of the potential parties to the agreement there is an obligation to conduct an investigation within reasonable limits of the opposing party before signing the contract or each party must pay sufficient attention to closing contracts related to good faith **(JM Van Dunne and Van Der Burght, Unlawful Acts, Dutch Indonesian Cooperation Council, Prerdata Law Project, 1988, P.15)**

This, as explained by Wirjono Projodikoro, who divides 2 (two) kinds of good faith, namely: **(Wirjono Projodikoro, 1992:56)**

a. Good faith at the time a legal relationship comes into force. Good faith here is usually in the form of an estimate or someone's assumption that the conditions needed to start a legal relationship have been met.
b. Good faith at the time of the implementation of the rights and obligations contained in the legal relationship.

For parties who have a position as Boheer (Job Owner), a contract is a contract, which under any circumstances remains binding on the parties. The main interest of Job Owner is of course, demanding counter performance from the Contractor (Job Executor), namely after Job Owner has given the performance to the Contractor.

There is a point in Boheer's stance. And the normal state of such a stance is completely understandable.

However, what about in an abnormal situation, for example due to a disaster, then 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 contractor, to be unable to fulfill their obligations properly to Boheer.

Obstacles or inability of the boheer party in fulfilling their obligations due to the occurrence of a disaster can occur by having a permanent or only temporary nature. From a case by case analysis and contextual testing must be carried out and of course it cannot be generalized.

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

Based on the things above, several problems arise which can be formulated as follows:

A. Can Force Majure Conditions Related to the Covid 19 Pandemic Affect Ongoing Construction Contracts?

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

DISCUSSION

A. Can Force Majure Conditions Related to the Covid 19 Pandemic Affect Ongoing Construction Contracts?

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

At least for a construction contract, in general, the parties feel the need to include a clause that regulates the possibility of a state of coercion or force majeure occurring, or what is also known as overmacht or force majeure.

Force Majure (force majeure) according to Soebekti, a situation can be said to be force majeure if the situation is: **(Soebekti, 2001: H144)**

a. Beyond his control;
b. Forcing
c. Unknown beforehand

Overmacht or Force majeure is the occurrence of such a situation which is certainly not desired by the parties, 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 included in the contract as an anticipatory attitude towards the possibility of a situation occurring in the future.

Force majeure, or what is known as overmacht, or force majeure is regulated in the provisions of Articles 1244 and 1245 of the Civil Code. The provision basically stipulates that the debtor can be released from the obligation of all costs, losses and interest in relation to the implementation of the contract, as long as the debtor can prove the existence of force majeure.

The parties based on the agreement have the freedom to formulate into their contract clauses what matters and how a situation is qualified as force majeure.

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

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

Force majeure circumstances are absolute, meaning a situation where it is absolutely impossible (impossibility) for an agreement to be carried out properly as in normal circumstances. For example, a natural disaster that cannot be predicted in advance causes the object of the agreement to be completely destroyed

A relative force majeure situation is a certain condition that makes it difficult for the debtor to carry out the agreement. Even if it is to be carried out, the debtor must make such large sacrifices that it would no longer be practical to carry out. Thus, the implementation of the contract will be delayed.

And of course, construction contracts affected by the Covid-19 Pandemic are included in the Force Majure category. This indicates that, anyone including the parties to the contract cannot know and predict with certainty beforehand that a COVID-19 pandemic will occur or sometimes there is mention of an event.

The parties to the contract also have no contribution in any form to the COVID-19 pandemic. The occurrence of the COVID-19 pandemic according to the principles in procedural law is basically a notoir feit that has been known together and cannot be denied.

Furthermore, if the parties in the clause of the contract from the beginning include an outbreak of a disease, endemic or pandemic, as a force maejur situation, this will make it easier for the parties and the judge in giving an assessment. So that in turn it does not require a prolonged debate related to the interpretation of the occurrence of force majeure.

For example, force majeure clauses which are generally formulated in detail include, among other things: "the parties are not responsible or cannot be prosecuted for any delays or failures in the implementation of this agreement which are directly caused by causes or circumstances beyond the control and capabilities of the parties such as natural disasters, fire, flood, general strike, war, rebellion, revolution, treason, riots, terrorism, epidemics/epidemics including but not limited to any regulations or orders issued by the government."

Likewise, with the occurrence of a force majeure situation, it is emphasized again based on Presidential Decree No. 12/2020 as well as various other regulations. If the parties in the contract only formulate in general terms, then the interpretation of the force majeure situation is entirely determined based on the interpretation of the judge or arbitrator in his decision, where the parties determine the choice of which institution decides the dispute then occurs.

However, it is necessary to always be thorough in assessing a situation as 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 agreed with the parties have described in detail what is

qualified as a force mejeur. This is important so that in the future it really happens as stated in the clause, then 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 terms, or there have been events that are completely different from those formulated in the force majeure clause in the contract, then the judge or arbitrator is authorized to interpret.
For absolute force majeure, for example with the destruction of the object of the agreement due to a natural disaster, the debtor can use this as an excuse to request that he be released from the obligation to carry out the contract and pay the costs, losses and interest as agreed in the contract.
Meanwhile, regarding the occurrence of the COVID-19 Pandemic, it is included in the qualification as a relative force majeure. In the sense that the obstruction of debtor obligations is only temporary, namely during the outbreak of the COVID19 Pandemic. During the occurrence of COVID19, the ability of debtors to be hindered and their opportunities delayed to be able to fulfill their obligations to creditors.
Therefore, at some point in the future, during the COVID-19 pandemic, the Government has officially declared that it has ended, the debtor is still obliged to continue and fulfill the contents of the contract to the creditor.

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

In a situation during a pandemic, it is necessary to determine a choice of priority steps to solve problems. Especially regarding construction projects that require very large amounts of funding, for example the construction of toll roads, airports, ports, train stations, procurement of defense equipment, office buildings should be temporarily postponed even though they have been programmed for a long time.
As for construction projects where the tender process has been carried out and the winner has been determined but the construction contract has not been signed, the contract signing should be postponed.
Prior to the signing of the construction work contract, the rights and obligations of each party had not yet been issued. The service user, as the project owner/ Job Owner, cannot be sued on the grounds of default. As for construction projects whose contracts have been signed, and the projects are already running, then this problem really needs to get attention and be resolved properly.
The force majeure situation due to the COVID-19 Pandemic of course also has an impact on the existence of contracts and the implementation of construction work contracts that have been made by the parties previously. Basically the parties based on the will and mutual agreement can renegotiate the contract. Contracts that have been made previously, and it turns out that they cannot be carried out properly due to the force majeure of the COVID-19 pandemic, can be renegotiated by re-arranging what things are to be adapted to new conditions. The substance of the new agreement in the renegotiation is entirely dependent on the freedom and agreement of the parties. The new agreement resulting from the renegotiation process is set forth in a new contract, or, or contained as an addendum, is binding on the parties and must be implemented in good faith.
Re-negotiation can be carried out on any business contract, including – but not limited to – construction contracts. If renegotiation results in a new agreement, then this is the best effort and achievement. This means that the parties based on the will, agreement and good faith have succeeded in resolving the problem (re-negotiation) through amicable deliberation.
It should be noted that renegotiation will succeed if the parties have good faith and strong will to try to renegotiate based on the principle of give and take, or take and give, which is based on the spirit to share risk and share responsibility. At the same time as an effort to maintain the relationship good in the long term in the future for the interests of the parties themselves. .
However, in practice, it is not easy to bring the parties' agreement to renegotiate to formulate a new contract. The renegotiation process will generally be difficult. Each party will try to take advantage of the advantage of its bargaining position (bargaining position) to pressure the other party to negotiate to be willing to accept the concept it offers.
In such circumstances, it is precisely the Job Executor who has a stronger bargaining position than the Job Owner. There are times, in such circumstances, the Job Executor will try to take advantage of the situation of the COVID-19 pandemic as a reason for the occurrence of force majeure to free himself, or at least to delay, the fulfillment of his obligations to Job Owner.
As for what is meant by a Job Executor in a construction work contract, it can include service providers and service users. The service provider's obligation is to provide counter-achievements in the form of continuing, completing and submitting work to service users as appropriate. The obligation of service users is to provide counter-achievements in the form of making payments for services for the work that has been done by the service provider in accordance with the agreed stages.
In such a situation, who will actually suffer the most? So it can be said that the service provider is the party who suffers the most in a situation like this. Because the service provider must bear all costs which include and are not limited to payment of wages and salaries of employees, including severance pay in the event of layoffs, payment of heavy equipment rental fees, costs for purchasing materials that may come from imports, payment of bank interest due to part of the project implementation capital generally comes from bank credit and so on. Meanwhile, construction projects have stalled and cannot be utilized.

Moreover, if the project owner is from a private company, the suffering for service providers will be even more severe. In the current situation, the project owner is also trying to survive, save him from more severe suffering. They also experience financial difficulties in being able to make payments to construction-only providers.
For example, available, but limited to survive, so they choose to delay payments until things get back to normal. Moreover, if the project is completed and handed over, for example a hotel or office, then even then in the current situation it cannot be utilized and cannot generate money.
As for the construction services sector, which is also affected by the COVID-19 pandemic, it seems that the government still has not received serious attention regarding how to solve it. It is hoped that the Government's policy will soon be followed up to provide solutions to the problems faced by actors in the construction services sector who are experiencing the same problems and suffering.
Thus, related to the occurrence of force majeure circumstances that have an impact on the contract and the implementation of the contract, the parties based on their mutual will can renegotiate the contract. The author is of the opinion that contracts that have been made previously, and cannot be carried out properly due to the occurrence of force majeure, can be renegotiated by rearranging any matters in accordance with the new agreement.
The substance of the new agreement in the renegotiation is entirely dependent on the freedom and agreement of the parties. The new agreement resulting from the renegotiation process is binding on the parties and the parties must implement it 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 amicable deliberation.
However, if the renegotiation process fails to produce an agreement to renew the contract, the settlement will inevitably lead to a dispute. Will it be resolved through court or through arbitration.
If it is done 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.

CLOSING

The author is of the opinion that the occurrence of 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 occurrence of the COVID-19 Pandemic is only delaying the fulfillment of Job Executor obligations to Job Owner. Such a situation is not to completely eliminate the debtor's obligations to the creditor. However, if the Job Executor uses such reasons precisely to cancel the contract or escape completely from his obligations to the Job Owner, then this indicates that the Job Executor has bad faith
There is an opportunity for renegotiation by both parties if the contract that has been carried out has a tendency for force majeure reasons. Usually the Job Executor will make efforts to take advantage of the COVID-19 disaster situation as a reason for the occurrence of force majeure. If the parties who have good intentions and strong will try to renegotiate and formulate a new contract based on the spirit of sharing risks and responsibilities, for the common good, so that the contract that has occurred can be resolved immediately regarding joint rights and obligations. However, if re-negotiation fails, then the only way is through a settlement through the courts or through arbitration.