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## Defining Concept of The Force Majeure in Fullfillment of Obligation During Covid-19 Pandemic

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### **Abstract**

*Presidential Decree Number 12 of 2020 concerning Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) stipulates the Covid-19 pandemic as a non-natural national disaster. It has implications for the termination of an agreement because of the inability of one of the parties to carry out their obligations. The unilateral cancellation of the contract or the inability of the debtor to fulfill the performance can be avoided if the parties can understand the legal consequences of the Covid-19 pandemic, especially regarding contractual relationships. The purpose of this study is to analyze business contracts that occurred during the Covid-19 pandemic whether the pandemic can be categorized as force majeure that can prevent debtors from fulfilling achievements. This research is normative legal research based on secondary data. The research method used is a statutory approach and a conceptual approach. The results show that the force majeure situation is relative. In addition, the agreement that has been made is possible to make changes / addendum to the agreement with the aim that the parties can still carry out their obligations as mutually agreed upon in the context of realizing the principles of balance and fairness in the contract.*

**Keywords:** Force majeure, contract, agreement

### **A. INTRODUCTION**

A contractual relationship is an agreement of two desires for completing each other. It is formulated through negotiation between each party to reach an agreement. An agreement itself exist based on the existence of offer, then it gets

accepted from the other party, the offer is a form of a willing statement towards the opposite party, whether it is explicitly or implicitly done, while acceptance is a positive response towards the offer by accepting the willing (Trimulyo, 2017). On the other hand, an obligation is a legal binding which characterized by property from two or more people, with fundamentally one of the parties has its right (the creditor) and another party has its obliged (the debtor) of an obligation. Obligation, if a debtor can not fulfill their obligation willingly with good faith as what is supposed to be, then the creditor can demand legal assistance toward them as coerced to fulfill their obligation. To define the legal relations of a relationship as an obligation, the scholar is initially “worth the money” for the standard.

A relationship is assumed as worth the money if someone suffered losses and it's worth the money. The object of obligation formed to provide something, to do something, and not to do something (Wibawa & Artadi, 2014). Obligation to provide something as their achievement through delivering the goods i.e. the seller is obliged to deliver its goods or the man who rents is obliged to leave the joy within the rented goods. The risen obligation is obliged to carry on a responsibility to fulfill the achievement and to carry on the loss (if sued) either under the law or administration order (Mahardika & Mertha, 2013). Commonly, every person has to be held accountable for what they have done. If the responsible is constrained by civil law, all parties are attached by the clause which stipulates the relationship among themselves. Concerning an obligation to bear an agreement, was possible for a debtor isn't able to settle up due to *force majeure* event because there has been circumstances or events that happened unexpectedly then obstructing debtor to meet their performance before the debtor is suspected of negligence and in that

current coercive situation, the debtor can not be blamed (Iswara & Wiryawan, 2015).

The *force majeure* clause is stated on some articles of Civil Code (KUH Perdata). Article 1244 of the Civil Code stated “if there is any reason for such, the debtor compensates for costs, damages, and interests if he cannot prove, that the non-performance or the late performance of such obligation, is caused by an unforeseen event, for which he is not responsible and he was not acting in bad faith”. This provision emphasizes the debtor is not liable for compensating if the achievement not fulfilled due to coercive situation. Article 1245 of the Civil Code stated, “The debtor needs not to compensate for costs, damages, or interests, if an act of God or an accident prevented him from giving or doing an obligation, or because of such reason he committed a prohibited act”. The concept of this clause is implicitly defined if the default is come about and he cannot prove it occurs due to an unexpected situation or out of debtor capacity.

A debtor is responsible to meet the performance, though he cannot meet the performance frequently. Then, debtor set in losses. Accordingly, a debtor will propose the existence of a coercive situation to ward off the allegation of default by creditor to compensate. In this condition, all around the world was struck by the Corona Virus Disease 2019 (Covid-19) outbreak. This virus spreads more easily and quickly from one person to other. Covid-19 is a dangerous virus that may cause death. *World Health Organization* (WHO) confirmed the outbreak of the Covid-19 virus spread contagiously and declare as a pandemic. Therefore, The Indonesian Government determined the corona outbreak is a disease that may cause emergency of public health to their people (Arini, 2020a).

As this far, Covid-19 pandemic has been caused disruption either directly or indirectly in economics aspect such as decreasing current of tourism number, air transportation being disrupted, at the point of the consumer trust is attenuate as well as the business due to almost all countries enforcing some policies such as, regional isolation, social distancing, quarantine, temporary closing the business sector activity, and also restricting the flow of the people movements that may lead the increasing number of Covid-19 positivity (Pusat Kebijakan Regional dan Bilateral, 2020). This social distancing implicates several regulations like economic, political, law, and health. Mainly, Covid-19 pandemic makes the economy running slow, no matter how powerful stuck with them, rather it is big, medium, or small.

In the middle of the world struggling to face the unseen enemy, indeed enforcing the health protocol in every location, for constructing settle state defense, mainly for protecting the citizen as one of the significant power elements. Many analyses state related with Covid-19 pandemic, begin with an examination of the health sector, that this kind of infectious disease which affects the respiratory system is not brand-new disease, however, this disease has mutated and resulted in the virus be more lethal and more transmissible, mainly for infected-person with hereditary disease. Nonetheless, the main point that we have to pay attention to is the pandemic issue itself has an impact on the business actor to carry out the agreement that has been promised (Sushanti, 2020).

Along with the release of Presidential Decree No. 12 of 2020 on Determination of Corona Virus Disease 2019 (Covid-19) Spreading Non-natural Disaster as a National Disaster, juridical problem whether Covid-19 pandemic can be categorized as *force majeure* becomes a hot issue just keep in mind how Covid-

19 impact of lowering economic level the people. The research by Syafrida and Mustakim stated the fact that Covid-19 spreading has been the reason for many companies for termination of employment in Indonesia (Mustakim & Syafrida, 2020). The other research of Kaya and Dharmawan concluded that the Covid-19 pandemic cannot automatically release the party from liability in commercial agreement based on *force majeure*, in the classification of redemption of price, costs, and interest as well as the redemption all the parties to fulfill the achievement that can cause the terminate agreement (Kaya & Dharmawan, 2020). This research is based on the existence of difficulties of some parties mainly the business actor during Covid-19 pandemic to meet their performance. *Force majeure* in practice, inside an agreement (contract) as one of choice to release from liability of business actor during economic struggling as the impact of Covid-19 pandemic as what the Government determined being the non-natural national disaster to be the reason of unfulfilled the achievement of an agreement.

## **B. RESEARCH METHODOLOGY**

This research is juridical normative with descriptive normative as an analytical technique. The method that was used in this research get along with statute approach and conceptual approach. The data used in this research is secondary data with secondary legal materials and primary legal materials such as Civil Code as well as other statutory regulations ruled about Covid-19 including Ministry of Health Regulation No. 9 of 2020 about Guidelines of Large-Scale Social Restrictions in Acceleration Handling of Corona Virus Disease 2019 (COVID-19); Presidential Decree No. 11 of 2020 on the Declaration of the National Public Health Emergency *Corona Virus Disease 2019 (Covid-19)*; Presidential

Decree No. 12 of 2020 on Determination of Corona Virus Disease 2019 (Covid-19) Spreading Non-natural Disaster as a National Disaster, while the used of secondary legal materials comprise of books, articles, other publications topic related. Collecting data from literature review with qualitative method where the result is displayed in descriptive clarification.

## C. RESULT AND DISCUSSION

### 1. *Force Majeure* Concept in the Context of Fulfillment the Obligation

A coercive Situation is an occurrence that qualified as a moment that can bring consequence to every party within an agreement, where the party that cannot fulfill their achievements cannot be said as default. In this case, the debtor cannot be blamed, and does not have to take the risk and cannot be predicted the situation will occur at the time of the agreement is signed (Rasuh, 2016). *Force majeure* as the effect of an unexpected event itself can cause something happening outside debtor's control in which moment an be the reason to be free from responsibility to compensate. Related with *force majeure*, Moch. Isnaeni stated that the details of *force majeure* inside the Civil Code were not regulated precisely which are may create default seems like the default cause of intended. In line with that, according to Bambang Winarno who stated that from among the positive statutory regulation, there is no non-natural disaster can be the reason for the establishment of *Force majeure*.

In Civil Code cannot be seen the term of *force majeure*, not even explain what is meant to be a coercive situation or the unexpected events itself, yet that term was drawn from rules of Civil Code in which regulate compensation, the risk for a one-sided party in the coercive situation, or the part of special contracts and drawn from

the conclusion of legal theories, doctrine, and jurisprudence of *force majeure*. There are several clauses inside the Civil Code that can be the guideline of *force majeure*, such as Articles 1244, 1245, 1545, 1553, 1444, 1445, and 1460, then Presidential Decree No. 12 of 2020 on Determination of Corona Virus Disease 2019 (Covid-19) Spreading Non-natural Disaster as a National Disaster, cannot be the direct basic provision to the establishment of *force majeure* (Dewangker, 2020). There are kinds of expert reviews about *force majeure*, as follows (Isradjuningtias, 2015):

1. Riduan Syahrani stated that *overmacht* is ofently known as *force majeure* normally interpreted as a coercive situation and some knew it as coercive cause “*sebab kahar*”.
2. According to Abdulkadir Muhammad, *force majeure* is a situation of the debtor cannot fulfill their achievement due to the unexpected event in which the debtor cannot be foreseeable will occur at the time of making the engagement;

The implementation of *force majeure* clause in the contract can be comprehended in the form of (Anand, 2020a):

1. *Force majeure* clause is included in the contract
2. Was worded include with the formula or unlimited –“including but not limited”
3. How if it is unregulated yet? Then it is applied the heteronomous factor that is available in Article 1339 of Civil Code

Article 1244 of Civil Code explains about compensation payment and its interest if the debtor cannot prove themselves that have through an unexpected event which leads them cannot fulfill their achievement. The existence of *force*

*majeure* is not solely the reason of debtor to ward off the liability, so there must be some conditions to avoid that kind of condition. *Force majeure* cannot be established in this some conditions (Anand, 2020a):

1. *force majeure* occurs outside debtor liability, however the debtor is already being negligent.
2. Avoiding to fulfill the achievement at the time of terminating the agreement,
3. Avoiding to fulfill the achievement due to one of the parties whose included inside the agreement,
4. Avoiding to fulfill the achievement due to the defective objects that are used by the debtor to meet their performance.

Related to the coercive situation, according to Subekti, a coercive situation is a situation that has been occurred at the time the agreement was made, at least not suffered by the debtor himself. If the debtor is on his way to prove the coercive situation, the creditor allegation will be declined and the debtor will be acquitted from penalty, whether to fulfill the achievement or recompensate as stipulated from the agreement. With all the conditions that have to be fulfilled, so somebody cannot be let alone claim himself has met the *force majeure*. Wherefore debtor can use many excuses so he can be acquitted from liability (Dewi & Djamil Fathurrahman, 2020). So judges may decide that a debtor is not liable then he can be acquitted from his liability not to meet his performance due to *force majeure*. *Force majeure* itself has to fulfill the elements based on Article 1244 of Civil Code, as the following bellow (J. Satrio, 1999):



1. There is a situation can be proven for debtor was avoided to meet his performance in which obstacle is a justification for a debtor not able to meet his performance or meet the performance not what has been promised;
2. The debtor has to prove he himself does not have the elements of guilty from the situation that obstruct him to meet the performance;
3. The debtor has to prove that those obstacle has never been expected as the agreement is closed.

Based on Articles 1244 and 1245 of Civil Code can be observed the regulation about *force majeure* (Gumanti, 2012). *Force Majeure*, in those Articles, according to Purwahid Patrik stated that there are 3 (three) conditions for *force majeure* that can be established, those are (Tauratiya, 2020):

1. There is an obstacle during the meet of performance;

A situation can be categorized as *force majeure* when the situation leads the debtor cannot fulfill the achievement. However regarding the Covid-19 pandemic, if the pandemic is ended, then debtor may fulfill his performance. In other words, the debtor's inability to meet the performance that caused him cannot to fulfill the achievement is only temporary, different from permanently *force majeure*, until whenever the debtor will not be able to meet the performance. It means that the debtor conditions need to be reviewed, whether he is categorized free from the compensation or he still can renegotiate related with the meet of performance.

2. The obstacle does not rise due to debtor fault;

The existence of Covid-19 pandemic brings negative effects for the debtor that his business is impacted by this situation. Based on that case, can be said that there is no bad faith from the debtor to avoiding his responsibility.

3. The obstacle does not rise cause of debtor risk.

No one in this world could predict the event of Covid-19 and through Government by releasing Presidential Decree No. 11 of 2020 on the Declaration of the National Public Health Emergency *Corona Virus Disease* 2019 (Covid-19) and Presidential Decree No. 12 of 2020 on Determination of *Corona Virus Disease* 2019 (Covid-19) Spreading Non-natural Disaster as a National Disaster.

In the history of the coercive situation, there are 2 kinds of it (Elfiani, 2012):

1. Objective theory

According to this theory, a debtor can only bring up the coercive situation, if it is impossible for everyone to meet the performance. An impossible situation to meet the performance that has been promised due to the debtor's inability to bear the reality. At this point, the debtor cannot meet the performance toward the creditor at all, i.e the settlement of a house cannot be held because the house is destroyed due to an earthquake or other natural disaster. Furthermore, this theory is not only based on the absolute impossibility anymore but presuming that the loss or out of sight of goods is coercive situation as well.

2. Subjective theory

According to this theory, there is a coercive situation, if debtor put concerned about his personal circumstances before he cannot fulfill the

achievement. It means that if debtor is going through a coercive situation, then debtor circumstance is acquitted. Thus, the debtor cannot be held responsible for creditor due to nothing to carry out, i.e. A is the owner of a small industry that has to deliver some goods to B, where those goods are still needed going through some production with certain materials. Unexpectedly the cost of those certain materials has risen, if A has to fulfill the achievement, he would be needy. In this case, subjective theory admitted the coercive situation. However, if it is related to the big industry then there is no coercive situation.

Based on what has been explained above, *Force majeure* is one of an unexpected event that cannot be prevented and potentially brings harm or endanger a business or profession. Among the kinds of *force majeure*, there are (Silalahi, 2020):

1. *Force majeure* due to natural state, coercive situation caused of natural events which unexpectedly and dodgy by every person due to the natural character itself without any intention, i.e. floods, landslide, earthquake, storm, eruption, and so on.
2. *Force majeure* due to coercive situation, coercive situation caused of coercive situation due to upnormal situation or condition, specific situation which is about to happen and happened in short, unpredicted before, i.e. war, blockade, strike, epidemic, terrorism, bomb, mass riot, including the run out of the instrument which may cause the unfulfillment the obligations.

3. *Force majeure* due to economic state, coercive situation caused of the changing of the economic state, there is certain economic policy, or all about economic sector related. Included as the *force majeure*, there are changes of economic state or statutory regulation that lead to the unfulfillment the achievement, the rising of monetary crisis which creates the rising of banking cost and others.
4. *Force majeure* due to the goods as the object of obligation is destroyed or lost or something technical happens unexpectedly, the coercive situation due to the event of decreasing function of technical or operational equipment which have an important role for continuity of factory production process, and those events cannot be predicted before. Included as *force majeure*, the machine which has a big effect on the factory, unable to work.
5. *Force majeure* due to policy or government regulation, the *force majeure* due to the changing of policy or revoked or newly released policy, which affected in progress action, i.e. the released of Governmental Regulation (whether it is from the central or the regional) which affected an object of agreement/obligations become no longer doable.

From the point of view of the duration of coercive situation will establish *force majeure*, so *force majeure* be distinguished into 2 forms (Arini, 2020b):

1. Permanent *force majeure* permanen. Can be said permanent if the risen achievement from the contract cannot be fulfilled again at all until

whenever, i.e. the goods as an object from the contract were destroyed outside debtor liability;

2. Temporary *force majeure*. Whereas, it is said temporary if fulfillment the achievement from a contract will not able to be done in temporary, i.e. the occurring of certain event, whereafter it is passed, the achievement can be fulfilled again.

Then *force majeure* has a legal implication that can be seen in 2 (two) things (Anand, 2020b):

1. According to absolute theory, a debtor is in a coercive situation, if fulfillment of the achievement no longer (impossibility element is required) be done by anyone or everyone. In this theory, the scholar put their concern to natural disasters or terrific accidents. It means that *force majeure* has absolute character and legal relationship among the parties is withdraw.
2. According to relative theory, the coercive situation exists, if a debtor is still able to meet the performance, though during these difficulties or with big sacrifice, i.e. a company for the expedition has to deliver the goods to creditor place. Even if the expeditor (the debtor) has used strong rope to shift the goods into the ship. However, the used rope and the goods will be sent is broken. Here, the debtor has to be responsible for the broken goods so *force majeure* event with this relative character can be the option to do the contract:
  - a. The delay of meet the performance until it can do (a situation caused debtor not able to meet the performance): or

- b. If the object is half-destroyed/the achievement was obstructed during *force majeure*, so it is opened negotiation for each party.

## **2. Force majeure concept for Fulfillment the achievement During Covid-19 pandemic**

Covid-19 spreading rapidly which makes people mobility worst, it is undeniable of business transaction sector, weakens the economy, even almost stops. This situation makes meet the performance is hampered due to the business doesn't work well. This pandemic situation has affected to meet the performance of every party inside the contract being obstructed or even cannot be done at all. In the context of Civil Law, an agreement must be obliged and obeyed by every party and binding like statutory regulation for whom who made it compatible with *pacta sunt servanda* principle. Related to that matter, can be interpreted that the achievement which has been made by every party to be an agreement is forcibly done (Kaya & Dharmawan, 2020). An agreement made with legitimation is doable for every party who can fulfill the rights and obligations that have been promised to pursue the aim of the agreement. In reality, during Covid-19 outbreak, not every legitimate agreement is doable.

To fulfill the achievement of an agreement is an obligation, however, there is an exception for compensating due to unfulfillment the achievement. The party who doesn't meet the performance, may file a plea with several exceptions to avoid a liability to do compensation, one of them is a coercive situation (*force majeure*). In this case, the situation must be able to prove where the party to an agreement is facing a coercive situation which rises without his intention, then the party can be

acquitted of compensating the cost, damages, and interest, as it has been ruled in Article 1244 and Article 1245. Both of the Articles are the basic framework of the coercive situation or *force majeure* of Indonesian Civil Law, according to Mochtar Kusumaatmadja stated that *force majeure* or *vis major* is admissible as an excuse not to fulfill the obligation due to the loss/destroyed objects or goals as the fundamental agreement, thus can be defined as a coercive situation or *force majeure* which is an unexpected event, there is no party wants it and accountability cannot be requested (Purwanto, 2014). Related to the current situation when the government determines that Covid-19 pandemic is a non-natural disaster (national disaster). The spreading of Covid-19 is not only striking public health out, but also creating the economic sector run-off, even the consequence of agreement cannot be executed.

Take a good look at the legal implication for the contract during *force majeure* which has relativity character about available option to delay meet the performance until it can be done; or if the object is half-destroyed/achievements was obstructed during the *force majeure*, then it leads to every party to open negotiate. In this case can be interpreted as a coercive situation with no absolute effect to do an agreement. In this matter, it can be displayed, the first is the existence of the coercive situation, debtor still meets the performance though it needs big sacrifice. In another situation, established the coercive situation, from that debtor is not able to fulfill the agreement in temporary, after the coercive situation is ended, the debtor can fulfill the agreement again. The acquaintance of cost, compensation, and interest are still able to get from the party who has been through relative *force majeure* event, however, it doesn't as far as the withdrawal of the agreement. During relative *force majeure*, it means that the acquaintance is only temporary and the *force majeure*

event is obstructing the debtor to meet the performance. If *force majeure* is ended, then the creditor can demand to meet the performance. The implication of relative *force majeure* is fulfillment the achievements cannot be done temporarily.

Determining Covid-19 pandemic as non natural disaster based on Presidential Decree No. 11/2020 on the declaration of the National Public Health Emergency Corona Virus Disease 2019 (COVID-2019) and Presidential Decree No. 12 of 2020 on Determination of Corona Virus Disease 2019 (COVID-19) Spreading Non-natural Disaster as a National Disaster. Based on those decrees, it indicates that a situation can be categorized as *force majeure* when it brings obstacle to a debtor to meet the performance. However to declare *Covid-19* pandemic as *Force Majeure* is a matter of relative, so it must be used just in case *by case* related with the agreement which is made by every party. The *case by case* means an agreement that is available to do or doesn't get impact during the pandemic. On other hands, if the pandemic is ended, then the debtor can fulfill the achievement again. On the other hand, the obstacle which makes the debtor cannot fulfill the achievement is occurring temporarily, different from absolute *force majeure* in which, the debtor cannot fulfill the achievement again until whenever.

The obstruction of debtor to meet the performance doesn't come from negligence, intention, nor bad faith of debtor. In the case of Covid-19 pandemic, this condition affecting mobility becomes obstructed, i.e. implicating of Large-Scale of Social Restriction (LSSR) and Restriction on Public Activities (RPA) in which are applied in several regions in Indonesia it will slow down the public mobility or limited certain activity, then it makes inability to fulfill the achievement. So, based on what has been explained, *force majeure* event in the context of debtor



cannot fulfill the achievement it can be classified as relative, due to every people in the agreement which was made at the time of incapability to meet the performance, however, when the pandemic is ended, every party can fulfill the achievement that has been promised. Based on the principle of good faith, when every party has been through the relative *force majeure*, for keeping it relevant it is better to consider renegotiate a new agreement. Nonetheless, a business contract does not only consist of a *force majeure* clause about the debtor condition that cannot meet the performance due to an unexpected event after the contract is signed. The hardship clause also includes in business contract as an alteration of situation that debtor is not able to meet the performance. The term of hardship is known as doctrine *rebus sic stantibus* in Europe. Reviewing the *rebus sic stantibus* doctrine or hardship, fulfillment the achievement is still doable but it is burdensome when the situation is changed. In the situation of the rising cost or waste over situation that damages every party. The hardship condition leads the parties to renegotiate the contract. It is different from *force majeure* which acquaintance the party from compensating accusation.

In international trade is known the principle of respecting the contract during the hardship, Indonesia there is no regulation yet, however, the hardship principle is developing during the practice of international contract law which is supported by the regulation and the doctrine of international contract law, i.e. *Unidroid Principles for International Commercial Contracts* (UPICCs). UNIDROIT is an independent intergovernmental, was Set up in 1926 as an auxiliary organ of the League of Nations. the Institute was, following the demise of the League, re-established in 1940 based on a multilateral agreement, the UNIDROIT Statute.

UNIDROIT is seat in Rome and it is financed by 50 member States wanting the needs unification international trade law. UNIDROIT *Principles of International Commercial Contracts* (UPICCs) regulating International Commercial Contracts, firstly was adopted in 1994 and was revised in 2004, is applicable mostly during formulating contract and international arbitration by state court and international court of arbitration to interpret and accomplish whether the conditions of the contract or making relevant the national law. The last amendment was adopted in 2010 and was approved by Governing Council in May 2010. As one of the states who has ratified the principles of UNIDROIT through Presidential Regulation No. 59 of 2008 on Confirmation the *Statute of International Institute for The Unification of Private Law* (Presidential Regulation 59/2008), since January 2<sup>nd</sup>, 2009 Indonesia has become the 63<sup>rd</sup> member of UNIDROIT, therefore as a member of UNIDROIT, Indonesia has to follow and run the principles which have been ruled by UNIDROIT. Presidential Regulation 59/2008 open the door of harmonizing the law for Indonesia in the context of international law of contract to get rid of obstacles of International trade. As what is supposed to do for the UPICCs principles can be formed as normal regulation to make the provision be more complete, order, flexible, and to accommodate the developing of international trade. One of important things for Indonesia from UPICCs is Civil Code itself doesn't regulate the permissible of unfulfillment contract during fundamental change of situation, i.e. a few years ago when the economic crisis hit Indonesia and caused a lot of contracts undisputable.

The hardship principle is progressing theory from *rebus sic stantibus* terminology which means the agreement will be affected if a fundamental change

of situation happens. Hardship principle is regulated in Section 2 Article 6.2.1 Principles of International Commercial Contracts 1994 – UNIDROIT (Article 6.2.1 – Contract to be Observed) which is stated that “*Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship*”. That clause mentions 2 basic matters, the first, the binding character of the contract is the general rule. It is projected to emphasize that contract is binding to be done as long as it is possible, without considering the holding charge that must be done. In other words, even one of the parties is suffering heavy loss, the contract must be respected no matter what. The second, change in circumstances relevant only in exceptional cases. Hardship definition itself is mentioned in Article 6.2.2. UNIDROIT Principles (Article 6.2.2 - Definition of Hardship) which stated that:

*“There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and : (1) the events occur or become known to the disadvantaged party after the conclusion of the contract; (2) the events could not reasonable have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (3) the events are beyond the control of the disadvantaged party; and (4) the risk of the events was not assumed by the disadvantaged party”.*

Based on Article 6.2.2 UNIDROIT Principles can be interpreted that hardship is one of basic/fundamental condition that has changed the balancing of a contract which has caused the value to do something is getting higher significantly or the value to do something is getting lower significantly and that condition is only aware by the aggrieved party after the contract is signed, that situation cannot be predicted logically by the aggrieved party before the contract is signed, it is outside control of the aggrieved party, and the risk of this event cannot be estimated. And then,

from *hardship* definition inside *UNIDROIT Principles*, there are 4 (four) terms that can be categorized as hardship:

1. The event is known by the aggrieved party after the contract is made.
2. That event is unforeseen by the aggrieved party during the process of making a contract.
3. The event is out of control of the aggrieved party.
4. The risk of the event is unpredicted by the aggrieved party.

Based on the hardship definition which is provided by *UNIDROIT Principles* as said above with the 4 terms, then there are at least 3 (three) elements to define the hardship:

1. A capability which can be precisely counted as financial terms
2. Substantial increase of the cost that has to be held by one of the party
3. Substantial decreased of the value to fulfill the contract

Based on what have said above, then there are hardship implications of the execution contract:

1. If hardship is proven, a contract is not expired
2. The aggrieved party are entitled to renegotiate
3. Renegotiate is must be based on good faith
4. If renegotiate is failed, be brought to trial

According to the explanation of *force majeure* and hardship above, Azis T. Saliba stated that the basic difference between *force majeure* and *rebus sic stantibus* is *force majeure* is impossible to execute the agreement due to on grounds physical way or legal way, by neglecting the economic difficulties or economic impossibility, while *rebus sic stantibus*, the reason of unexecuted agreement is the

execution itself is onerous, so it is concluded as an economic impossibility. In other words. The difference between *force majeure* and *hardship* or *rebus sic stantibus*, is that *force majeure* itself can be an excuse not to do what is promised therefore the default party cannot be punished/accused, if *hardship* or *rebus sic stantibus* is not an excuse, but the possibility of the party to ask the judges to renegotiate their contract.

Covid-19 pandemic as the excuse of *force majeure* must be seen as casuistic. In this case, the clause of an agreement strictly excludes epidemic, virus, pandemic, even other measures categorized as *force majeure* so every party inside the agreement can do the obligation as promised and signed by both parties. Determination of Covid-19 pandemic as *force majeure* has to consider whether in the last agreement is regulate about *force majeure* clause and what is the condition that included as *force majeure* situation as regulated inside the agreement. If in the agreement no clause regulates details about the natural or non-natural events which are included as *force majeure* then kinds of achievement itself become the consideration.

Refly Harun opinion that quoted by Setyo Aji Harjanto, Covid-19 pandemic cannot be the basis of terminate an agreement, where Covid-19 pandemic is not included into *force majeure* elements by the reason that the spreading of Covid-19 can be anticipated and the coming itself is not all of sudden. In this case, Covid-19 pandemic is one of the coercive situations which caused of unnormal situation or condition, special circumstances happen immediately and temporarily without no one can predict before, including the run out an equipment that may cause the unfulfillment of an agreement.

The interpretation of pandemic as *force majeure* in a contract is based on the *clausula rebus sic stantibus* principle (things thus standing), which can be interpreted that a contract can be voided or terminate, if fundamental change happens toward situations that comprise in a contract. Therefore, the to prove Covid-19 pandemic as *force majeure* of the contract is depended on that disaster whether will it give big impact or not during the execution of the agreement. When Covid-19 pandemic is said as *force majeure* has implications to the agreement which is made by parties, parties are not charged or have the responsibility to bear the loss and have to pay the cost and fine of the obstruction to meet the performance (default), due to unfulfillment or negligence to meet the performance as what has been decided in the contract. In other words, the debtor does not default due to the contractual obligation cannot be done, not due to negligence nor intended. The contractual obligation which is attached with one of the parties cannot be insisted a compensation when the existence of the unforeseeable event.

#### **D. CONCLUSION**

Covid-19 pandemic as a *force majeure* execution needs more casuistic study. To determine Covid-19 pandemic as *force majeure* in contract, firstly, the contract must be examined to ensure the existence of *force majeure* caluse and what are the terms and conditions to be concluded as *force majeure* event as what has been regulated inside the agreement. Determination of Covid-19 pandemic as non-natural national disaster is related with basic of *force majeure* which implies termination of the agreement, where the termination itself is based on the inability of one party to meet the performance. Determination Covid-19 pandemic as *force*

*majeure* needs to verify that the inability is due to the direct impact of Covid-19 pandemic or not. Therefore, Covid-19 pandemic can be concluded into an agreement as *force majeure* clause although it is not an absolute *force majeure*, but relative *force majeure*. Other than that, the parties can seek renegotiation about substances and clauses of the agreement that have been made to look for any possibility to change/addendum the agreement through updating the agreement so that the parties are still able to meet the performance as what has been mutually agreed in the context of applying the principles of balance and fairness in contract based on Article 1244, Article 1245, and mainly Article 1338 of Civil Code.

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