

Conference Paper

Force Majeure as a Justification for Failure to Fulfill Contractual Obligations Due to the Covid-19 Pandemic: Suspending or Terminating Contract?

Natasya Yunita Sugiastuti

Faculty of Law, Universitas Trisakti, Jakarta, West Jakarta, Indonesia

ORCID

Natasya Yunita Sugiastuti: <https://orcid.org/0000-0002-1528-6684>

Abstract.

As a result of the Covid-19 pandemic, large debtors experienced performance failures so that the President of the Republic of Indonesia designated Covid-19 as a non-natural disaster and a national disaster in Presidential Decree (Keppres) No.12/2020. The Civil Code has provided rules to anticipate failure to contractual obligations caused by circumstances beyond the parties' ability through measures of defense against non-performance on the grounds of *force majeure*. The problem lies in whether the parties impeded in carrying out contractual obligations can use Presidential Decree No.12/2020 as a cause for *force majeure*. This study examines whether Presidential Decree No. 12/2020 meets the criteria for *force majeure* as regulated in the Civil Code. This research is normative legal research examining the legal norms regarding *force majeure* regulated in Articles 1244 and 1245 of the Civil Code. The researcher deployed legislation as primary legal material and legal doctrine as secondary legal material. Data were obtained through literature studies incorporating electronic textbooks attained through the google scholar search engine. The data were analyzed qualitatively, and conclusions were drawn based on deductive reasoning. The results indicated that Presidential Decree No.12/2020 is a fact that does not require proving. However, the event of *force majeure* alone is an inadequate cause for non-performance; instead, causality between the *force majeure* and the failure to perform must be proved. Similarly, it also needs to be confirmed that the debtor acts in good faith. In concrete cases, judges have the authority to perform the primary function of good faith by either suspending the performance of contractual obligations or terminating contractual relations and determining the responsibility of bearing the risks caused by *force majeure*.

Keywords: *force majeure*, suspend, terminate the contract, Indonesia

Corresponding Author: Natasya Yunita Sugiastuti; email: natasya.yunitasugiastuti@trisakti.ac.id

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1. INTRODUCTION

Article 1388 (1) of the Indonesian Civil Code (hereinafter referred to as the Civil Code) suggests that validly made agreements apply as law to those who have made them. Based on such a legacy, a validly made agreement by fulfilling the four requirements under Article 1320 of the Civil Code is legally binding. In the Civil Code, the norm is formulated in the phrase "applies as a law to those who have made it" [1], which means that matters declared by persons in a legal relationship becomes law to them (*nexum faciet mancipiumque, uti lingua mancuoassit, ita jus esto*). A valid agreement having binding force just like the law is a critical universal principle in the law of obligations [2], known as *pacta sunt servanda* in natural law, meaning that a promise is binding and must be fulfilled [3]. According to Ridwan Khairani (cited in Jamil 2020), the principle of *pacta sunt servanda* constitutes the binding force of an agreement; that is to say, a promise becomes a legal obligation that must be complied with and implemented. Based on the compliance principle, the contract is performed in conformity with the parties' subject matters [4]. If one of the parties breaches or does not perform the mutually agreed agreement, the other party can file a request to the court to force the party breaching the agreement to continue effectuating the agreement they have agreed.

On the other hand, the law also grants a right to the party accused of default to conduct a defense. The debtor's defense is performed by submitting a statement that the cause of non-performance is, among other things, a compelling condition (*force majeure*) [5]. Thus, the non-fulfillment of the agreement can occur due to default and *force majeure*. Consequently, the non-fulfillment of the agreement ensues because of two factors: default and *force majeure*, resulting in the agreement not being operated as it is supposed to [6].

Legal experts have extensively explored the concept of *force majeure*. Subekti describes *force majeure* as a condition whereby the debtor demonstrates that entirely unforeseeable circumstances cause the non-performance of a promise, and they cannot do anything about such unforeseeable circumstances or events [5]. *Force majeure* is postulated in Article 1244 and Article 1245 of the Civil Code. Based on these two articles, *force majeure* is a condition whereby the parties do not implement their promises due to unforeseeable circumstances, and the debtor cannot do anything about the circumstances giving rise to such an unforeseeable event [7]. None of the two articles previously mentioned defines *force majeure* explicitly; however, they can identify the

elements of a situation, unpredictable events, considered as *force majeure* cannot be perceived as the debtor's liability because there is no bad faith on the debtor's part.

In business practices, the Covid-19 pandemic has also become a debate among business actors bound by business contracts. Debtors with contractual obligations have used the pandemic-related circumstances as a reason for relief from an obligation to fulfill their performance. The pandemic has benefitted some business actors by canceling their existing contracts [8]. When the government of Indonesia issued Presidential Decree No.12/2020 concerning the determination of the Covid-19 public health emergency, some parties stated that such a Presidential Decree could potentially legitimize the stance that the Covid-19 pandemic is a *force majeure*; hence, the parties can use it as an underlying reason for canceling an agreement or contract. However, others have disagreed with this statement.

This research explored whether the legal norms in Articles 1244-1245 of the Civil Code are still able to accommodate *force majeure*-related issues so that they continue to provide predictability and stability given *force majeure* issues in the post-Covid-Pandemic era. In the following section, the researcher discusses five issues that drove her to conduct her research.

First, the definition of *force majeure* is not static; it has developed from time to time. Scholars classify the events as the cause of *force majeure* from initially including only events classified strictly as disasters referred to as the act of God, subsequently developing to include events classified as a disaster caused by human actions (e.g., riot, rebellion, war), technical conditions beyond the parties' capacity, as well as government action both through laws and policies [7].

Second, the parties' contractual obligations in a business contract require regulations capable of providing predictability to the parties. Nyhat suggested, "The substantive function law plays by predicting which of man's actions will invoke the power of the state to the benefit of one side or another to the controversy" [9]. Accordingly, the researcher conducted this study to examine whether the *force majeure* provisions of Articles 1244 and 1245 of the Civil Code are capable of accommodating and providing guidance to contract users as to the act which must be undertaken by them if circumstances arise in which the parties fail to implement their contractual promises due to unforeseeable matters. Such predictability is critical because the contractual parties encounter unforeseeable circumstances which affect their ability to execute their contractual obligations. This situation confirms Burg (cited in Theberge 2020) and NyHart's statement that "The need for predictability is especially great in countries where most people are entering

for the first time into economic relationships beyond their traditional social environment” [9], [10].

Third, if circumstances affecting the performance of the parties’ contractual obligations ensue, a need for conditions under the law enabling stability is required. Burg (cited in Theberge 2020) and NyHart point out the function of stability as “the potential of law to balance and to accommodate competing interests” [9], [10].

Fourth, concerning the requirement of stability or balance and its connection with Article 1338 paragraph (1) of the Civil Code that denotes that a valid agreement applies as a law to the parties, the Civil Code also adheres to the principle of good faith as stipulated in Article 1338 paragraph (3). The principle of good faith is the principle incarcerated by the parties to perform the substance of the trust-based contract, belief, or goodwill of the parties [11]. Good faith is not limited to entering into legal relations but also the time of exercising the rights and performing obligations arising from such legal relations [12]. In implementing the principle of good faith, the judge has the power to supervise the implementation of the agreement to ensure that it is not contradictory to compliance or justice. In other words, the judge has the ability to deviate from the agreement contents when its black letter implementation contradicts good faith.

Fifth, numerous studies on the relationship between Covid-19 and reasons for releasing oneself from the obligation for performance (*force majeure*) have been conducted; however, these studies have been limited to *das sollen* norms. Previous studies have not examined *majeure* provisions in understanding *das sollen* at the normative level and *das sein* in concrete cases; thus, this is the gap that this study contributes. In this research, the researcher utilized Verdict No. 288/Pdt study.Sus-PHI/2020/ PN. Jkt. Pst. of March 8, 2021, in the case of Traveller Hotel Jakarta and Decree No.15/Pdt.G/2021/PN Mrt. of June 18, 2021, in the case of NEO Mitra Usaha to examine whether the Covid-19 pandemic can be used as a force majeure clause as a defense of non-performance.[13]

2. METHODOLOGY/ MATERIALS

Drawing on a normative legal approach, the researcher deployed normative methods that are doctrinal [14]. The study focused on the internal aspects of the positive law to resolve the problems existing within the positive law [14], or the law in the sense of *das sollen* as articulated in the law [15]. The legal norm refers to the norm on *force majeure* as stipulated in Articles 1244-1245 of the Civil Code. To understand such legal norms, the researcher performed a literature study [16]. The researcher deployed primary legal materials: the provisions of Article 1244-1245 of the Civil Code concerning *force majeure*;

Article 1339 of the Civil Code regarding matters that the parties always consider to refer to in an agreement; Article 1338 paragraphs (1), (2), (3) of the Civil Code concerning the binding force of an agreement and the principle of good faith in the implementation of the agreement as well as court decisions. The researcher also studied secondary legal materials on the contract law experts' opinions from diverse sources and various published articles in journal publications.

The sources of library research data comprise printed books and electronic materials available through search engines [17], such as Google Scholar and Google Books, and free access to internet sites, particularly those provided by the Supreme Court of the Republic of Indonesia. The researcher collected her data using a qualitative approach and an inductive reasoning method because it involves judges' thinking of a case; in other words, the researcher examines how judges apply the rule of law in deciding cases [18].

In this research, the inductive thinking process occurred through understanding the content of the court decisions studied, including legal facts and judges' considerations to arrive at their decisions. Based on a reasoning process, conclusions concerning the benchmarks used by the judges in determining whether the debtor is in the condition of *force majeure* and whether such *force majeure* condition has causality with the debtor's non-performance are drawn. The inductive reasoning process is spelled out simultaneously with the doctrines of the law of obligations, thus resulting in qualitative reflections on the application of *force majeure* legal norms of *das sollen* nature in concrete cases. This process ultimately provides an answer to the problems of whether the *force majeure* provisions of Article 1244-1245 of the Civil Code can be used as a defense against non-performance, whether the existing *force majeure* provisions accommodate the interests of contractual parties by providing legal certainty and at the same time justice as well as legal protection in the Post Covid-Pandemic era.

3. RESULTS AND DISCUSSIONS

To address the question of whether the parties used the Covid-19 pandemic as a *force majeure* clause as a defense against non-performance, the researcher embraced two cases:

1. Decree No. 288/Rev.Sus-PHI/2020/PN. Jkt. Pst., March 8, 2021, in the case of Epi Gunawan (Plaintiff 1), Heri Purwanto (Plaintiff 2), and Suhaidi (Plaintiff 3) against PT Bait Damai Abadi (Traveller Hotel Jakarta).

In this case (hereinafter referred to as Traveller Hotel Jakarta case), the plaintiffs and defendant had a legal relationship (industrial relations) whereby the plaintiffs were employees of the defendant who had worked for more than 24 (twenty-four) years. The employment termination by the defendant against the plaintiffs was declared as an act of efficiency. After the employment termination and during the bipartite negotiation process, the plaintiffs continued working and earning a daily income. During the bipartite negotiations, the defendant offered severance pay at 22% (twenty-two percent) of the defendant's total calculation. The plaintiffs rejected that offer and requested an extension to resume bipartite negotiations; however, the request was refused. Therefore, the plaintiffs submitted a letter of Application for Mediation Negotiations (tripartite) to the Municipal Manpower, Transmigration, and Energy Office of the Central Jakarta Administrative Municipality, Jakarta. The Mediation Negotiations (tripartite) did not produce an agreement, but the Manpower, Transmigration, and Energy Office of the Central Jakarta Administrative Municipality, Jakarta, issued a letter regarding recommendations. The Manpower, Transmigration, and Energy Office of the Central Jakarta Administrative Municipality, Jakarta, concluded that the termination of employment by the defendant against the plaintiffs was the termination of employment on the grounds of efficiency as stipulated in the provisions of Article 164 paragraph (3) of the Manpower Law. The plaintiffs accepted the letter of recommendation, whereas the defendant rejected it. Subsequently, the plaintiffs filed this lawsuit with the Industrial Relations Court at the Central Jakarta District Court.

The defendant declined the plaintiffs' claim and considered the recommendation letter irrelevant to the Covid-19 pandemic-related issues. The defendant had never anticipated the employment termination proposed by all employees, including the plaintiffs. It was unpredictable that the hotel and other businesses would close down and the uncertainty of their reopening due to the pandemic outbreak impacted the employment termination. If employment continued, the defendant would have been unable to pay salaries; even now, they cannot settle the arrears of bills (e.g., electricity, clean water, bank interest) because there is no revenue. Even when the reopening of businesses was allowed while maintaining health protocols, the defendant's financial condition remained stagnant because the number of guests dramatically decreased to a maximum of 10 people, and having no guests at all was not uncommon [19]. Yogahastama and Fajar maintained that "the absolute nature of *force majeure* condition is not solely based on a person's postponing or not implementing its performance, especially in agreements entered into business actors in the tourism sector. It affects the parties to the agreement; hence they cannot fulfill their obligations. Therefore, it

is not the fault of parties unable to fulfill their obligations, but it is due to the Covid-19 outbreak that such operations or activities are halted” [20].

In the Traveller Hotel Jakarta case, the plaintiffs’ petitions submitted to the panel of judges to declare the defendant’s actions against the plaintiffs by unilaterally terminating their employment, contrary to Law No.13/2003 concerning workforce, were therefore rejected [19]. Based on justice and propriety, the panel of judges declared that the termination of the employment relationship between the plaintiffs and the defendant transpired for urgent reasons (*force majeure*).

Even though the Traveller Hotel Jakarta case involved the plaintiffs and defendant who had an industrial legal relationship, in general, it remains within the scope of contract law because the legal relationship arises as a result of the parties’ agreed letter of employment. Under Article 1338 paragraph (1) of the Civil Code, such agreement has a binding force as a law on the parties entering it. Each party must keep its promise to carry out its obligations and respect the other party’s rights, *pacta sunt servanda*, and the promise is binding and must be fulfilled. However, it is essential to note that one of the agreement’s objectives is to balance one’s and others’ interests [21]. Badriyah (cited in Irayadi 2021) stated that “the purpose of the agreement is to achieve a balance of interests between the parties from the pre-contractual stage, the contractual stage, and to the stage of execution of the agreement” [22]. Badruzaman interprets the principle of balance as a principle that is worthy or just [23]. However, Hasibuan (cited in Sinaga 2019, 108) states that “a proper understanding of the meaning of justice in agreements is complicated and even abstract, especially when it is associated with various complex interests” [24]. Accordingly, in the process of arriving at Verdict No. 288/Pdt.Sus-PHI/2020/PN, the panel of judges, took into consideration all aspects related to the Traveller Hotel Jakarta case in support of the fulfillment of statutory requirements and considered the existence of compelling circumstances and the defendant’s good faith. Thus the function of the balance principle is optimally implemented because it balances the interests of the parties and provides an ideal law for the parties and justice [22].

In the Traveller Hotel Jakarta case, proof of the fulfillment of the requirements of Article 1244-1245 of the Civil Code is carried out by considering the provision of Law No. 13/2003 concerning workforce (hereinafter referred to as Manpower Law). Article 164 paragraphs (1) and (2) of the Manpower Law provide two causes for employers who intend to terminate employment if the company suffers losses when it conducts its operational activities under normal national or international political and economic conditions. Another reason is the termination of employment by entrepreneurs due to *force majeure* when such losses arise due to catastrophic factors [25]. There is no

explanation whatsoever as to the definition of *force majeure* in the Manpower Law; hence, the interpretation of *force majeure* largely depends on Industrial Relations Tribunal (PHI) judges [26]. For example, the panel of industrial judges in Verdict No. 14/Rev.Sus-PHI/2014/PN.Pal state that the Minister of Energy and Mineral Resources Regulation No.07/2012 concerning increasing the added value of minerals through mineral processing and refining activities *Jo*. Letter of the Minister of Trade No. 04/M-DAG/D/12/2013 stating that the company is unable to export as a *force majeure* situation makes it possible for such termination of employment of its employees [26]. Hasanah and Ramadhani stated that “if the Covid-19 Pandemic is related to Article 164 paragraph (1) of the Manpower Law regarding the reason for termination of employment due to *force majeure*, it can be said that Covid-19 can be classified as termination of employment on the grounds of *force majeure* because such event causes consequences beyond the ability of employers. The decrease in production volume leads to a decrease in the income earned by the company. Some entrepreneurs have difficulty managing their finances, including paying the entitlements of their workers provided for under the law” [25].

However, since the Verdict of PHI No.242/Pdt.Sus-PHI/2018/PN Mdn, *force majeure* alone is an inadequate cause for entrepreneurs to terminate employment per Article 164 paragraph (1) without the entrepreneur’s evidence of loss and failure to carry out its obligations as a result of such event. The phrase “in the absence of evidence” means that to conduct termination of employment on the grounds of *force majeure*, the parties require evidence to prove that such *force majeure* has caused the entrepreneur to suffer losses and to fail to carry out its obligations. In the Traveller Hotel Jakarta case, the fulfillment of this requirement is evident from at least two legal considerations of a judicial panel stated as follows [19]:

- (a) The defendant experienced financial distress due to Covid-19, whereby the government lockdown restrictions (herein known as *PSBB*) have impacted the hospitality sector. The hospitality sector has been unable to carry out normal operational activities, affecting the hotel’s decreasing revenues or nil income due to low occupancy daily and even as few as ten guests for several days. In such circumstances, the defendant was compelled to introduce efficiencies because of its incapacity to pay employees’ wages/salaries and hotel operational costs, electric power, clean water, and bank interests, whereby other hotels in Jakarta have experienced the same situation.

(b) Drawing on the territorial impact of Covid-19, in March 2020, the Governor of Jakarta decided to close schools until the end of March and then implemented a study from home policy. Restaurants, hotels, and malls, including the defendants' business activities, were equally closed down. Businesses and offices were encouraged to work from home. In Jakarta and outside Jakarta, PSBB has been enforced based on the Jakarta Governor Regulation No.33/2020 concerning the implementation of PSBB in response to the Covid-19 management in Jakarta.

Based on the primary concerns, the panel of industrial relations judges expressed a highly rational and legally reasonable view of the defendant's reasons of urgency and compulsion to terminate the employment of his employees with 24 years of service.

The panel of judges also held that the defendant managed to prove its good faith for decades of employment relationships with its employees, including the plaintiffs; thus, had there not been a pandemic, such termination for urgent reasons could undoubtedly have been avoided [19]. Furthermore, regarding workers' rights, Uwiyono (cited in Randi 2020) states that "if Termination of Employment is outranged due to the company's closure as a result of losses or *force majeure*, the provisions of Article 164 paragraph (1) of the Manpower Law concerning workers' rights apply". Similarly, Hasanah and Ramadhani (2021) state that "The condition of *force majeure* alone cannot be directly used as an excuse to terminate their workers. The provisions of Article 164 paragraph (1) still need to be fulfilled, stating that entrepreneurs can terminate employment if the company closes due to *force majeure*. Suppose the company still operates its activities normally and is not closed permanently, employers cannot immediately use *force majeure* as a cause to terminate employment of their workers" [25].

Therefore, in the Traveller Hotel Jakarta case, the industrial panel of judges upheld the recommendations of the Manpower, Transmigration and Energy Office of the Central Jakarta Administrative Municipality, Jakarta, namely compensation for rights based on Article 164 paragraph (3) of the Manpower Law, through which the plaintiffs accepted such recommendation [19]. Furthermore, Article 164 paragraph (1) of the Manpower Law requires that companies can terminate the employment of workers/laborers provided that the company closes due to the company's continuous losses. In connection with the phrase "continuous losses," such losses must be evidenced by the last two-year financial statement audited by a public accountant [27]. In the case of Traveller Hotel, the judicial panel discovered no evidence of audit results from a public accountant concerning the defendant's finances during the pandemic. The judicial panel confirmed this and held that "Defendant's statements were obvious, proving that defendant could foster a good

working relationship with the plaintiffs for decades and not for a short period. Therefore, the absence of financial statements is understandable in urgent conditions because it requires extra expenses. At the same time, a defendant is no longer able to pay salaries and pay for the operation of the hotel and is only able to pay employees, including the plaintiff's daily wages/salaries, and pay severance pay only 22% of the defendant's total calculations which has been received by almost all employees as a last resort in good faith to maintain an employment relationship with its employees including the plaintiffs" [19].

The principle of good faith the panel of judges borne represents a reflection of Article 1338 paragraph (3) of the Civil Code, which discloses that agreements must be accomplished in good faith. Subekti emphasizes that good faith is the most critical element of contract law [5]. In other words, good faith means embedding the norms of propriety and decency into one's work [24], worthiness, and justice [28]. Good faith is the uppermost foundation to executing an agreement appropriately. The actual acts of the agreement signed the parties' good faith, and this relationship can be measured objectively [29]. Good faith limits and negates, indicating that a particular agreement or a provision of the law regarding that contract can be set aside, providing a change of circumstances ensue upon the initial creation of the contract; hence, the performance of such contract gives rise to injustice. In such circumstances, contractual obligations can be limited, even waived entirely based on good faith [30], [31]. It is, therefore, appropriate for the judicial panel to make decisions based on fairness and propriety to declare the termination of the employment relationship between the plaintiffs and the defendant for an urgent reason (*force majeure*).

1. Decree No. 15/Rev.G/2021/PN Mrt, June 18, 2021. In the case of 17 Plaintiffs: Dwi Kurnia Agus Wibowo (Plaintiff 1), Sugiyono (Plaintiff 2), Yelly Hr (Plaintiff 3), Asniwarnis (Plaintiff 4), Solikin (Plaintiff 5), Joni Samosir (Plaintiff 6), Surprise Kowesti (Plaintiff 7), Upomo Budiarmo (Plaintiff 8), Nana Suwarna (Plaintiff 9), Jamaluddin (Plaintiff 10), Rismanto (Plaintiff 11), Muhammad Agus Setiawan (Plaintiff 12), Rohaeti (Plaintiff 13), Marsono (Plaintiff 14), Dasman (Plaintiff 15), Joko Imam Supi'l (Plaintiff 16), and Erfansyah (Plaintiff 17) against the Neo Mitra Usaha Cooperative Management which was decided by the Tebo District Court in Decree No. 15/Pdt.G/2021/PN Mrt. June 18, 2021.

In this case (hereinafter referred to as the NEO Mitra Usaha case), all the seventeen plaintiffs were members of the NEO Mitra Usaha cooperative. These members provided Neo Mitra Usaha Cooperative with investment capital documented in a Participation

Capital Agreement Letter. For the share capital submitted by the plaintiffs, the defendant paid profit sharing to the plaintiffs following the agreed day of the month depicted in the aforementioned letter signed by both parties. The defendant was supposed to transfer the profit sharing electronically through the e-wallet/digital money application on the Neo Mitra Usaha application. The plaintiffs were advised to disburse money into their respective accounts through the e-wallet application. However, the plaintiffs stated that none of them had received a revenue share because they could not disburse their e-wallets. Due to the defendant's failure to perform his obligations, the plaintiffs filed a suit with the Muara Tebo District Court, alleging the share capital return to all the plaintiffs. The defendant rejected the plaintiff's arguments because the Covid-19 pandemic had impacted the world's economic downturn, including Indonesia, from March 2020 to the time they filed a lawsuit. Countries around the world have declared a state of emergency, and the government of Indonesia established a Presidential Decree No.12/2020 concerning the determination of national disaster. This decree prevented the defendant from compassing its obligations due to an increasingly difficult economic situation, the absence of sales, and profits sharing due to non-natural disasters or *force majeure*.

Regarding the type of business unit as per the plaintiffs' preference, the plaintiffs' profit sharing was working soundly before the Covid-19 non-natural disaster. However, during the Covid-19 pandemic, the Neo Mitra Usaha Cooperative unit partners suffered losses or did not obtain profits, hindering the sharing of profits. Such constraints stem from a darkening economic outlook, the absence of sales and profits distribution due to the non-natural disaster/*force majeure* beyond humans' will and ability [32]. Proof of the fulfillment of the requirements of Article 1244-1245 of the Civil Code in the case of NEO Mitra Usaha is based on the considerations of the judicial panel as follows [32]:

1. Presidential decree No.122020 indicated that the Indonesian government has officially declared that the Covid-19 virus affecting the world is a national disaster (*force majeure*).
2. The national outbreak or pandemic of Covid-19 has indisputably devastated all pillars of Indonesia's national economy and resulted in millions of unemployed citizens. This situation has shrunk the Indonesians' purchasing power, including the paralysis of the economic pillars of all cooperatives in Indonesia.

Then, this study also reveals a finding that is different from the finding of previous studies ([30], [31], and [28]). This means that debate on the comparison between the effect of homogeneous and heterogeneous groups on students writing quality has not

come to an end. In other words, there will be chances for the next researchers to verify the different findings.

Based on the panel's consideration, "As it has become common knowledge and the proof is no longer essential, the national origin of the spread or pandemic of Covid-19 ...", it can be concluded that the judicial panel is of the view that the Covid-19 spread is a known fact. Harahap (cited in Azikin 2015) states that "civil procedural law recognizes a doctrine of the law of proof known as the known fact (*notoire feiten*). According to such doctrine, facts known to the public need not be proved. A fact known to the public is that an educated person or society needs to know events, incidents, or circumstances without conducting scientific research or discussion. Such incident or circumstance is an actual one so that it can be used as a legal basis for justifying a serious civic act in the form of a judge's ruling" [33]. In her review of Sufiarina's research, Wahyuni states that "the Covid-19 Pandemic and the impact of lockdown restrictions (PSBB) is included in the condition of *notoir feiten* [known fact], which is known to everyone. Likewise, the implementation of the PSBB policy based on Government Regulation No.21/2020 concerning the lockdown restrictions in the context of accelerating the handling of Corona Virus Disease 2019 (Covid-19) applies the fictional theory that everyone knows about it" [34].

However, the existence of *notoir feiten* [known fact] as a result of the *PSBB* does not apply automatically to all debtors but only to particular debtors who experience personal problems and must prove such obstacles to be released from the state of default [34]. Likewise, Mahfud MD (cited in Dewangker 2020) states that "*force majeure* cannot be automatically used as a reason for cancellation of the contract but can definitely be used as an entry point to negotiate cancellation or amendment of the contract contents" [35]. In this case, the NEO Mitra Usaha Cooperative can also prove that bad faith is not the reason for non-performance. This argument supported the judging panel when stating "that there is a fact that the record of per-user wallet transactions is available, supported by evidence of revenue sharing transfers. This fact is correct from the day the share capital agreement was made until about April 2020. The profit sharing was running uninterruptedly at the beginning of the covid-19 pandemic, and only after that no record of the profit sharing data was recognized [32].

The compelling circumstances are closely related to the risks, which are the liability of the parties entering and implementing the contract. In the reciprocal agreement, the legal settlement process of *force majeure* and its related risks share the burden of liability on a proportionate basis between the parties [36]. In the field of cooperatives, in particular, Susamto states that "in the cooperative business, the cooperative

equity capital, functioning as an investment, is obtained from individual membership to strengthen cooperative business activities. Because it is an investment, the share capital implies that members have to participate in risk-bearing if the cooperative suffers a loss” [37]. This statement concurs with Selajar, Bachari, and Nabila, who refer to Article 7 paragraph (1) of Government Regulation No.33/1998 concerning share capital in cooperatives suggesting that the capital shareholders bear risks for their participation in the business[38]. According to Isnaeni, in the context of a reciprocal agreement, a judge will make a judicial decision aligning with their guiding values (i.e., wise and appropriateness) providing there is a court-based factual dispute concerning the ensuing risks due to *force majeure* [39].

In the case of NEO Mitra Usaha, the judicial panel considered that the losses incurred by the joint business carried out by the defendant due to the national disaster (*force majeure*), i.e., the global Covid-19 pandemic, is the joint responsibility (risk) of the cooperative management (defendant) and all members of the cooperative including the share capital holders (the plaintiffs). This consideration is based on the legislation rules relating to cooperative business activities. The legislation rules stipulate that share capital is recognized as a supporting cooperative capital with risks; therefore, capital holders also bear the risk of business losses at the agreed shared value. This consideration aligns with Article 1339 of the Civil Code, stating that an agreement binds all matters required by propriety, custom, or statute. The laws which serve as a basis for the judicial panel’s considerations in the Neo Mitra Usaha case are presented below [32]:

1. Article 7 paragraph (1) of Government Regulation No.33/1998 concerning share capital in cooperatives;
2. Article 131 paragraphs (1), (2) and (4) and Article 136 paragraph (1) of Regulation of the Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia No.09/2018 concerning the administration and development of cooperatives;
3. Article 14 paragraph (1) sub-paragraph of Regulation of the Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia No. 11/Per/M.KUKM/IX/2015 regarding guidelines for implementing capital supporting share capital in cooperatives;
4. The Neo Mitra Usaha Cooperative’s financial management and stability system policy, as specified in Chapter IV about share capital withdrawal and Article (2), suggests that “for Neo Mitra Usaha Cooperative members participating in the share

capital program and whose term of the contract has expired, automatic contract extension shall be made for 12 months (1 year)".

Based on the laws and regulations mentioned earlier, the 'disbursement' functioning as shared cooperative profits is no longer a defendant's immediate obligation to the plaintiff during the national disaster or the spread of the Covid-19 virus *force majeure*. Referring to the above statement, the judicial panel interpreted *force majeure* as something that delays performance rather than eliminates or terminates the agreement. Thus the *force majeure* condition in question is only relative, and the agreement cannot be canceled or considered void. Instead, the debtor can only be given leeway to delay fulfilling their obligations. The function of *force majeure* is relative, by which the debtor can fulfill his obligations at another time [40]. The above case analysis indicates that the parties' heart of the dispute is that the defendant has not proven to have defaulted under the agreement with the plaintiffs. Accordingly, the petitum of the suit demands to "stipulate that the defendant committed the act of default by not performing their obligations as postulated in the agreement" because nothing has proved that the defendant has defaulted in the agreement entered into with the plaintiffs; hence this petitum must be rejected [32].

4. CONCLUSION AND RECOMMENDATION

The study of Tebo District Court Decision No.15/Pdt.G/2021/PN Mrt and Industrial Relations Court Decision No.288/Rev.Sus-PHI/2020/PN.Jkt.Pst showed that the Covid-19 pandemic could be used as an excuse for *force majeure* as an attempt to ward off non-achievements. However, it is essential to say that the Covid-19 pandemic (*force majeure*) alone is inadequate to claim that the party experiencing *force majeure* led to their failure to perform as they agreed upon without evidence to suggest that they have suffered losses and no indication of bad faith. Likewise, it is critical to state that to prove causality between the Covid-19 pandemic (*force majeure*) and failure to perform, only the judge can make a wise and appropriate decision through the case before them. The results of this study also indicated that as a result of *force majeure*, the contract implementation could be suspended or canceled. In this case, judges are the ones who make wise and appropriate decisions based on facts and rules, thus fulfilling the stability aspects of contractual relationships between the parties. These findings imply that all the parties to a contract should include a *force majeure* clause and firmly state the possibility of contract renegotiation in the event of *force majeure*. This aims to anticipate specific circumstances or events affecting the contract implementation.

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