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SUPERVENING EVENTS IN INDONESIAN COMMERCIAL CONTRACTS AND NOTES ON THE UNIDROIT PICC IN RELATION TO COVID-19 HEALTH CRISIS

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Abstract

The COVID-19 pandemic has been affecting many aspects of our daily lives, including law and economics. In regard to this, the issue of international commercial contracts is significantly affected as well. It is well-settled that the pandemic could be classified as a supervening event. This could be the basis for a party for not being able to perform a contractual obligation, or to postpone the performance of such contractual obligations. However, different approaches of each national law of a State as well as what has been regulated might lead to multiple interpretations relating to whether COVID-19 should be classified as force majeure or hardship. As a UNIDROIT member state, it is important to examine Indonesia's perspective towards this issue. Notably, during the recent situation in which an increasing number of international commercial contracts involving Indonesian parties. This article examines supervening events on international commercial contracts, especially from the perspective of Indonesian law.

Keywords: *international commercial contracts, COVID-19, force majeure, hardship, supervening event.*

I. INTRODUCTION

The COVID-19 pandemic has dramatically changed the socio-economic realities. This global economic crisis has resulted from the enforcement of physical distancing, limitation of economic activities and transactions, travel restrictions, as well as national emergency declarations, which have been enacted by most countries. As a consequence, it not only affects the health situation of population, but also the other fundamental aspects such as the economic sector. On a global scale, COVID-19 has caused an economic recession which weakened supply chains and international trades. This leads to disadvantages to long term sustainable development. A health crisis which limits physical activities also affects business and industries.

Business entities have also endured the consequences of government policies during the pandemic. Such policies lead to legal consequences which affect business as well. This is closely related to the decrease in business

confidence. In the matter of international trade, it is well-known that a state could not independently fulfill its own domestic necessity. Consequently, several interactions and transactions with other states are commonly required in order to ensure legal certainty. Thus, it is generally accepted that, in entering into such transactions, parties are agreed to enter into a written and binding agreement (specifically, an international commercial contract which involving parties who are originated from different states).

Execution of a contract is based on the assent of the parties who are willing to mutually perform the contractual obligations have been agreed. Regarding this matter, parties have the freedom to draft the contractual clauses based on the principle of the freedom of contract. Such principles have been universally recognised and adhered in the provision of Article 1338 of Indonesian Civil Code (*KUHPerdata*) as well as the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contract.

Art. 1.1. of the UNIDROIT Principles of International Commercial Contract governs that "the parties are free to enter into a contract and to determine its content."[1] Based on this provision, it could be stated that the principle of the freedom of contract is internationally accepted since such freedom is given to any business. Such freedom includes the determination of with whom they would like to enter into a contract, as well as provisions that are going to be agreed on the contract between parties.

The principle of the freedom of contract is a basic norm (*grundnorm*) of the entire UNIDROIT principles.[2] A binding contract can only be amended in cases where parties agree to do so. This condition becomes the limitation of the principle of the freedom of the contract. Moreover, several limitations to this principle have to be based on social norms and (domestic) interests.

Under to Indonesian law, the principle of the freedom of contract is stipulated under the provision of Article 1338 of Indonesian Civil Code (*KUHPerdata*). This provision specifically dictates that every valid agreement shall be applied as a law to those who are entering into such agreement and must be properly enforced. Prof. Subekti interprets that the phrase "every" in the provision as emphasising that the parties are allowed to enter into any

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[1] UNIDROIT, Principles of International Commercial Contracts 2016, Chapter 1 General Provisions, Article 1.1.

[2] UPICC 2016 in the comment Article 1.1 (General Provision) which explains *"the principle of freedom of contract is of paramount importance in the context of international trade. The right of businesspeople to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order."* See also Stefan Vogenauer and Jan Kleinheisterkamp (Eds), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), (Oxford: Oxford University Press, 2009), pp. 118-119.

agreements, in any form including its substance. In other words, parties are allowed to make their "own regulations."[3] Additionally, the parties are also allowed to set aside the provisions as governed in Indonesian Civil Code as long as it does not contradict Indonesian public order and mandatory regulation.[4] This shows that Book III of the Indonesian Civil Code adheres to an open system (*openbaar system*). This is the direct embrace of the freedom of contract principle.[5] In addition, according to Article 1338 par. (1) and (2) Indonesian Civil Code, the agreement would be a binding agreement on the parties and plays a role as a law to the parties (*pacta sunt servanda*).

In relation to the contractual obligations that have to be performed, there can be legal consequences arising from a binding agreement between the parties. As previously stated, the pandemic has caused a domino effect in international trade. The majority of countries in the world have arranged several policies in order to reduce the expansion of the virus. Such government policies are commonly found to be a difficult situation for parties in a contract in performing their contractual obligations. This is due to contrary to public interests which commonly causing the postponement or the annulment of the contract. It also leads to a common situation of the breach of contract, thereby causing legal uncertainty among the parties.

As for legal terminology, a breach of contract is defined as breaking a promise or negligence in fulfilling obligations on the basis of the agreement in a contract. The non-breaching party could grant a lawsuit to the debtor in case of breach to enforce his/her contractual obligations. In the midst of the recent global crisis, namely COVID-19, there might be forbearance, annulment, or termination. Therefore, it would be important to examine and understand whether COVID-19 could be the basis to postpone, annul or terminate an international commercial contract. The understanding towards the concept of supervening events in an international commercial contract would play an important role. So that, it could give legal certainty to the non-breaching party; whether *force majeure* or hardship may be the "solution" to the international commercial contract problems.

The concept of *force majeure* and hardship are a justification to excuse breach of a contract andpostpone or annul the performance of a contract. These two concepts principally had slight differences. Hardship is a typical common law concept while *force majeure* is a typical from civil law system. Indonesia

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[3] Subekti, *Hukum Perjanjian* (Jakarta: Internusa), 2004, p. 14.

[4] Mandatory rules mean the prohibitions that must be applied by the judges and cannot be waived even though the relevant parties have agreed to do so. See Sugardo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, (Jakarta: Binacipta, 1987), p. 170.

[5] *Ibid.*

adopts the latter. It should be noted that force majeure is not the same as hardship. As previously stated, the classification towards this situation plays an important role in order to achieve legal certainty since it might cause different legal consequences.

This article examines and discusses the matter of whether the COVID-19 pandemic shall be classified to force majeure or hardship. This would be based on the perspective of Indonesian law and its decision district courts. By conducting the normative juridical method, the discussion of this research would be divided into three parts: (1) Factors that may postpone or annul the performance of an international commercial contract; (2) The concept of supervening event changing the performance of international commercial contract; and (3) The perspective of Indonesian courts towards COVID-19 and supervening events on international commercial contracts. Whereby the second part of the discussion would also be in line with the discussion of the UNIDROIT notes regarding COVID-19 relating to the recent international commercial contracts and the third part includes as to whether Indonesian law needs to adopt the legal concept the hardship.

II. DISCUSSION

II.A. Factors that May Forbear or Annul the Performance of an International Commercial Contract

Fundamentally, a contract that has been created by assenting parties conceive a binding agreement that engages rights and obligations. This is explicitly stated in Article 1313 of the Indonesian Civil Code states that an *"agreement is an act by which one or more persons bind themselves to one or more other persons."*[6] Based on this provision, it can be seen if the agreement is a legal relationship between two or more parties based on an agreement to cause legal consequences. The mutually bound parties are obligated to fulfill performance and the other party is entitled to the said performance. According to Indonesian law, the forbearance on or cancellation of an agreement is heavily related to the valid requirement of an argument which is referred to in Article 1320 of the Civil Code as follows.[7]

i) There must be consent by the parties

The bound parties should agree to the main contentions that are being discussed for the agreement. This requirement includes the principle of

[6] *Kitab Undang-Undang Hukum Perdata* [*Burgerlijk Wetboek*]. Diterjemahkan oleh Subekti dan R. Tjitrosudibio. (Jakarta: Pradnya Paramita), 2008.

[7] *Ibid.*

consensus which states that agreements are generally not held formally, and only the agreement of both parties suffices. An agreement is a meeting of the minds of both parties. Thus, the parties aim for something mutual reciprocally without any coercion *(dwang),* fallacies *(dwaling),* and deception *(bedrog)* to avoid the agreement being imperfect.

ii) The parties must have the legal capacity to enter into an agreement
This requirement accentuates that a party that is bound to an agreement must have the capacity (physical and mental) to perform the obligations in accordance with what has been agreed upon. Fundamentally, every person who has reached adulthood and has a sound mind is classified as capable according to the law. However, the definition of capable must be scrutinized further, in accordance with the Civil Code in Article 1330. From the perspective of law and order, the parties must have full rights upon their assets because the parties compromise their wealth in the forming of an agreement.

iii) A specific object
An agreement must be about certain matters that are agreed upon, including the rights and obligation of both parties if a dispute arises. The goods that become the object of an agreement must be certain, at least the type must be determined, whereas the amount does not have to be determined as long as it can be calculated (Article 1333 of the Civil Code) which can be in a form of an object that exists in the present day and will exist in the future. If it is in the form of a service, it can be further specified to minimise misinterpretations among parties.

iv) There must be an admissible cause
What is meant by the cause of the agreement is the content of the agreement itself which describes the objectives to be achieved by the parties. The contents of the agreement must not conflict with the law, morality, or public order.

These conditions are divided into subjective and objective conditions. Subjective conditions include points (1) and (2) because it discusses individuals as the subject who form an agreement, whereas objective conditions include points (3) and (4) because they regulate the object of the legal action itself. This condition is then divided into subjective conditions and objective conditions. Subjective conditions consist of the point (1) and (2), concerning the individual who are involved to the agreement, while objective conditions consist of the point (3) and (4) concerning the object and the legal cause of the agreement.

In the case of subjective conditions are not satisfied; the cancellation of the agreement may be requested by one of the parties. However, any failure to meet the objective conditions results annulation that makes the relevant agreement

is null and void. This will obviously create different legal consequences. Relating to subjective conditions, the agreement shall be considered to remain exist until any party request annulation of the agreement. As for the objective conditions, if an agreement is null and void, the agreement is considered to have never existed.

The COVID-19 pandemic has caused a non-ideal situation to carry out or to continue an agreement. Any adjustment or any discussion are required if the parties are willing to continue the agreement. In this situation, the law is requested to provide a basis for the parties to review the contents of the contract and make any adjustments to the contract clauses, to see if there are any clauses to be renegotiated, amended, or canceled.[8] There are several concepts that are relevant to the conditions to performance of a contract. These concepts are act of God, *force majeure*, and hardship. These conditions cause a change that is fundamental and was not considered previously. These conditions also known as *rebus sic stantibus*. As a result, there are parties that are greatly disadvantaged when implementing an agreement is forced to continue.[9] Subsequent to the discussion of the annulment of a contract is the discussion of supervening events which are force majeure and hardship. As international transactions are commonly subject to diverse political and economic influences, an element of uncertainty involved in case of a change of circumstances changes at the time when performance has to take place. For example, a contractual object may be impossible or impracticable to be punctually delivered due to COVID-19 pandemic. Or there may be a delay in the contract object shipment. This circumstance may occur without the intention or fault of one of the parties. Such situation may unexpectedly result from government policy during the pandemic as well.

Relating to such circumstances, several questions arise as to whether the parties of the contract would be relieved from his/her contractual obligations, or what would happen to the entire contract. The predicted ouctcome in these circumstance is that whether the contract shall remain to be performed as it is, or there would be possibility for the contract to be modified or discharged by the parties. In regard to this matter, we have to note the principle of *pacta sunt servanda* which is the main principle when entering into a contract.

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[8] Taryana Soenandar. *Prinsip-Prinsip Unidroit, Sebagai sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional.* (Jakarta:Sinar Grafika), 2006, p. 18.

[9] Faisal Akbaruddin Taqwa. *Rebus Sic Stantibus dalam Khasanah Hukum Kontrak*, Law Society (ILS) Utrecht School of Law, Universiteit Utrecht, p. 2. The doctrine requirements indicate that the doctrine is to give effect to the parties' common intentions and shared expectations, which are being pursued with the conclusion of the treaty. See Kulaga, J. (2020). A renaissance of the doctrine of rebus sic stantibus? *International and Comparative Law Quarterly, 69*(2), pp. 477-497.

There are several approaches towards the concept and theory of supervening events in international commercial contract law. The understanding towards such a concept would help parties in drafting the international commercial contracts, especially in determining and predicting the possible legal consequences that might arise from the contract. Prior to further discussion of *force majeure* and hardship, it is important to begin with several terminologies used to refer to the supervening events. There are two possible situations which can affect the performance of a contract; (1) force majeure and (2) hardship.

Another important point to understand is the difference between these two concepts is due to the fact that the distinction between force majeure and hardship is not always clear-cut. When a country has determined a circumstance as a force majeure, it can be classified as hardship from the perspective of another country. Thus, the classification towards the circumstance under this issue plays an important role in determining which situation, legal system and regulation can interfere with the international commercial contract agreed by the parties. It would also be important to note the legal sources governing supervening events besides the international commercial contract itself. Whereby the civil codes, statutes, convention as well as regulations and/or principles regarding international commercial contract. Finally, the main discussion of this research paper would also refer to several provisions such as UPICC (UNIDROIT Principles), the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG 1980), Principles of European Contract Law (PECL), and Indonesian law.

The first way of supervening event which can affect the performance of a contract is force majeure. It may result in the situation in which the performance of the contract becomes impossible to one of the parties of an international commercial contract. Civil Law countries commonly refer to the term 'force majeure'.[10] Whilst Common Law countries commonly covers this

[10] The law of England and other common law jurisdictions does not provide definition of *force majeure*. Unlike the position in other jurisdictions, it is not a term of art with a legislative definition. Instead, the concept is incorporated into contracts by the parties based on their own free will and is therefore subject to the principles of contractual interpretation. These principles include the rule known as the *contra proferentem* rule; namely, the rule that a clause excluding the liability of a party to the contract should be interpreted narrowly. See Andrew Godwin, "The Contractual Impact of COVID-19 – Common Law and Chinese Law", https://law.unimelb.edu.au/centres/alc/engagement/asian-legal-conversations-covid-19/alc-original-articles/the-contractual-impact-of-covid-19-common-law-and-chinese-law. German law refers to the term 'impossibility of performance' or *Unmöglichkeit*.

concept with the general doctrine of frustration of contract.[11] This doctrine concerns the effect of supervening situations on contractual obligations.[12]

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG 1980)[13] governs the matter of force majeure on Article 79.[14] Not only governed by the CISG 1980, but it is also governed by the other regulations. Such as the Principles of European Contract Law (PECL)[15] and the UNIDROIT Principles of International Commercial Contracts.[16] The former governs the matter of force majeure through the provision of Article 8.108 which refers to the term of "impediment".[17] Whilst the latter governs the same through the provision of Article 7.1.7 which adhere to the French

[11] In the common law jurisdictions, there is no single definition of force majeure. the application of the doctrine is decided on a case-by-case basis. When the contract is governed by a common law system, the courts will generally start from the presumption that parties are free to agree on all matters, which includes the freedom to agree to widen or narrow relief in force majeure situations. Generally, force majeure provisions are interpreted by focusing on the actual language used, with the result that each case rests on its own contractual language and set of facts. *See* Cornelius Grossman, "Covid-19: four key considerations for legal positions on force majeure" https://www.ey.com/en_id/covid-19/covid-19-four-key-considerations-for-legal-positions-on-force-majeure See also Andrew Stewart and J.W. Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal", *The Cambridge Law Journal*, Vol. 51 No. 1 (March 1992), pp. 66-112.

[12] Marta Cenini, Barbara Luppi and Francesco Parisi, "The Comparative Law and Economics of Frustration in Contracts", *Minnesota Legal Studies Research Paper*, No. 09-20 (2009), pp. 1-22.

[13] The CISG 1980 is aiming to provide a modern, uniform and fair regime for contracts for the international sale of goods. For further explanation regarding this convention, see https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg. As for the text of the Convention can be found at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf.

[14] "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.", Art. 79 (1) of CISG 1980.

[15] The main aim of PECL is to serve as a basis for a European Code of Contracts. See Ole Lando, "Principles of European Contract Law: An Alternative or a Precursor of European Legislation", *The Rabel Journal of Comparative and International Private Law*, Vol. 56 (1992), pp. 261-273.

[16] The UNIDROIT Principles of International Commercial Contracts (UPICC) constitute a non-binding codification or "restatement" of the general part of international commercial contract law. The text of the UPICC 2016 can be found at https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf.

[17] "A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.", Art. 8:108 (1) of PECL. For the text of the PECL, see https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf or lexmercatoria.org.

law concept of "force majeure".[18] It is commonly believed that the use of the term "force majeure" is widely known in the realm of international trade practice, whereby commonly referred to as the "force majeure" clause in an international commercial contract.

In regard to force majeure, it is generally accepted by national legal systems that once such circumstance happens and consequently the contractual performance become impossible, the non-performance of the international commercial contract shall be principally excused. However, each approach of various national legal systems is different. As an example, according to the French law, the situation of force majeure is strict.[19] This should be seen as an irresistible and unforeseeable circumstance at the time when the contract was made.[20] Such a situation lies outside the control of the debtor. The legal consequence of force majeure under the French law is that the debtor does not have to perform his obligation as well as to pay damages.

Different from the French law, which is Civil law country, according to the English law, a party of an international commercial contract may be relieved from his/her liability as long as the circumstance particularly falls under the situation in which after the conclusion of the contract, the contractual performance becomes illegal.[21] Such illegality of the contractual performance is due to the change of law which may prohibits the performance of the contract. It can be seen that it is contrary to the impossible situation which would not always lead to the relief of the contractual performance. Thus, it is generally known that the English law refers this situation as an aspect of frustration.[22]

In contrast to the strict provisions as stipulated under the French and the English Law, the German law is tended to stretch the impossibility of

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[18] "Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.", Art. 7.1.7 (1) of the UPICC 2016. It is governed under the provision of Art. 7.1.7 (*Force Majeure*).

[19] "The debtor is liable, where appropriate, to pay damages, either because he has not performed an obligation or because he was late in performing, in all cases in which he cannot prove that the non-performance resulted from a *cause étrangère* for which he was not responsible and that there was no bad faith on his part.", Art. 1147 of French Code Civil.

[20] "There will be no damages when, as the result of *force majeure* or *cas fortuity*, the debtor has been prevented from delivering or doing that which he was obliged to deliver or do, or has done that which was forbidden.", Art. 1148 of French Code Civil.

[21] Hossein Fazilatfar, "The Impact of Supervening Illegality on International Contracts in a Comparative Context", *The Comparative and International Law Journal of Southern Africa*, Vol. 45 No. 2 (July 2012), pp. 158-188.

[22] Barry Nicholas, "Force Majeure and Frustration", *The American Journal of Comparative Law*, Vol. 27 No. 2/3 (1979), pp. 231-245.

contractual performance to the circumstance of economic impossibility or economic sense.[23] Further, it can be stated that the German law has a broader concept of contractual impossibility than the French and the English law. This is as stipulated in §275 of the German Civil Code which governs that there are several assessments and situations regarding the contractual impossibility. Whereby the impossibility of performance, the practical impossibility and economic impossibility as well as the moral impossibility.

Finally, it would also be relevant to briefly discuss on how the Dutch law governs the matter of force majeure. It is stipulated under the provision of Article 6:74[24] and Article 6:75[25] of the Dutch Civil Code. On the basis of these two provisions, it can be stated that the Dutch law approach towards force majeure is closer to what has been stipulated by the French law. Whereby the Dutch law requires the circumstance to be unforeseeable to be classified as a force majeure situation. In this regard, for instance, the non-performance of the contractual obligations, related parties would be relieved from his/her obligation to the contractual performance. In addition, such parties would also not oblige to pay damages due to the non-performance. The legal consequence towards this situation, under the Dutch law, is that the parties may terminate the contract they have agreed on.

Finally, as a complement to the discussion of force majeure events, we would like to briefly discuss how international regulations (instruments) stipulate force majeure events. As previously stated, the matter of force majeure is also governed by several international instruments such as the CISG 1980, the UNIDROIT Principles and the PECL. The latter has been enforced as the regional regulation within European countries. It can be stated that the provision of Article 79 of the CISG 1980 shares the same point of view as both of Article 7.1.7 of UNIDROIT Principles and Article 8:101 of PECL.

To begin with the discussion of these three provisions, a brief comparison towards these provisions would be conducted. These three provisions principally stipulate the conditions and the effects of force majeure. There are four circumstances that have to be satisfied for a situation to be determined as a force majeure event. Whereby, (1) the circumstance has to be occurred following the conclusion of the contract; (2) the obstacle causing the non-performance of the contract shall outside the control of the debtor; (3) the impediment must be unforeseeable at the time the contract was made; and (4)

[23] See the case of *Reichsgericht in Entscheidungen in Zivilsachen*; E.J. Cohn, "Frustration of Contract in German Law", *Journal of Comparative Legislation in International Law*, Vol. 28 No. 3/4 (1946), pp. 15-25.

[24] *"(1) Every failure in the performance of an obligation obliges the debtor to repair the damage which the creditor suffers therefrom, unless the failure cannot be imputed to the debtor."*, Article 6:74 of the Dutch Civil Code.

[25] *"A failure in the performance cannot be imputed to the debtor if it does not result from his fault, and if he cannot be held accountable for it by law, juridical act or common opinion either."*, Article 6:75 of the Dutch Civil Code.

the obstacle causing the non-performance of the contract shall be irresistible. The latter shall be meant as the contractual parties could not have avoided or overcome the situation.

Even though these three provisions stipulate the similar matter regarding the conditions that have to be satisfied in order to determine a force majeure event, it appears that each of these provisions differently governs the effects of force majeure. This besides that the entire provisions particularly stipulate the right to terminate the contract as a right might be exercised by the creditor. The main difference among these three provisions is regarding the approach for an international commercial contract to be terminated. The CISG 1980 requires a notification by the creditor to the debtor. Whilst the PECL stipulates that the contract would be automatically terminated if the debtor's non-performance is excused due to the force majeure circumstance.

The following brief perspective is regarding the Indonesian Law towards *force majeure*. There are two Indonesian provisions governing *force majeure*, namely Art. 1244[26] and Art. 1245[27] of Indonesian Civil Code. The former refers to the phrase of *hal yang tak terduga* or unforeseen event. Whilst the later refers to the phrase of *keadaan memaksa*. These two legal terms can be interpreted as *force majeure*. In this regard, the legal term of *hal yang tak terduga* can also be interpreted as a legal term which is derived from the principle of *Rebus Sic Stantibus* or hardship.[28] Relating to the legal term, which is derived from the principle of hardship, it is noted that Indonesia, which is a civil law system country, does not recognise hardship. In consequence, such principle or concept of hardship shall be interpreted as legal doctrine within Indonesian jurisdiction.[29]

Beside the perspective of Indonesian Civil Code, it is also important to see further on how the Indonesian court interpreting several situations into *force majeure*. There are several jurisdictions or precedents which stating that Indonesian courts adhere the concept of *force majeure*. First, it can be concluded from Decision No. 3087/K/Pdt/2001 which classifying that monetary crisis is

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[26] Art. 1244 Indonesian Civil Code, "*Debitur harus dihukum untuk mengganti biaya, kerugian dan bunga bila ia tak dapat membuktikan bahwa tidak dilaksanakannya perikatan itu atau tidak tepatnya waktu dalam melaksanakan perikatan itu disebabkan oleh sesuatu hal yang tak terduga, yang tak dapat dipertanggungkan kepadanya, walaupun tidak ada itikad buruk kepadanya.*"

[27] Art. 1245 Indonesian Civil Code, "*Tidak ada penggantian biaya, kerugian dan bunga, bila karena keadaan memaksa atau karena hal yang terjadi secara kebetulan, debitur terhalang untuk memberikan atau berbuat sesuatu yang diwajibkan, atau melakukan suatu perbuatan yang terlarang baginya.*"

[28] Achmad Budi Cahyono, Private Law lecturer in Faculty of Law, Universitas Indonesia.

[29] *Ibid.*

an unforeseen event; *force majeure*.[30] Principally, this situation shall terminate the contract between parties. However, the legal consideration given by the courts decided that re-negotiation was possible to be performed by the parties of the contract. This is on the basis of principle of *pacta sunt servanda*, thus, the good faith of parties shall be considered.[31]

Based on the above-mentioned case occurred in Indonesia,[32] it can be inferred that there is a development of *force majeure* concept in Indonesian perspective. The two characteristics of such concept potentially lead to different legal consequence in which the consequence of relative *force majeure* is almost similar to the legal consequence of hardship: the re-negotiation of the contract. In addition, it can also be stated that in the Indonesian perspective, the concept of hardship is considered as the legal doctrine to "implement" hardship concept which is adhered by the UNIDROIT Principle, which is in the form of relative *force majeure*.

The second way of supervening event which can affect the performance of a contract is hardship.[33] It may be defined as a situation in which the performance of the contractual obligations is excessively onerous without expecting it to be impossible. For example, it may be caused by the substantial increase or substantial decrease of the value of the contract performance (e.g., dramatic increase of inflation). Hardship can also be stated as a circumstance which fundamentally changes the equilibrium of a contract. The hardship clause is commonly recognised as an advanced contractual defense in resolving issues relating to fundamental change of situation which is going to affect the contract between parties.

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[30] This decision was reinforced by the Decision No. 2914/K/Pdt/2001 in which the situation of economy crisis is classified as relative *force majeure*. This decision relating to the social riots occurred on 1998.

[31] In this regard, Prof. Edy Lisdiyono, the private law professor at Faculty of Law Universitas Tujuh Belas Agustus opine that there are two characteristics of *force majeure*; absolute and relative. The legal consequence of the former characteristic is that the contract may be terminated on the basis of the situation. Whilst the legal consequence of the later characteristic is that the re-negotiation of contract is possible to be performed; on the basis of the principle of good faith.

[32] There are also other decisions regarding *force majeure* in Indonesia which are reflected through Decision No. 587PK/Pdt/2010 relating flood, Decision No. 3087/K/Pdt/2001 relating monetary crisis, Decision No. 2914/K/Pdt/2001 relating social riots on 1998. Decision No. 285PK/Pdt/2010 relating economy crisis, Decision No. 15/K/Sip/1957 relating to war risk, Decision No. 3389K/Pdt/1984 relating administrative policy of government and Decision No. 409K/Sip/1983 relating sea accident.

[33] According to the French Law, this circumstance is commonly referred to as "unforeseen event" or *imprévision*. According to the German Law it referred to as the "disappearance of the foundation of the contract" or *Wegfall der Geschäftsgrundlage*. According to the English Law, this is commonly referred to as the frustration of contract doctrine. Whilst according to the PECL and the UNIDROIT Principles it referred to as the "change of circumstances" and "hardship" respectively.

A hardship clause is commonly used in a long-term and high-valued contract. This aims to resolve the difficulty which in the contract enforcement included coercion and frustration doctrine. Such a situation is caused by the contract enforcement cost which highly increased or the contract enforcement value which decreased significantly to the recipient parties. Meanwhile:

a. such incident occurs or known by the aggrieved party subsequent to the end of the contract;
b. such incident could not be estimated properly by the aggrieved party at the time of the end of the contract;
c. such incident occurs out of the control of the aggrieved party;
d. the risks of such an incident were not estimated by the aggrieved party.

On the basis of the above-mentioned circumstances, it can be stated that the event of hardship is highly unreasonable, or more unforeseen than force majeure.

Similar to the discussion regarding force majeure, the discussion of hardship will begin with a brief comparative study on how several legal systems govern such matters. Principally, the major distinction between force majeure and hardship is that in the event of the latter demanding the contractual obligations to be performed is genuinely unreasonable. It can be stated that performing the contractual obligations would extremely burden one of the parties. Another major difference between force majeure and hardship is the principle of sanctity of contract which is more strictly applied.

According to both French law and English law, the principle of sanctity of contract has been recognised in case of the event of hardship. Based on these two national laws, any notion of relief for hardship which is not amounting to impossibility is generally rejected. An example regarding such circumstances is in the case of economic situations which are outside of the parties' control.[34] As widely known, economic situations might genuinely affect the market price as well as the import and export transactions.

On the basis of the English law approach, legal consequences arise due to the frustration of the contract. In this event, both the contract and the parties are automatically discharged. Consequently, the performance of the contract is discharged as well. However, an adjustment towards the contract prior to the time of such discharge is still possible. Since the modification of the contract

[34] As an example; the case of Suez Canal in which resulted the unexpected cost of a longer voyage on one of the parties of the contract. And this matter may be regarded as a ground for relief the contractual obligations performance. See Birmingham, Robert L., "A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory" (1969). *Articles by Maurer Faculty*, 1700.

is openly recognised in England, the English law tends to reject the ground for adapting or altering contract on the basis of frustration.[35]

It can be summarised from the point of view of English law that it does not support the frustration doctrine in international commercial contract. In this regard, several situations might be considered to determine whether a contract is frustrated. Whereby limitedly in the case of: (1) physical impossibility; (2) the subject matter of the contract is destroyed; or (3) legal impossibility which is taken into account to illegality. So, it can be stated that an international commercial contract might be discharged not only solely based on hardship but also must be in line with another combined f. In addition, the sanctity of contract is also playing an important role in order for the courts to adapt or modify the contract in the event of hardship.

In contrast to the approaches of the French law and the English law, both the German law and the Dutch law do accept hardship as the basis for relieving the performance of a contract. The legal consequence is that the modification or alteration of an international commercial contract is generally admitted. This is even though such performance of the contract would become excessively onerous for one of the parties of the contract.

Based on these two legal systems, courts may have the revising authority of the contract. This is generally accepted through the case law as well as the codification as stipulated in the civil codes. In accordance with German law, the doctrine of the disappearance of the foundation of the contract is applied. This is as stipulated under the provision of §313 of BGB (German civil code).[36]

Relating to the possibility of the contract adaptation, the following conditions shall be satisfied in playing a role as the basis of the parties' right to demand such adaptation: (a) the change in circumstances is significant; (b) the change concerns the circumstances which the parties have presupposed at the time their contract was made; (c) the change are so important to one of the parties which could affect the conclusion of the contract; (d) the change occurs beyond the limits of the risk which causing disadvantages to the parties; and (e) the terms originally agreed cannot reasonably be expected from the disadvantages party.[37] Once these situations are satisfied, the objective basis for

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[35] This is based on the rationale that an international contract is principally in accordance to *pacta sunt servanda*. Thus, it is believed that such 'power' of courts to revise the contract would impose the contractual obligations which had or never agreed by the parties.

[36] *"Disappearance of the contract foundation: 1) If the circumstances which became foundation of the contract have considerably changed after the conclusion of the contract, and if the parties would not have concluded the contract or would have concluded it under different terms had they foreseen the change, one may claim adaptation of the contract, …"*, §313.

[37] §313 (1) of BGB.

the contract to be disappeared is established. Consequently, the parties have the right to demand for a contract adaptation.

Meanwhile, in accordance with the Dutch law, the matter regarding hardship is stipulated under the provision of Article 6:258 BW (the Dutch Civil Code). In principle, such provision governs that the judge may modify the effects of a contract upon the demand of one of the parties. The judge may also partially or entirely set aside the contract on the basis of unforeseen circumstances. However, this must be according to the criteria of reasonableness as well as equity.[38] Further, the provision of Article 6:260 of the same regulation stipulates that the judge may pronounce a modification of the contract or set it aside, as referred to in Article 257 and 259 as well as the conditions determined by him.[39] It can be concluded that based on the German law and the Dutch law, based on the demand of one of the parties, the judge may modify or terminate the contract under similar circumstances which is hardship.

Finally, the matter of hardship is also governed under the international instruments as well; the CISG 1980, the UNIDROIT Principles and the PECL. It is widely interpreted that the matter of hardship is excluded from what has been stipulated under the provision of Article 79 of CISG 1980. In contrast, both of the UNIDROIT Principles and the PECL extensively governs the matter of hardship. The latter instruments, same as the approach of the German law and the Dutch law, is allowing the adaptation of an international commercial contract under exceptional circumstances.

The provision of Article 6.2.2 and Article 6.2.3 of the UNIDROIT Principles govern the definition and the effects of hardship, respectively. The former governs that hardship is where the occurrence of events fundamentally alters the equilibrium of the contract either because of the cost of a party's performance has increased or because the value of the performance a party receives has diminished.[40] Whilst the latter stipulates several effects of hardship, whereby: (1) the disadvantaged party is entitled to request renegotiations; (2) the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance; (3) party may resort to the court; and if reasonable (4) the court may terminate the contract at a date and on terms to be fixed, or adapt the contract with a view to restoring its equilibrium.[41]

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[38] Art. 6:258 BW (the Dutch Civil Code).

[39] Art. 6:260 BW (the Dutch Civil Code).

[40] Further, the provision of Article 6.2.2 of the UNIDROIT Principles also stipulates the situation in which: (a) the events occur or become known to the disadvantages party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

[41] Art. 6.2.3. of UNIDROIT Principles.

The PECL stipulates the "change of circumstances" in governing the matter of hardship. Under the provision of Article 6.111 (1), a party to a contract is bound to fulfill its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. However, the following paragraph of the same provision stipulates that if, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract of terminating it.[42]

From the above-discussed international instruments, it can be inferred that the provisions as stipulated under the PICC and the PECL are quite similar in regard to their approach to hardship. Both international instruments clearly recognised that hardship is only an exception from the sanctity of contract. The legal consequence is that the parties to an international commercial contract remain bound to fulfill the performance of their contractual obligations even though it has become much more difficult. These two international instruments also generally establish three conditions of hardship: 1) the change of circumstances must have brought a major disequilibrium towards the international commercial contract; 2) the change must be unforeseeable; and 3) the risk of the change of circumstances was not assumed by (and beyond the control of) the disadvantaged party of the contract.

A question arises when the situation of disequilibrium of a contract is established. In regard to this, is it generally accepted that under the realm of the UNIDROIT Principles, such disequilibrium shall be fundamental if there is an increase in cost of performance and a decrease in value of the performance received by one party. Thus, under both of the UNIDROIT Principles and the PECL, the judge may terminate or adapt an international commercial contract due to the changed circumstances only if the parties have failed to reach an agreement to do so. However, the slight difference among these two legal instruments is that under the former instrument, the disadvantaged party is only entitled to request renegotiations. Meanwhile, under the latter instrument the parties are obliged to enter into negotiations.

Based on what has been discussed relating to the matter of force majeure and hardship, it can be concluded that force majeure clauses in an international commercial contract generally deal with supervising events which cause the performance of the contractual obligations permanently or temporarily unable

[42] Art. 6.111 of PECL, further, it is also shall provide that: (a) the change of circumstances occurred after the time of conclusion of the contract; (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

to be performed. This is different from the concept of hardship clauses in an international commercial contract. In which the latter generally deal with the occurrence of events which substantially upset the economic situation of an international commercial contract.

II.B. Note of the UNIDROIT Secretariat on the UPICC Principles of International Commercial Contracts and the COVID-19 Health Crisis

II.B.1. UNIDROIT as a Civil Law Unification International Institution

The development of the global economy and economic integration has increased the frequency of trade transactions which heavily affects and influences the economic growth of a country. The rapid globalisation often causes cross-countries trade transactions. This phenomenon is usually known as international trade which is inseparable from the interdependence among nations in fulfilling their domestic needs.[43] In international trade, there are two or more parties from different countries. Hence, each party obeys a different system of law. Each country has their own domestic set of rules, thus, there is a difference in rules for one country and the other. The difference in the legal system can cause legal uncertainty and difficulties for the party in executing a transaction or a settlement for a dispute that might occur.[44]

In order to guarantee a legal certitude, a regulation that can support universal trading and arrange the rights and obligations of the parties involved in the international trading transaction. To be able to reach that goal, a lot of efforts have been made towards unification and harmonisation of international trade laws. One of the international organizations with the purpose of legal harmonisation, whether in the shape of hard law or soft law, is International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT was formed because of the failure of *Project De Code Des Obligations Et Des Contratas*, the means to renew contract laws between the French government and the Italian government in 1917. This project failed because World War I that turned the tides in the political world. Furthermore, this failure was caused by the legal system that was too narrow, only following the French and Italian legal systems, and the fact that the two systems are used as a material to unify law in many different countries. Therefore, UNIDROIT was established as a simpler means, and is designated for legal fields that can be objectively determined.

The establishment of UNDROIT was recently consummated after a dispute between experts that represented three legal systems in the world, namely the civil legal system, the common legal system, and the socialist system.

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[43] Peter van den Bossche, "The Law and Policy of the World Trade Organization: Text, Cases, and Materials (fourth edition), (Cambridge: Cambridge University Press, 2017), pp. 50–73.

[44] *Ibid.*

Generally, the purpose of UNIDROIT is to study the needs and methods for modernisation, harmonisation, and coordination of private law and especially commercial law between countries and country groups, as well as to formulate legal instruments, principles, and rules which are uniform to achieve those objectives.[45] The principles of UNIDROIT function as the source of law which is used as a reference in interpreting unclear legal contract provisions in international trade, so it becomes a solution to arising issues. Hereafter, the principles can be used as additional legal instruments if the rules in the law that should apply are not found due to it being appropriated from uniform international customs and practices.

Nonetheless, the UPICC principles of UNIDROIT are a non-binding codification of contract law rules and designed to be applied to commercial contracts on a global scale. The objective is to provide parties, as well as adjudicators and other users, with a set of balanced rules that are particularly well suited to cross-border transactions.[46] Thus, the principles avoid the usage of specific terminology used in certain legal systems hence its substance provides different options and possesses flexible qualities.[47] Most of these principles are indeed meant as balancing rules which are universal for international transactions and more important, to assist parties in drafting their contracts and adjudicators in resolving disputes regardless of the legal traditions and political economy conditions of a particular country.[48]

According to Prof. Michael Joachim Bonell,[49] UNIDROIT is not classified as a convention or international agreement or a legal model, so it does not have any legal power, rather only as an instrument that has a mere "influential" power (persuasive value).[50] However, the UNIDROIT principles has become 'soft-law'[51] for international legal and business communities due to its non-

[45] UNIDROIT, see: https://www.unidroit.org/about-unidroit/overview/

[46] United Nations Commission on International Trade Law. *UNCITRAL, HCCH and UNIDROIT: Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales.* 2021, p.72. For full text regarding this guide, see: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf

[47] *Ibid.*, p.6.

[48] *Ibid.*, p.73.

[49] Michael Joachim BONELL — Professor of Law (emeritus), Univer sity of Rome I "La Sapienza"; Consultant, UNIDROIT; Rapporteur on Articles 4.3 and 5.1.3; Co-Rapporteur on Articles 1.11, 7.3.6 and 7.3.7; Chairman of the Working Group for the Preparation of the UNIDROIT Principles 2016. For further explanation, see: https://www.cisgac.com/professor-michael-joachim-bonell/.

[50] Michael Joachim Bonnel, "An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts", 2005, p. 373.

[51] Soft law is used to denote agreements, principles and declarations that are not legally binding. Soft law instruments are predominantly found in the international sphere for a variety of non-binding normatively worded instruments used in contemporary international relations by states and international organizations.

binding instrument as stated above and that in consequence the acceptance will depend upon their persuasive authority. The effort of harmonisation toward international commercial contract law has more or less been reflected in the results within UNIDROIT's international commercial contract principles.[52]

Indonesia has become contracting party of UNIDROIT by ratifying the principles of international commercial contracting through Presidential Regulation No. 59 of 2008 on the Ratification of the Statute of the International Institute for the Unification of Private Law.[53] This ratification signifies a harmonisation of the alignment of national and international commercial contract laws for the modernisation of national laws in order to sanction national and international trading practices. The trading practices are expected to be free of issues from contracting in trading practices, so the differences in national law contracts will not be a hindrance for international trade practices.

This harmonisation of national contract law systems with international commercial contract law systems is a form of modernisation of the contract law system in Indonesia in accordance with the wide-range development of its practice. Naturally, this gives the domestic advantage of how the patterns and principles of contracting in the international trade practice audience are possible to be applied domestically. This makes the domestic advantage of the patterns and principles of contracting in audiences of international trade practice that are possible to be applied domestically.

II.B.2. The Concept of Supervening Event Changing the Performance of International Commercial Contract: Considering the UNIDROIT Notes

UNIDROIT released an important note through *"Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis"* to analyse the relevance of general principles during a pandemic and whether the parties are able to use COVID-19 as an excuse of non-performance. The effects of the COVID-19 pandemic in the execution of contractual relationships have impacted both nationally and internationally. Domestically, jurisdiction has to be careful in handling the situation, whether to use the general national law of contracts, in accordance with the validity of emergency law, or to use a combination of both. The complexity and severity of the factual situation caused by the pandemic tested many frameworks of the traditional domestic law of contract, in order for it to stay relevant with the needs of the modern audience. On the other hand, international commercial

[52] Michael Joachim Bonell, The UNIDROIT Principles of International Commercial Contracts: Why? What? How?, 96, no. 5 (1995): 1121.

[53] Indonesia, Presidential Regulation No. 59 of 2008 on Ratification of the Statute of the International Institute for. the Unification of Private Law.

contracts have a harder challenge due to the differences in legal systems in different countries, therefore the international Civil Code has an important role in the legal certainty.

According to the UNIDROIT notes,[54] UPICC is an instrument of international law that is suited to be used in situations like this. UPICC itself was approved and published by UNIDROIT in 1994 for the first edition as codification of international law of contracts and can be applied universally, followed by three subsequent editions in 2004, 2010 and 2016. While most international uniform law instruments, whether legislative or non-legislative in nature, are restricted to particular types of transactions or to specific, the UNIDROIT Principles provide a comprehensive set of principles relating to international commercial contracts in general.[55] Moreover, the fact that UPICC represents the one and only global instrument that possesses a comprehensive set of general rules that is applicable to different kinds of commercial contracts. Therefore, principles in UPICC have affected national and international legislators and applied as a practice by the parties, arbiter, and court around the world by offer a simpler solution in many ways since its principle has become the standard rule of interpretation in contracts.[56]

As has been previously discussed, the recommended approach by the UNIDROIT notes is through UPICC with the provision of "force majeure" (Article 7.1.7) and "hardship" (Articles 6.2.2-6.2.4). Through these two concepts, UPICC tries to offer a more flexible and uniform alternative choice that is adoptable by the many different existing legal systems. Moreover, the concepts of force majeure and hardship have a big impact in the settlement of disputes, both domestically and internationally with modifications in accordance with each country's legal system. For example, the formation of ICC Hardship Clause 2020 and Article 18 and 19 ITC Contractual Joint Venture Model Agreements 2004 by the International Trade Centre (a joint cooperation agency of UNCTAD and WTO) was inspired by the concepts of force majeure and hardship in UPICC.

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[54] In the context of the outbreak of COVID-19, UNIDROIT has released *"Secretariat Note on the UNIDROIT Principles of International Commercial Contracts and Covid-19"* as a form of guidance as to how the principles could help address the main contractual disruptions caused by the pandemic directly as well as by the measures adopted as a consequence thereof. The full text can be found here https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf.

[55] Michael Joachim Bonell, "The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles", ***Uniform Law Review***, Volume 23, Issue 1, March 2018, pp.15–41.

[56] Areej Abdul Rahman Hamada, "Applying the UNIDROIT Principles to Regulate International Commercial Contracts" https://www.globallawexperts.com/NewsArticle.aspx?PID=2294, accessed on March 7, 2022.

In force majeure, strict impossibility of performance is not necessary for the principles of UPICC, but a relevant obstacle and a cause-and-effect relationship between the obstacle and non-performance are needed. In this case, the party invoking the force majeure needs to prove causation between the pandemic, or the measures adopted because of the pandemic, and the non-performance of the obligation due under the contract. For example, the COVID-19 pandemic that affected the health condition of the parties or caused a postponement or suspension because of government's policies in the form of prohibition, social restrictions, lockdown, etc. The existence of the pandemic as an obstacle cannot be generalised in every contract. Whether the pandemic caused a contract performance to be executed or not, but with a limited moving space. Both things would cause different legal implications.

Similar to force majeure, the possibility to use COVID-19 as a hardship depends on the relevant situations of each case. Conditional changes due to COVID-19 have to change the balance between parties that is fundamentally set in the contract. The "fundamental" criteria itself does not have an exact quantitative measure, but each use for certain cases have to be based on every relevant circumstance and is in relevance with the contract (the nature of the contract, the expected characteristics from the performance, the relevant market condition during the relevant time, etc.). The fundamental alteration of the equilibrium by a COVID-19-related cause must have increased the cost of performance of one party or diminished the value of the said performance for one of the parties (including cases where the performance no longer has any value at all for the receiving party), and, in both cases, the increase in cost or the reduction in value must be objectively ascertainable and determined. It should be noted, however, that arduous will only concern performance not rendered: the disadvantaged party may not invoke a substantial increase of costs or decrease in value of the part it has already performed.

It can also be concluded that the criteria to determine whether a supervening event shall be classified as a *force majeure* or hardship is depending on a concept that is adhered by a state. We cannot infer that there are strict criteria to determine such situation. However, the primary factor that can be the basis of such classification and/or consideration is that whether a state mainly consider the principle of legal certainty or principle of justice. In case of the later, it can be stated that a supervening event tend to be considered as a hardship. Another consideration is relating to different legal concepts being adhered by each state, i.e., the principle of *Rebus sic Stantibus* which is not adhered in Indonesia but is adhered by other states. Even though the re-negotiation of the contract is remained possible on the basis of *pact sunt servanda*. In addition, we can also conclude that the primary similarity between the concept of *force majeure* and hardship is that both are considered as an unforeseen event.

II.C. COVID-19 and Supervening Event: The Perspective of the Indonesian Courts and Government

II.C.1. The Perspective of the Indonesian Government Policies

On March 2, 2020, President Joko Widodo announced the first two cases of COVID-19 in Indonesia. With the emergence of this case, the Indonesian government designated COVID-19 as a disease that caused a public health emergency through Presidential Decree (*Keppres*) No. 11 of 2020. For further handling, the government issued various laws and regulations to deal with the COVID-19 pandemic, one of which is Presidential Decree No. 12 of 2020 on the Determination of Non-Natural Disasters for the Spread of Coronavirus Disease 2019 (COVID-19) as National Disasters. Through the Presidential Decree, the government stated that (i) COVID-19 is a national disaster that is included in the non-natural disaster category; (ii) the COVID-19 response is carried out by the Task Force; and iii) the appointment of governors, regents, and mayors as Chair of the Task Force *(Gugus Tugas)*.

In addition to these two regulations, there are several other regulations regarding COVID-19, among others:

a) Government Regulation in Lieu of Law No. 1 of 2020 on State Financial Policy and Financial System Stability for Handling the COVID-19 Pandemic.
b) Circular of the Directorate General of Taxes No. SE-32/PJ/2020 on Affirmation of the Determination of the Time Period of Force Majeure Due to the Corona Virus Disease (COVID-19) Pandemic.
c) Financial Service Authority Regulation (POJK) No. 11/POJK.03/2020 on National Economic Stimulus as a Countercyclical Policy for the Impact of the Spread of Corona Virus Disease 2019, which discusses one of them regarding the provision of credit restructuring by banking institutions. For non-banking financial institutions, OJK also issued POJK No. 14/POJK.05/2020 on Countercyclical Policy on the Impact of the Spread of Corona Virus Disease 2019 for Non-Bank Financial Services Institutions.
d) Instruction of the Minister of Public Works and Public Housing No. 02/IN/M/2020 on the Protocol to Prevent the Spread of Corona Virus Disease 2019 (COVID-19) in the Implementation of Construction Services; and
e) Karo Regent Regulation Regent Regulation (PERBUP) No. 36 of 2020 on Elimination of Rural and Urban Land and Building Tax Administrative Sanctions in Force Majeure Due to the Corona Virus Disease 2019 (COVID-19) Pandemic.

Based on these regulations, it can be stated that the COVID-19 pandemic is indeed a force majeure situation in Indonesia. As a concrete example, the

Financial Services Authority (OJK) issued a credit restructuring policy as a recovery effort for debtors who have the potential to experience difficulties in fulfilling their obligations in early 2020. The credit restructuring policies carried out are: (1) lowering interest rates; (2) extending the term; (3) reduction of principal areas; (4) addition of credit/financing facilities; and (5) conversion of credit or financing into Temporary Equity Capital.

To mitigate the impact of the high rate of spread of COVID-19, OJK decided to extend the validity period of the credit restructuring relaxation policy until 2023 through POJK Number 17/POJK.03/2021. This step is intended to be part of a countercyclical policy and to be one of the driving f needed to support the performance of debtors, banks and the economy in general. However, OJK emphasised that this relaxation policy does not eliminate the debtor's obligation to make payments but is limited to providing convenience. In other words, debtors who are not affected or are still able to pay instalments must fulfil their obligations in order to avoid fines and negative records of the Financial Information Report System (SLIK).

In line with economic sector policies, the Indonesian government's perspective in viewing COVID-19 as a pandemic can be seen through other sectors, such as education. Based on a Joint Decree of 4 Ministers which includes the Minister of Education and Culture, Minister of Religion, Minister of Health, and Minister of Home Affairs No. 03/KB/202l, No. 384 of 2021, No. HK.01.08/MENKES/4242/2021, No. 440-717 of 2021 on Guidelines for the Implementation of Learning in the Corona Virus Disease 2019 (COVID-19) Pandemic, it was decided that the implementation was carried out via limited face-to-face learning by applying health protocols and/or online learning. This decision was taken considering that health and safety aspects are a top priority at this time. Thus, it implies that the non-economic sector also views COVID-19 as a force majeure.

In relation to contracts, the elements of force majeure which have been previously discussed in Article 1244 and Article 1245 of the Civil Code need to be further proven whether COVID-19 can be the basis for force majeure for acts of breaching in contracts. This will greatly depend on the performance or obligations that must be carried out and the circumstances of the party. If the existence of the COVID-19 pandemic does not really hinder the implementation of achievements by related parties, then this situation cannot be used as a force majeure argument. Therefore, to prove whether the COVID-19 pandemic causes force majeure, it must fulfill all the elements stipulated in Article 1244 and Article 1245 of the Civil Code, not only through the contents of the agreement. Nevertheless, the policies issued by the government related to the COVID-19 pandemic can be used as evidence of non-natural disasters.

In addition to the Civil Code, force majeure provisions are regulated in other laws and regulations, such as Law No. 2 of 2017 on Construction Services. In Article 47 paragraph (1) letter j, it is stated that force majeure is a state of unforeseeable circumstance, which contains provisions regarding events that arise against the will and ability of the parties that cause harm to one of the parties. UUJK also divides the classification of force majeure into absolute and relative categories. Then, in Presidential Regulation No. 12 of 2021 on Amendments to Presidential Regulation No. 16 of 2018 on Government Procurement of Goods/Services.

The definition of force majeure in this Presidential Regulation is different from the UUJK, but still has the same meaning. Force majeure is a condition that occurs against the will of the parties to the contract and cannot be predicted in advance, so that the obligations specified in the contract cannot be fulfilled. In addition to the definition of force majeure, this Presidential Regulation explains the consequences that may arise, the implementation of the contract can be terminated in the event of a force majeure event. However, if the contract is continued, then the parties can make changes to the contract.

According to the views of civil law experts in Indonesia, the COVID-19 pandemic and its economic impact cannot cancel the agreement because it is considered a relative force majeure. The courts nowadays tend to practically implement a broader interpretation on the 'impossibility' element, as they also acknowledge the applicability of relative force majeure theory, under which the contractual performance may still be doable, but with great or unreasonable difficulties and sacrifice.[57] So it is important to pay attention to how the force majeure clause works in every contract that applies to the parties. This is in line with the statement given by Mahfud MD, the Coordinating Ministry for Political, Legal and Security Affairs, that in order to declare an event to be considered force majeure, it must be seen whether there is a clause in the agreement and the type of force majeure that occurs in the contract clause.[58] Thus, the consequences arising from the occurrence of COVID-19 in the implementation of the contract may vary depending on the agreement made by the parties in the applicable agreement.

As long as the affected party is able to prove that the elements of force majeure have been met, the affected party can claim that this pandemic is a

[57] Hamalatul Qur'ani. "Akibat Hukum *Force Majeur* Dalam Pandangan Pakar Hukum Perdata", https://www.hukumonline.com/berita/baca/lt5ea3ac716afa1/akibat-hukum-iforce-majeur-i-dalam-pandangan-pakar-hukum-perdata, accessed on December 17th 2021.

[58] Kanavino Ahmad Rizqo, "Menko Mahfud: Keppres Bencana Nasional Tak Bisa Jadi Dasar *Force Majeure*", Detik News, https://news.detik.com/berita/d-4976489/menko-mahfud-keppres-bencana-nasional-tak-bisa-jadi-dasar-force-majeur?single=1, accessed on March 6, 2022; see also https://www.hukumonline.com/berita/a/penjelasan-prof-mahfud-soal-i-force-majeure-i-akibat-pandemi-corona-lt5ea11ca6a5956?page=all

force majeure event. Then, the COVID-19 pandemic is only a delay in the performance of the debtor to the creditor and does not completely eliminate the debtor's obligations to the creditor. The jurisprudence in this case is the Supreme Court Decision No. 3078K/Pdt/2001 regarding the monetary crisis.[59] which was strengthened by the Supreme Court Decision No. 2914K/Pdt/2001 related to the social riot case on May 14, 1998.[60]

Based on the discussion regarding force majeure in various current national laws and regulations, none of them provide a detailed definition of what circumstances or events are included in force majeure. Therefore, the conditions included in the force majeure classification are not limited to what is regulated in the Civil Code but can also include conditions that can fulfill all of these elements, such as regulations or prohibitions issued by the government. Seeing the principle of freedom of contract adopted in Indonesian contract law, the enforcement of force majeure is again left to the parties who entered into the agreement in determining the editorial. The implementation of force majeure will always refer to the contract made by the parties which causes various legal consequences.

[59] A resident of North Jakarta sued a company because of the legal relationship between the contract sale and purchase of apartment *(rumah susun)*. The Petitioner has paid off their obligations, but Defendant did not hand over the apartment that has been purchased. In the trial, Defendant argued that he could not continue his obligations due to the monetary crisis in Indonesia. In submitting a memory of appeal, the appeal Petitioner (the original defendant) submitted an argument about force majeure because the monetary crisis that occurred was an unpredictable and unavoidable condition for every Indonesian citizen. According to the Judges of the Supreme Court, these reasons cannot be justified because the decision of the Court of Appeals/*judex facti* is correct, namely that the appeal Petitioner violates the governing law. In the Court of Appeals, the Judges of the Supreme Court partially granted the Petitioner's claim and sentenced Defendant to return the payment for the flat and pay compensation to the Petitioner.

[60] A paper company filed a lawsuit against the state-owned bank and insurance company to the court. The Petitioner claims that the insurer paid for the insurance for his burned goods due to social costs on May 14, 1998. On the other hand, the Petitioner also has a credit agreement with the bank. The insurer refuses to pay the insurance claim because the fire is not covered by the insurance. The Petitioner's lawsuit was rejected at the first instance, and at the appeals level. The bank also filed the cassation for fear of force majeure reasons for not paying credit. The bank reminded that merchandise fires caused by heavy loads were relative. In addition, it is not included in the reasons for the termination of the agreement as stated in Article 1381 of the Civil Code. The bank's memory of appeal was finally accepted. Judge of the Supreme Court stated that the paper company had done a breach of contract. In relation to the coercive circumstances, Judge of the Supreme Court on the appeal considered that the Respondent/Petitioner did not pay the debt because the *overmacht* could not be justified. The Petitioner's burnt stocks and merchandise is not included in the credit agreement and therefore does not remove or reduce the Petitioner's obligations as stipulated in the credit agreement. The credit recipient is related to the credit agreement even though the collateral is burned because according to law, all the Petitioner's assets are debt guarantee.

II.C.2. The Perspective of the Indonesian Court Decision Analysis

On this part, we did not find any district court decision that gave a verdict to terminate the international commercial contract due to COVID-19 pandemic. Due to this, we looked for the termination of contracts on the reason of the same. We found several decisions which terminated the employment contracts. Therefore, our analysis shall be based on these district court decisions.

II.C.2.a. The Supreme Court Decision No. 607 K/Pdt.Sus-PHI/2021 (PT AMS v. DCF, et al.)

The relevance of supervening event concepts in special civil cases regarding industrial relations dispute (PHI) in Indonesia can be seen through Supreme Court Decision No. 607 K/Pdt.Sus-PHI/2021 between PT AMS (Petitioner for Cassation) and TR, ANH, and SNA (Respondent for Cassation). Initially, the Defendant of Cassation was terminated by the Defendant's Petitioner. However, the Cassation Petitioner did not give the Cassation Respondent rights in the form of payment of severance pay, service award money, and compensation for entitlements in accordance with the Employment Law No. 13 of 2003.

In the District Court Decision Number 18/Pdt.Sus-PHI/2020/PN Yyk dated March 3, 2021, the Yogyakarta District Court partially granted the Plaintiffs' claim due to an *obscure libel* lawsuit and declared the termination of the employment relationship between the Cassation Petitioner and the Cassation Respondent for reasons efficiency. Then, the Yogyakarta District Court decided to sentence the Cassation Petitioner to pay compensation due to termination of employment in the form of cash amounting to Rp.86,785,076.00 (eighty-six million seven hundred eighty-five thousand and seventy-six *rupiah*). The Respondent's appeal which was partially granted by the Yogyakarta District Court was based on several considerations:

a. DCF is bound by a certain time working agreement (PKWT), and he has not worked for 3 (three) years and works as a cleaning service which is not a permanent job. In this case, PT AMS terminated the working relationship with DCF before the PKWT ended. Therefore, he is entitled to compensation as stipulated in Article 61 paragraph (1) letter b of Employment Law.
b. TR, ANH, and SNA who were terminated due to the financial condition of PT AMS due to the impact of the COVID-19 pandemic. Hence, they are still entitled to compensation (Article 164 paragraph (1) of Employment Law).
c. Nevertheless, the Supreme Court of the Republic of Indonesia needs to improve the judgments and decisions of the *judex facti* as follows:

i) PT AMS was proven to have suffered losses due to the decline in turnover due to the COVID-19 pandemic, so it was forced to close several outlets where it sells.
ii) PT AMS has also tried to prevent termination of employment for its employees by laying off employees and others, but these efforts are not sufficient to prevent termination of employment.
iii) PT AMS is in a state of loss due to the COVID-19 pandemic, then PT AMS can terminate employment (PHK) to its employee (vide Article 164 paragraph (1) of Employment Law.

The Supreme Court is of the view that the appeal filed by PT AMS should be rejected by amending the Industrial Relations Court's decision at the Yogyakarta District Court No. 18/Pdt.Sus-PHI/2020/PN Yyk dated March 3, 2021.

In this case, it is concluded that the Covid-19 is considered as an absolute *force majeure* as a cause for termination, instead of renegotiation. Such consideration could be found in the next case discussed below.

II.C.2.b. The Supreme Court Decision No. 665 K/Pdt.Sus-PHI/2021 (PT SRIA v. HP, et al.)

Similar to the previous decision regarding industrial relations disputes, Supreme Court Decision No. 665 K/Pdt.Sus-PHI/2021 between PT SRIA v. HP, et al. have also been legally binding. In this case, PT SRIA (Petitioner of Cassation) has one-sidedly terminated the employment relationship of HP and Z (Respondent for Cassation) which is not in accordance with the provisions in Article 156 of Employment Law. The Cassation Petitioner asks the Supreme Court that the Decision of the Industrial Relations Court at the Jambi District Court No. 27/Pdt.Sus-PHI/2020/PN Jmb which punishes PT SRIA for granting the rights to the Cassation Respondent as a result of the termination of the employment relationship to be cancelled.

According to the view of the Supreme Court, the termination of employment occurred due to the COVID-19 pandemic that greatly affected the income of the Cassation Applicant so that it was categorised as *force majeure*, so *Judex Facti* was right to punish the Cassation Petitioner to pay compensation for the termination of employment in the form of compensation, service money as a form of appreciation, and compensation money to the Cassation Respondent. Thus, the Supreme Court stated that the Jambi District Court's decision did not conflict with the law and/or legislation. Therefore, the appeal filed by PT SRIA was rejected.

Based on the above cases in the field of employment contract, the Covid-19 is considered as a ground for termination. The Covid-19 is considered as an absolute force majeure that makes the agreements between the parties is

impossible to be performed. However, in Indonesia we should note that the employment contracts are not having purely commercial nature due to the involvement of Indonesian government to protect the employee who usually considered as the weaker party.

Based on the previous the Supreme Court's decisions discussed in point (**) , the Indonesian position to the supervening events is developed. Monetary crisis during 2000s, the social riot in 1998 could be considered as *force majeure*. *Force majeure* is no longer limited to natural events (act of God) and the loss of the agreed object but has expanded to the administrative actions of the authorities, namely the issuance of government policies. Yet, we must take notes that the Covid-19 is a temporary policy for overcoming the pandemic. Therefore, the Covid-19 could be considered as the relative *force majeure* that requires renegotiation, instead of termination.

III. CONCLUDING REMARKS

The pandemic situation affects contractual relationships born by the parties. In the middle of an uncertain situation like this, there is a hindrance to the performance of a contract which makes it possible for negligence or failure of performance of a contract by a debtor to happen. In this regard, UNIDROIT released "Note of The UNIDROIT Secretariat on The UNIDROIT Principles of International Commercial Contracts and The Covid-19 Health Crisis" on 17 July 2020, on how to tackle the problem of performance of a contract due to the Covid-19. UNIDROIT emphasised in its note that the execution of contracts should be analysed based on the specific circumstances of a contract. A contract that is hampered by Covid-19 must be thoroughly confirmed if its performance is hindered and has a cause-and-effect relationship between obstacle and non-performance. In viewing this pandemic, UNIDROIT concluded if all terms are fulfilled, the COVID-19-related issues may constitute a case of *force majeure* or, at least, hardship. As to whether it is *force majeure* or hardship, UNIDROIT will depend on each case due to the complexity of the situation. However, for mid-to-long term contracts, UNIDROIT suggests if the obstacle is temporary, it would be better for renegotiation to help preserve the contract and maximise value for the jurisdiction(s) involved.

Related to the Indonesian position to the *force majeure* concept is developed. The supervening events, such as the monetary crisis during 2000s, the social riot in 1998 were considered as *force majeure*. Therefore, *force majeure* is no longer limited to natural events (act of God) and the loss of the agreed object but has expanded to the administrative actions of the authorities, namely the issuance of government policies. However, the COVID-19 is a temporary policy for

overcoming the pandemic. Therefore, the impact of this pandemic to the pure commercial contract should be equal to the relative *force majeure* impact, namely renegotiation instead of termination. If the parties could not reach a consent, they could ask decision from a district court.

The concept of *force majeure* in Indonesia has developed that enable to cover the impact of the concept of hardship, namely known as the relative *force majeure*. The reason to negotiate is covered by the regulation of good faith of the parties when they enter into the contract. This good faith principle is also the rational ground to negotiate the existing contract between them that postponed due to COVID-19. Therefore, it can be concluded that Indonesia regulations and its decisions have developed and covers the solution of the pandemic COVID-19.

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