Journal of Indonesian Legal Studies
Vol. 10 Issue 1 (2025) 349-390
DOI: https://doi.org/10.15294/jils.v10i1.1592
Online since: September 7, 2025

Journal of INDONESIAN LEGAL STUDIES
https://journal.unnes.ac.id/journals/jils/index

A Change of Circumstances and Contract Adjustment: Indonesian Law and Beyond

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Abstract

In the case of long-term contracts, parties might find it challenging to anticipate the relevant state of affairs that may affect the performance of the contract in the future or any change of circumstances. This paper argues that implementing a change of circumstances doctrine that allows the disadvantaged party to demand contract adjustment has been applied since long ago in Indonesia. This application is particularly evident when it comes to changes in currency. The principle of justice becomes the main consideration for the judges to make contract adjustments due to changes in circumstances. However, some court decisions accepted such requests for contract adjustment due to a change in circumstances, even though it was based on a force majeure defense. In order to provide legal certainty in the future, it is highly recommended that legislators separate the rules of force majeure from the rules of change of circumstances.

KEYWORDS *A Change of Circumstances, Contract Adjustment, Force Majeure*

Introduction

This article analyzes the implementation of the doctrine of change of circumstances according to Indonesian contract law. In performing the contract, a change of circumstances might occur, which the parties did not foresee when they concluded the contract. Because of that reason, even though the performance of a contract is still possible, it might be unjust for a party to insist that another party has to perform in contractual obligation in the same way as it was agreed before since the situations have been changed. Performing a contract might be more burdensome for one of the parties due to the change of circumstances. A change of circumstances may increase the cost of performance or decrease the value of the counter-performance of one of the parties in the contract.

A high appreciation for the principle of freedom of contract and respect for the principle of binding contracts characterizes classical contract law. The paradigm in classical contract law treats the contract as a 'one-off' transaction that is discrete and self-contained, while a relational relationship characterizes modern contract law.[1] The characteristic of modern contract law, which is relational, is that the parties can always modify the contract according to changing circumstances.

In a long-term contract, such as mining and infrastructure building agreement, arranging everything in detail is difficult. The contracting parties may be unable to predict many things when they conclude the contract. An agreement to modify a contract in case circumstances change is necessary. The parties should refrain from maintaining the previously agreed contract if circumstances change. John Bell explained that two things are difficult to predict in a long-term contract.[2] The first is inflation and commodity price increases. Meanwhile, the second one is the development of new technology. The development of a new technology will make the contracts that have been made commercially unfair to be maintained.

Several countries have adopted the doctrine of change of circumstances as a condition of contract adjustment. One of them is the Netherlands. Applying the doctrine of change of circumstances in the Netherlands is stipulated in Article 6:258 of the *Niew Burgerlijkwetboek* (New Dutch Civil Code or

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1 Richard Stone, and James Devenney. *The Modern Law of Contract.* London: Routledge, 2019, p. 16.

2 John Bell, "The Effect of Changes in Circumstances on Long-term Contracts." *Contract Law Today: Anglo-French Comparisons* (1989): 199-243.

NDCC).[3] This provision allows one of the contracting parties to demand modification of the effect of the contract due to unforeseen circumstances.

The spread of COVID-19 reminds us of the importance of the doctrine change of circumstances. The spread of COVID-19 is affecting the economic conditions of countries worldwide. In order to mitigate the impact of the spread of COVID-19, the Indonesian Government has issued some policies. One of these policies is to ask Indonesian banks to restructure their loan. This is stated in the regulation issued by the Financial Services Authority Number 11/POJK.03/2020 concerning National Economic Stimulus as a Countercyclical Policy on the Impact of Spread Coronavirus Disease 2019. This regulation has been amended twice. The latest amendment is through regulation number 17/POJK.03/2021. Previously, the President of the Republic of Indonesia had issued Presidential Decree No. 12 of 2020, which stipulates the spread of covid 19 as a non-natural disaster.

The two provisions above asked banks to restructure loans given to debtors affected by the spread of COVID-19. This policy is the implementation of the doctrine of change of circumstances. It is based on the consideration that the obligation to make loan payments is not impeded physically or legally, making the contract performance impossible. On the other hand, it is still possible to carry out obligations, but it is only appropriate to demand contract adjustment. The problem is that these regulations only apply to banks in Indonesia. These provisions do not bind other creditors.

The analysis regarding implementing the doctrine of change circumstances and contract adjustment in contract law is essential because not all countries, including Indonesia, have special regulations for applying the doctrine of change of circumstances. In the case of unforeseen circumstances, the Indonesian Civil Code (KUHPer) only regulates force majeure provisions as an excuse for nonperformance.[4] Even though in its historical background, force

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[3] Article 6: 258 paragraph (1) of The New Dutch Civil Code states, '(1) Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.' Hans Warendorf, *et.al.*, *The Civil Code of The Netherlands*, The Netherlands: Kluwer Law International BV, 2009, p.714

[4] Article 1244 KUHPer stipulates that, 'If there is any reason for such, the debtor is compensate for costs, damages and interests if he cannot prove, that the non-performance or the late performance of such obligation, is caused by an unforeseen event, for which he is not responsible and he was not acting in bad faith.'

majeure was limited to the performance of the contract, which is impossible,[5] nevertheless, the term 'impossible' is not written in the elements of force majeure provisions in KUHPer. This situation raises the question of whether the disadvantaged party can use the force majeure provisions and ask for contract adjustment or termination due to a change of circumstances. If the answer to that question is negative, another question would be, what will be the consideration of the judges in the case of the occurrence of a change of circumstances? Court decisions become a crucial reference in this case because of the absence of provisions regarding change of circumstances in KUHPer.

Unlike commercial contracts, discussions about applying the change of circumstances doctrine to the law of treaties have been going on for a long time. The doctrine of change of circumstances has long been included in the 1969 Vienna Convention on the Law of Treaties. In the Vienna Convention, states may escape from treaty obligations if a change is impossible to execute these obligations or if the change qualifies as being 'fundamental.'[6] Such an arrangement does not occur in commercial contracts. The doctrine of change of circumstances is not clearly stated in the United Nations Convention on Contracts for the International Sale of Goods (CISG). In Article 79 CISG, the debtor can be excused of his obligations if he can give valid argumentations that he cannot fulfill his obligations due to an impediment beyond his control and he cannot predict it at the time of the conclusion of the agreement or to be avoided or overcome it or its consequences. The word impediment in the article gives rise to multiple interpretations.[7]

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[5] The definition of Force Majeure derives from Roman Law (*vis maior*), meaning that the object of the contract cannot be utilized anymore due to a situation that is beyond the reasonable control of the parties. Therefore, the implementation of the contract becomes impossible. James Gordley describes the concept of *vis maior* as 'One who borrowed property gratuitously for his own use is liable if he failed to exercise the most scrupulous diligence (*exactissima diligentia*). He was not liable if the property is destroyed by invading enemies or bands of robbers. He was not liable for *vis maior*, that is, for accidents that no one could have prevented.' *See* James Gordley, and Arthur Taylor Von Mehren. *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials.* New York: Cambridge University Press, 2006.

[6] Benny Tan Zhi Peng, "The International Law Commission's draft articles on the effects of armed conflicts on treaties: Evaluating the applicability of impossibility of performance and fundamental change." *Asian Journal of International Law* 3, no. 1 (2013): 51-76.

[7] Professor Yasutoshi Ishida said, "The controversy has long continued unsettled over whether a party could be exempted in the so-called 'hardship' cases". *See* Yasutoshi Ishida "CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness—Full of Sound and Fury, but Signifying Something," *Pace International Law Review* 30, no. 2 (2018): 331-382.

Article 79 of the CISG states that an impediment can be interpreted narrowly as a physical or legal obstacle, making performances impossible. Impediment can also be interpreted broadly to include economic obstacles that result in the contract not being enforceable without adjusting the contract to the new circumstances.

Another issue is that changes in circumstances can occur in a long-term contract. These changes do not occur suddenly, as occurs in force majeure events. The impact of changing circumstances can also decrease the value of the counter-performance received by one of the parties in the contract. The decrease in the value of counter-performance due to changes in circumstances is certainly not an impediment to the performance as a condition for the force majeure provisions to be applied.

Some articles analyze the implementation of the change of circumstances doctrine in Indonesia. One of the articles was written by Taufiq Adiyanto.[8] The article describes the implementation of the changing circumstances doctrine in Indonesia and its comparison with Dutch law. However, the article does not comprehensively analyze why Indonesia needs to regulate and implement the doctrine of change of circumstances. The article also does not analyze the limitations of increasing costs and decreasing the value of counter-performance, which are the basis for contract adjustments. This paper will analyze this matter, which the previous writings have yet to discuss.

The second part of this article will analyze the history and development of the doctrine worldwide, especially in Europe. Then, the third part will analyze the importance of applying the doctrine to complete the force majeure as an excuse for nonperformance due to unforeseen circumstances. Furthermore, this article's fourth part would determine the legal basis for implementing the doctrine according to court decisions. The next part will discuss the limits on cost increases and counter-performance received by the disadvantaged party due to changing circumstances. The final section will discuss the need to regulate the doctrine of changing circumstances in Indonesia as part of legal reform.

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[8] Taufiq Adiyanto, "Dealing with unexpected circumstances: Judicial modification of contract under Indonesian and Dutch Law." *Hasanuddin Law Review* 5, no. 1 (2019): 102-119.

The Doctrine of Change of Circumstances: Its History and Development

We cannot separate the history and the development of the doctrine of change of circumstances from the rise and fall of the principle of *pacta sunt servanda* (agreements must be honored). The solid acceptance of that principle may limit the implementation of the change of circumstances doctrine in contract law. Conversely, the solid acceptance of the principle of fairness may give extensive exceptions to the enforceability of the *pacta sunt servanda* principle through implementing the doctrine of change of circumstances.

A. The Doctrine of Change of Circumstances Derives from Roman Philosophy

Even though Roman Law[9] does not explicitly mention the idea of the change of circumstances, the doctrine has occurred since the Roman Empire. Cicero (106 BC–43 BC) initiated the exemption to the binding force of contract based on change of circumstances. He argues, 'One need not keep a promise to return a sword to a person who becomes insane.' According to this, then Sineca (4 BC–AD 65) adduces a formula, 'clausula rebus sic stantibus,' which means 'all conditions must be the same as they were when I made the promise if you mean to hold me bound in honor to perform it.'[10]

Cicero's idea became influential and Augustine included it in Decretum Gratiani, compiled and written around 1140 BC.[11] Therefore, St. Thomas Aquinas elaborates on Cicero's idea in the theology perspective, whether every lie committed sins. He concludes that breach of promise is not committed sins in two conditions: firstly, when the deed is against the law or morality; secondly, in the related condition to the subject or object of an agreement is changing.[12]

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[9] In the ancient Roman Law, the stability in an agreement was one of the basic of contract law. Even though all parties may demand that the legal binding of an agreement is based on some requirements, the Roman Law scholars did not recognize a particular doctrine that specifically gives exemptions to all parties from their obligations in a contract due to unexpected situations. *See* Andreas Their, "Legal History" in Ewoud Hondius and Hans Christoph Grigoleit, *Unexpected Circumstances in European Contract Law*, Cambridge: Cambridge University Press, 2012. pp. 15-16.

[10] Hondius and Grigoleit, p. 16.

[11] Hondius and Grigoleit, p. 17.

[12] Rodrigo Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contract*, Antwerp, Portland: Intersensia, 2011, p. 30.

The concept of changing circumstances became a contentious issue by the glossators of Roman Law. The glossators developed the doctrine of change of circumstances as an implied condition, in which every agreement is binding when there is no change in the circumstances of the contract. The doctrine of change of circumstances as an implied condition significantly influenced civil law scholars until the 16th and 17th centuries.[13]

B. A Change of Circumstances Doctrine Lost Its Influence in the 19th Century

In the 19th Century, the theory of contract law was primarily influenced by the philosophy and the concept of liberal economics:[14] individual freedom and the minimum intervention from the Government to the private life were honorable values in society. The autonomy principle prohibits external interventions in deciding what is best for the individual. Bentham reveals that nobody knows what is best for him except himself. The limitation of freedom of contract is a limitation of freedom itself and all limitations to freedom are vicious and it needs justification to be applied.[15]

With the strengthening of individual freedom and the autonomy of will, the concept of the sanctity of the contract is revealed as a consequence. Therefore, a contract cannot be terminated or changed unless based on mutual consent of the parties or grounds sufficient by law. Applicable laws adopted Roman Law, such as *vis majeur*/force majeure, which the courts narrowly interpret. It was interpreted as an event in which performance was absolutely or objectively impossible to be implemented.

French Civil Code, influenced by Roman Law and made in the 19 th Century,[16] uses the impossibility doctrine as an exception to the principles of *pacta sunt servanda*. Although the change of circumstances doctrine (*clausula rebus sic stantibus*) and its case law had been discussed in the Parliament in the 17th and 18th centuries, such provisions were not included in the Civil Code

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[13] Uribe, pp. 30-31.

[14] Ridwan Khairandi, *Itikad Baik dalam Kebebasan Berkontrak,* Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2003, p. 46.

[15] Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia,* Jakarta: Institute Bankir Indonesia, 1993, p. 24.

[16] Barry Nicholas, *The French Law of Contract*, New York: Oxford University Press, 2009, pp. 1-2.

draft. The legislator prioritized the security of transactions rather than fairness or equity in contracts. [17]

The refusal to implement the change of circumstances doctrine (*clausula rebus sic stantibus*) in the Civil Code did not just occur in France. German Civil Code (1900) also refused to adopt such a doctrine.[18] At that time, Windscheids revealed the doctrine of contractual assumption/*Lehre von der Voraussetzung*. According to Windscheids, all the parties of the agreement are under an assumption that the intended legal consequences should only occur under certain circumstances. [19]

C. The Revival of the Change of Circumstances Doctrine

The refusal of the doctrine of changing circumstances based on the implied conditions did not last long. Post-World War I crises caused the need for the doctrine of change of circumstances as an exception to the *pacta sunt servanda* doctrine. In 1921, Oertmann revived the assumption doctrine in the agreement introduced by his predecessor, Windscheids. With some improvements, Oertmann argued a new doctrine, namely the contractual basis doctrine, as follows:

> "Contractual basis is an assumption made by one party that has become obvious to the other during the process of the formation of the contract and has received his acquiescence, of circumstances forming the basis of the contractual intention. Alternatively, 'contractual basis' is the common assumption on the part of the respective parties of such circumstances."[20]

Oertman's theory justifies the German Supreme Court (*Reichsgerich*), which exempts the debtors from their obligation in a contract caused by the change of circumstances that destroy the basic assumption of the parties. Due to very high inflation, on February 3, 1922, the Supreme Court annulled the

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[17] Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contract*, pp. 44-45.

[18] Peter Hay, "Frustration and Its Solution in German Law", *The American Journal of Comparative Law* 10, no. 4 (1961): 345-373.

[19] Konrad Zweigert and Hein Kotz, *Introduction of Comparative Law,* 3rd ed., Oxford: Claredon Press, 1998, p. 520.

[20] Ernst J. Cohn, "Frustration of contract in German law." *Journal of Comparative Legislation and International Law* 28, no. 3/4 (1946): 15-25.

agreement. At that time, prices were increased forty-fold from the basic prices before the war emerged.[21] Based on the principles of good faith and fairness, in June 1922, the Court stated that the paper mark was not comparable with the value of gold in Germany (the gold mark).[22]

After the world war, the re-emergence of the doctrine of change of circumstances as an exception to the *pacta sunt servanda* doctrine in the early 20th Century was applied in Germany and many other countries, such as Italy, Russia, Uzbekistan, Turkmenistan, Spain and Poland.[23]

The Urgency of the Doctrine of Change of Circumstances

The regulations regarding the doctrine of change of circumstances in contract law give a broader ground of an excuse to the disadvantaged parties. Traditionally, due to unforeseen circumstances, the debtor will be excused for nonperformance only if he can prove a force majeure. Modern contract law provides a broader excuse for nonperformance due to unforeseen circumstances based on the doctrine of change of circumstances. The issue of fairness becomes the main reason to apply the doctrine of change of circumstances. This doctrine has been applied in the civil codes of several countries, such as Germany, Italy, the Netherlands and France.

A. The Ambiguous Regulations and Doctrines of Force Majeure

Contrary to the force majeure doctrine, which many countries, including Indonesia, have admitted, the doctrine of change of circumstances is not well recognized worldwide. The doctrine of change of circumstances is not clearly stated in the United Nations Convention on Contracts for the International Sale of Goods (CISG). It then raises the question of whether the doctrine of force majeure can be interpreted broadly, including the doctrine of change of circumstances. Within that regard, there are debates among legal scholars.

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[21] RGZ, 103, 328 in Michael L. Hughes, "Private Equity, Social Inequity: German Judges React to Inflation, 1914–24." *Central European History* 16, no. 1 (1983): 76-94.

[22] RGZ, 104, 394, *in* Hughes.

[23] Charles Tabor, "Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law." *Louisiana Law Review* 68, no. 2 (2008): 549-603.

In the CISG, there is a provision that excuses the debtor from his obligations if he can give valid arguments that he cannot fulfill his obligations due to an impediment beyond his control and his incapability to predict it at the time of the conclusion of the agreement or to be avoided or overcome it or its consequences. This situation is mentioned in Article 79 CISG. Even though the terminology of force majeure is not explicitly mentioned in Article 79 CISG, there is no debate among legal scholars that such provisions can be applied when performing a contract is impossible. However, there is a debate among legal scholars if there is a question regarding whether Article 79 CISG can be applied in the event of a change of circumstances or hardship situations.

The notion that Article 79 CISG can only be implemented in force majeure based its argument on the history of that provision. Article 79 CISG is stricter than Article 74 ULIS, the previous version of Article 79 CISG. The idea that Article 79 CISG contains a change of circumstances or hardship situations was rejected. On the other hand, another argument that supports the implementation of Article 79 CISG in change of circumstances or hardship situations based its argument on the concept of the impediment in the performance of the contract and the reasonable overcoming of its consequences for the party who suffered those situations. When the contract performance becomes burdensome, demanding obligations from the disadvantaged party is inappropriate. [24]

A similar situation occurred in Indonesia. The provision regarding force majeure as regulated in Articles 1244 and 1245 of the KUHPer contains no limitations for the debtor to defend himself when implementing the contract is impossible. Article 1245 of the KUHPer contains force majeure regulation. This article requires an impediment of performance to be excused for force majeure.[25] Legal scholars have two interpretations regarding the impediment to the debtor's performance. Firstly, the impediment of performance is being narrowly interpreted as the impossibility of performance. Secondly, elements of the impediment to performance are being extensively interpreted, including the situations of change of circumstances or hardship.

Furthermore, two theories are usually used to explain the force majeure situation. The first theory is the objective/absolute theory and the second one is the subjective/relative theory. According to the objective theory, the debtor can

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[24] Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contract*, pp. 192-193.

[25] Article 1245 KUH Perdata mentions: The debtor needs not compensate for costs, damages or interests, if an act of God or an accident prevented him from giving or doing an obligation, or because of such reasons he committed a prohibited act.

only claim for a force majeure defense if anybody in the same situation as the debtor cannot fulfill his or her obligations. In this case, the impossibility of fulfilling the obligations is absolute; nobody will be able to do that.[26] In contrast, the subjective theory calculates the subjective conditions of the debtor. Under this theory, a force majeure situation is when the debtor has made his best effort per the prevailing societal standard relevant to the agreement.[27]

Two of the most distinguished legal scholars in Indonesian civil law, Subekti and Mariam Darus Badrulzaman stated in their book that a subjective or relative force majeure occurs when the contract performance is still possible but very costly or requires a massive sacrifice from the debtor.[28]. Therefore, in this theory, propriety or fairness becomes a standard to determine whether the debtors can be accused of fulfilling his or her obligations. Regardless of the type of force majeure, the event has to be beyond the reasonable control of the disadvantaged party, and the disadvantaged party must take steps to mitigate such event from occurring, and the event impeds the ability of the disadvantaged party.[29] Indonesia's relative force majeure theory is very similar to the change of circumstances or hardship doctrine in other countries. There are two reasons why this theory is widespread and still used by disadvantaged parties, courts, and legal scholars. First, they, especially the disadvantaged parties, are unfamiliar with the change of circumstances doctrine. Second, legal scholars have promoted this theory since the 1980s to cope with the absence of the changes of circumstances doctrine in KUHPer.

In 1997, Indonesia had already ratified *the Unidroit Principles in Commercial Contract* (UPICC), which has a special section regarding hardship. Based on Article 6.2.3. of the UPICC which regulates that hardship is a situation where an event occurs that fundamentally changes the balance of the contract and increases the cost of performing the contract or decreases in the value of the contract, and the event:

1. occurs after the contract is concluded;
2. cannot be reasonably foreseen by the disadvantaged party before signing the contract;

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[26] J. Satrio, *Hukum Perikatan: Perikatan Pada Umumnya*, Bandung: Alumni, 1999, p. 254.

[27] Satrio, p. 263.

[28] R. Subekti. *Pokok-Pokok Hukum Perdata.* Jakarta: Intermasa, 1982, p. 150; Mariam Darus Badrulzaman. *Kitab Undang-Undang Hukum Perdata: Buku III, tentang Hukum Perikatan dengan Penjelasan*, Bandung: Alumni, 1983, p. 37.

[29] Muskibah Muskibah, et al. "Force Majeure During COVID-19 Outbreaks: Case of the Cancellation and Termination of Government Construction Contracts." *Journal of Indonesian Legal Studies* 8, no. 1 (2023): 129-158.

3. beyond the control of the disadvantaged party;
4. the event's risk is beyond the disadvantaged party's assumptions.

From the provisions above, it can be understood that this event does not result in the performance of the contract being impossible, but rather the cost of implementing the performance becomes very expensive, or the value of the contra performance received decreases so much that it is no longer economically beneficial for the disadvantaged party to continue the contract without an addendum.

What distinguishes force majeure from hardship is the impact of the unforeseen event. In a force majeure event, the event prevents the agreement's implementation, making the contract performance impossible or impeded. While in a hardship event, the implementation of the agreement is still possible. However, there is a fundamental change in the balance, so the agreement is no longer mutually beneficial for the parties. Because the agreement is no longer mutually beneficial, contract renegotiation is the main solution so that one party does not bear all the risk or loss. Conversely, in a force majeure event, the performance of the contract becomes impossible, so termination of the agreement is the solution. Thus, there is no change in the contractual balance where one party benefits while the other party is harmed, but what happens is an obstacle in performing the agreement. The obstacles in question are physical or legal obstacles. In comparison, economic obstacles in the form of changes in balance that the parties can still resolve through the renegotiation process are included in the concept of hardship. The obligation to renegotiate to restore the disturbed balance is not explicitly regulated in the provisions of force majeure, including in the KUHPer. Articles 1244 and 1245 of the KUHPer that regulate force majeure in Indonesia do not regulate the existence of economic obstacles that require the parties to renegotiate or the right of the disadvantaged party to request adjustments to the terms of the agreement to the judge. The absence of this regulation causes requests for renegotiation or adjustments to the terms of the agreement to the judge by the disadvantaged party not always to produce results.

Another thing that differentiates force majeure from hardship is regarding the party who is harmed. In force majeure, the party who suffers losses due to a force majeure event is the debtor. Therefore, force majeure becomes a defense for the debtor in default to be released from the obligation to pay compensation. Meanwhile, in hardship, the disadvantaged party can occur to the creditor because the value of the counter-performance that should have been received is significantly diminished. During the COVID-19 pandemic, for example, shopping centers (malls) generally experienced a decline in the number of

visitors due to large-scale social restrictions implemented by the government to avoid the spread of the COVID-19 virus. In such a situation, it is not appropriate or fair if the shopping center manager continues to apply the usual room rental to entrepreneurs according to the rates previously agreed in the agreement. It is necessary to adjust the terms of the agreement (renegotiation) to reduce room rental rates because the room rental benefits received by tenants have remarkably decreased.

Here, it can be understood that the doctrine of force majeure and a change of circumstances have several similarities, namely that they are events that:

1. occur after the signing of the contract (after the contract being concluded);
2. cannot be reasonably predicted by the disadvantaged party before signing the contract;
3. beyond the control/error of the disadvantaged party so that the disadvantaged party still needs to prove its anticipation and mitigation efforts;

And furthermore, the differences are:

1. Force majeure results in the impossibility of performance, either temporary or permanent.[30] A change of circumstances results in the cost of performing the contract becoming very expensive (costly) or the value of the counter-performance being greatly diminished for the disadvantaged party, changing the balance of the contract significantly.[31]
2. Force majeure suspends the performance of the contract if the force majeure event is temporary, or terminates the agreement if the force majeure event is permanent. While hardship or a change of circumstances gives the disadvantaged party the right to renegotiate to change the agreement, and if the parties do not reach an agreement, then:[32]
   a. the parties can terminate the agreement by mutual consent; or
   b. the disadvantaged party can file a lawsuit to ask the judge to amend the agreement or to cancel the agreement;

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[30] Joseph Perillo, "Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts." *Tulane Journal of International and Comparative Law* 5, no. 1 (1997): 5-28.

[31] Dionysios P. Flambouras, "The Doctrines of Impossibility of Performance and Clausula Rebus SIC Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law-A Comparative Analysis." *Pace International Law Review* 13, no. 2 (2001): 261-293.

[32] Anna Veneziano, "UNIDROIT Principles and CISG: change of circumstances and duty to renegotiate according to the Belgian Supreme Court." *Uniform Law Review* 15, no. 1 (2010): 137-149.

3. Force majeure causes physical or legal obstacles in performing the agreement, temporarily or permanently, so the agreement needs to be suspended or terminated. On the other hand, hardship or a change of circumstances results in a change in balance, so the parties need to renegotiate to restore balance by adjusting the terms of the agreement to the new circumstances.

B. The Fairness of Risk Distribution to All Parties

In a commercial contract, generally, the parties demand fair distributions of rights and obligations (commutative justice).[33] The fairness principle will be conflicted due to change of circumstances. The change of circumstances may give one party advantages and disadvantages to another. This situation would lead to an imbalance situation between one party to another. Therefore, the distribution of risks is needed to restore disequilibrium.[34]

Achieving commutative justice requires all parties to have the same value before and after the transaction.[35] Commutative justice does not guarantee that all parties will acquire the same value as the object or cost that has been paid. However, it will be based on the prevailing market value. Commutative justice may lead to a just price.

In an agreement, the fair cost does not guarantee that all parties will have the same advantages in a transaction. The object's value will be adjusted per the prevailing market values.[36] This indicates risks that each party should bear in an

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[33] Thomas Aquinas and James Gordley explain: '*the virtues of liberality and commutative (or corrective) justice constitute the two main ends of contracting*'. Furthermore, Aristotle explain: 'Liberality is a virtue exercised in the giving and taking of wealth, and especially in respect of giving…Commutative justice, on the other hand, applies to voluntary and involuntary transactions between persons and it requires that each party's holding the same value after the transaction as they were before it'. Petter Benson, "Contract", in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory*, 1st ed., USA, UK, Australia: Blackwell Publishing Ltd, 1996, p. 43.

[34] Disequilibrium refers to the unbalance of the parties' rights and obligations the contract. *See* Lorenzo Cotula. *Chapter 4 of Land Deals in Africa: The Economic Disequilibrium of The Contract: What Resources, in Exchange for What?,* London: International Institute for Environment and Development, 2011, p.21.

[35] Cotula.

[36] Raymond de Roover explains: 'Nor did they believe that the just price of goods was an intrinsic or stable property of them like their colour. They identified the just price with the price on a competitive market.' *See* Raymond de Roover, "The Concept of the Just Price and Economic Policy" *Journal of Economic History* 18, no. 4 (1958):418-434. Cited by James Gordley, "The Foreseeability Limitation on Liability in Contract" in Arthur

agreement. Because of the obligation to bear the risk, the equal condition agreed upon at the beginning of the agreement may change when the agreement is being implemented. All parties can anticipate that situation if they can predict what kind of risks might occur in the future. By anticipating the risks that may occur in the future, the risks that all parties should bear can be mitigated with the compensation that will be obtained by each party when the agreement has been agreed. Therefore, the equal condition may apply when the agreement is being implemented. Concerning the relationship between an unexpected event and the imbalance situation to all parties, James Gordley cited the theory of justice from Aristotle as follows:

> 'The virtue of justice can be subdivided into distributive justice (that which concerns the distribution of goods in a society) and commutative justice (that which requires equivalence of exchange of resources). For purposes of contract, commutative justice required that a contract party agree to give up goods or services, but only for a price that enriches neither of the parties. Equality of exchange is hall-mark of voluntary commutative justice. Thus, when an unexpected event occurs, it would be unfair to saddle the obligor with increased cost of performance if the contract price did not reflect the cost of assuming that risk. [37]

Based on this notion, implementing the doctrine of change of circumstances allows implementing an agreement as fair as possible by distributing the risks. The mechanism of risk distribution can be done with the negotiation process or the court sentences to adjust the agreement according to the new conditions that have been changed.

C. The Wide Implementation of the Change of Circumstances Doctrine

The economic crisis in Europe because of World War I and the strengthening of the good faith in an agreement created the necessity for the doctrine of change of circumstances, which was abandoned in the golden age of liberalism in the 19th Century. Germany was one of the initiators to implement the doctrine of change of circumstances after World War I based on the court

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Hartkamp *et.al.* (2011), *Toward a European Civil Code*, Nijmegen: Kluwer Law International BV, p. 709.

[37] C. Scott Pryor, "Clear Rules Still Produce Fuzzy Results: Impossibility in Indian Contract Law," *Arizona Journal of International and Comparative Law* 27, no. 1 (2010):1-30

sentences. The German Court utilized the principle of good faith in the case of a change of circumstances in an agreement as a general principle to exempt the *pacta sunt servanda* principle.

The exercise of the good faith principle as an exception to the *pacta sunt servanda* principle continued to apply until a German legal scholar, Oertman, gave a theoretical basis based on the doctrine of change of circumstances. This theory is called the lapse of the contract basis or *'wegfall der Geschaftsgrundlage.'* According to this theory, the Court may terminate a contract or adjust the agreement in the event of supervening disequilibrium. Supervening disequilibrium is the consequence of unexpected events when all parties in an agreement do not, explicitly or implicitly, bear the risks due to a change of circumstances.[38]

The theory of '*wegfall der Geschaftsgrundlage*' is the development from the theory of assumption in agreement that was rejected to be adopted in the German Civil Code/BGB 1900.[39] At that time, a German legal scholar, Bernhard Windscheids, proposed the theory of contractual assumption (*Lehre von der Voraussetzung*) based on the doctrine of change of circumstances. According to Windscheids, when making a contract, all parties should assume that the intended legal consequences should only occur under certain circumstances.[40] Because of this, when the theory was needed again since Germany suffered a crisis due to World War I, Windscheids said, 'Thrown out by the door…it will always re-enter through the window.'[41]

The doctrine of change of circumstances was introduced on September 21, 1920.[42] In this case, the Court granted the lawsuit from the Plaintiff, who wanted a price adjustment to the ongoing lease agreement. The revised agreement had a clause that the Plaintiff would provide steam for industrial purposes. Due to the increasing price of coal and wage, on September 1, 1917, the Plaintiff had spent 89,000 Marks until July 1919, while the rent cost was only 9,362 Marks. According to this, the Plaintiff asked to adjust the price, or the agreement should be terminated and the Plaintiff will not provide the steam anymore. The Court rejected the complaint in the first level of the court

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[38] Cristoph Brunner. *Force Majeure and Hardship under General Contract Principles*, AH Alphen aan den Rijn: Kluwer Law International BV, 2009, p. 79.

[39] Hay, "Frustration and Its Solution in German Law", pp. 358-359.

[40] Zweigert and Kotz, *Introduction of Comparative Law*, p. 520.

[41] Tabor, "Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law", p. 558

[42] R.G.Z. 100, 129 (21 September 1920) in Gordley, and Von Mehren. *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, pp. 512-513.

sentence and the Court of Appeals. However, at the cassation level, the complaint was granted.

Another case of this doctrine can be seen in the ruling from *Reichsgericht* on November 29, 1921.[43] This case started when the Plaintiff bought 10 Tons of iron cable from the Defendant. When the Defendant failed to fulfill his or her obligation, the Plaintiff claimed compensation because of the breach of the contract. The Defendant won the case in the first court sentence, but in the Court of Appeals, the sentence said the contrary. At the cassation level, *Reichsgericht* said in the same line as the Court in the first level. In its sentence, *Reichsgericht* mentioned as follows:

> 'If the events so change values, especially the value of money, that obligee would receive for his performance a counter performance that no longer comes even near to containing the equivalent that the contract had contemplated. The obligor violates the requirement of good faith when he insists upon the performance under such circumstances.'[44]

After the doctrine of change of circumstances was implemented through jurisprudence in 2002, this doctrine was included in the German Civil Code (BGB). It is mentioned in Article 313 BGB with the title: 'Wegfall atau Storung der Geshaftgrundlage.' Article 313 BGB mentioned that:[45]

> (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration;
> (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect;

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[43] R.G.Z. 103, 177 (29 November 1921) in Gordley, and Von Mehren, pp. 515-516.

[44] Gordley, and Von Mehren.

[45] Federal Ministry of Justice, "German Civil of Code," 2021. http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1094.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

The same condition also occurred in the Netherlands. After implementing the change of circumstances doctrine through the court sentences, the Dutch Court included the doctrine in the NDCC in 1992. As mentioned in Article 6:258, as follows:

(1) Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect;

(2) The modification or the setting aside shall not pronounce to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if this follows from the nature of the contract; (3) For the purpose of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party.'[46]

Before it was regulated in NDCC, the doctrine of change of circumstances was first applied to a court sentence. The case was tried before the Amsterdam Court of Appeal (*Hof Amsterdam*) in 1982 and was known as the case of KBB (*KBB case*).[47] KBB is a retail company (a chain store business) that entered an agreement with the Municipality of Utrecht to construct magnificent buildings and a shopping center called the *Bijenjkorf Store.* The preparation of the building site took several years. After all the preparations, KBB's desire to continue the contract weakened. For several years, Utrecht's population growth was lower than expected. General purchasing power also declined.

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[46] Warendorf, Hans. *Netherlands Antilles Civil Code.* Kluwer Law International, 2005, p 714.

[47] KBB Case, nr.314/81 Date 6 May 1982. As quoted by P. Abas, *Rebus Sic Stantibus*, Deventer: Kluwer, 1989, pp. 202-205. Cited back by Jaap Hijma, "The Role of the Court and of the Parties in Adapting a Contract to Unforeseen Circumstances" in A.G. Casterman, *et.al., Foreseen and Unforeseen Circumstances,* Deventer: Kluwer BV, 2012, pp. 20-21.

Communities with high purchasing power left the city while many shopping centers (shopping malls) had been established. At that time, constructing large-scale buildings would be a disadvantage to KBB. Utrecht municipal government believed that such a problematic circumstance was a common risk for a company.

The first level court (district court) ruled that KBB was bound by the contract (*pacta sunt servanda*). However, the appellate Court (Court of Appeal) observed that based on the principles of reasonableness and fairness, the municipal Government should not demand the performance of the agreement without any contract adjustment. The Court considered that the municipal Government should not demand the contract performance following the original agreement. However, it could only insist on the performance of the contract partially. The agreement bound KBB to explore other possibilities and contract performance options to implement a favorable new agreement for both parties. Finally, the Court ordered the parties to seek possibilities to enable KBB to carry out the agreement. A few years later, a more straightforward *Utrecht Bijenkorf Store* was officially opened.

In contrast to Germany and the Netherlands, the application of the doctrine of change of circumstances in France is not preceded by court sentences, especially in civil law. French Supreme Court's reasoning to reject a debtor's plea based on the doctrine of change of circumstances was reflected in the case of *Canal de Craponne*. In that case, the *Cour de Cassation* overturned the verdict of the Aix Court of Appeals that previously ruled price adjustments due to changes in economic conditions of the contract, which was adequate for 300 years at a fixed price. *Cour de Cassation* overruled the lower court sentence under Article 1134 of the French Civil Code. Under this provision, an agreement is binding upon the parties as law. It is considered that a court is not competent to adjust the terms of the agreement or to fill in the gap based on the principle of justice or good faith. Thus, according to the *Cour de Cassation*, the contract remained binding even though it was contrary to the principle of justice.

In another case, the *Cour de Cassation* also overruled the decision of the Paris Court of Appeal (*Cour d'appel of Paris*). Paris Court of Appeal made price adjustments due to changes in economic conditions that meet the principles of justice (*un juste prix*). However, the *Cour de Cassation* repealed the decision. In its December 18, 1972 decision, *Cour de Cassation* stated, 'the court cannot,

based on equity or any other grounds, modify the agreements concluded lawfully."[48]

A different situation occurred at the French Administrative Court. The French Supreme Administrative Court (*Conseil d'Etat*) implemented the doctrine of change of circumstances regarding the case of *Gaz de Bordeaux*. In the case of *Gaz de Bordeaux*,[49] Bordeaux City received gas supply from private companies based on a concession agreement for most city dwellers. The contract was made in 1914 and was valid for 30 years. After the First World War, the price of coal increased from 35 to 117 *francs* per ton.

Although the first-level Court rejected the lawsuit, the Court of Final Appeal (*Conseil d'Etat*) ruled in favor of the Plaintiff. The Court considered that due to war, coal prices soared very high, resulting in the price set in the contract being considered inadequate due to the change in economic conditions. Therefore, the private company was entitled to compensation from the city of Bordeaux. This is done by *Counsel d' Etat* regarded as a contract adjustment (contract modification). This case became a precedent for many cases in the field of administration.

Although in the field of civil law, Cour de Cassation refused to apply the doctrine of change of circumstances, in the end, the doctrine was adopted in the amendment of the French Civil Code in Article 1195 as follows:

> (1) Where a change of circumstances that was unforeseeable at the time of the contract's conclusion renders exceedingly onerous performance for a party that had not accepted to assume such risk, the party may ask the other party to renegotiate the contract. It shall continue to perform its obligations during renegotiation.
> (2) In the event of refusal or failure of the renegotiation, the parties may agree to terminate the contract, on a date and on terms determined by them, or jointly apply to a judge to proceed with its adaptation. Failing agreement within a reasonable period of

[48] Bull. Civ., IV N. 339, p. 266, as cited by Ghestin (1990) p. 127, recited by Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contract*, p. 47.

[49] Egijidus Branauskas and Paulius Zapolskis, "The Effect of Change in Circumstances on the Performance of Contract," *Jurisprudencija: Mokslo Darbu Zurnalas*, 118, no. 4 (2009): 197-216..

time, the judge may, upon a party's request, revise the contract or terminate it, on the date and terms he decides.[50]

Legal Basis of Implementing the Doctrine of Change of Circumstances by Courts in Indonesia

Courts hold a significant role in law enforcement and justice. As the law is broadly defined to include written and unwritten laws, courts may not refuse to adjudicate a case due to the absence of written legal provisions or unclear governing provisions. Under the provisions of Article 10 paragraph (1) Law No. 48 Year 2009 regarding Judicial Power,[51] judges must create a law if the law is absent and find the law if the law needs to be clarified. According to the Law, the function of the Court becomes essential not only to implement the provisions of the law but also to create law and find law through its sentences. Court sentences that became precedents become important sources of law in addition to law provisions.

As elaborated above, there is no specific provision in the Indonesian Civil Code regarding applying the doctrine of change of circumstances. However, the Court may not reject to adjudicate a case brought before the Court due to the absence of legal provisions or unclear provisions. The principle of justice becomes the primary foundation for judges in deciding cases brought before the Court, it is needed to balance imperfections in the application of law.[52]

A. Some Court Sentences Do Not Reject the Force Majeure Defense in the Case of a Change of Circumstances

Although historically, the doctrine of force majeure is different from the doctrine of change of circumstances, in countries where there are no special arrangements on the doctrine of change of circumstances, such as Indonesia, force majeure doctrine can be used as a legal basis for the disadvantaged party

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[50] Trans-Lex Law Research, "French Civil Code in 2016," (2016) https://www.trans-lex.org/601101.

[51] Article 10 paragraph (1) of Law No. 48 of 2009 states, "The court is forbidden to examine, hear and decide a case filed on the grounds that the law does not exist or is unclear, but is obliged to check and adjudicate." Indonesia, *Law regarding Judicial Authority*, Law No. 48 of 2009, Gazette No. 157, Additional State Gazette No. 5076 (Indonesia, 2009).

[52] *See* Markus Hage and Panggih Kusuma Ningrum, "Corrective Justice and Its Significance on The Private Law," *Journal of Indonesian Legal Studies*, 7, no. 1 (2022): 1-30.

as a result of change of circumstances to defend itself against nonperformance of contract or request for contract adjustment. This occurs when the creditor or the party that benefits from the incident refuses to adjust the terms of the agreement or terminate the agreement due to such events.

The Court's policy that did not reject the arguments of the debtor or the disadvantaged party due to a change of circumstances that is based on force majeure provision was reflected in the case of *Pertamina v. PT Seno Wahana Utama*, with court sentence No.237/Pdt.G/2003/PN.JKT.PST dated December 10, 2003. The Supreme Court subsequently upheld this sentence in its award No. 1787K/PDT/2005 on May 28, 2008. In the appellate Court, the Appellant's request was not accepted not because of the rejection of the Applicant's arguments but because the periods of appeal expired. This is consistent with Jakarta High Court Sentence No. 267/PDT/2004/PT.DKI dated September 1, 2004.

In the case above, the Court overruled the Plaintiff's lawsuit that claimed the Defendant had committed a breach of contract. In a counterclaim filed by the Defendant, the Court ruled in favor partially and declared that the Plaintiff had committed a tort against the contract and the Defendant. Therefore, the Court sentenced the Plaintiff to review the project's economics and finalize the amendment of the terms of the agreement as mutually agreed by both parties. The Court also sentenced the Plaintiff to reimburse the guarantee fee that it had disbursed.

The case began when PT Pertamina, as the Plaintiff, entered into a Cooperation Agreement on the Construction, Operation and Management of the Gas Tower Building with PT Seno Wahana Utama (PT SWU) as the Defendant on August 9, 1996. PT Pertamina had carried out its obligations by handing over land used for the construction of buildings and submitted the required design on May 1, 1998. However, due to changes in economic conditions resulting from the crisis, which caused soaring and unstable materials prices, PT WSU, as the Defendant, suspended the project's construction.

As a follow-up of the suspension of project construction, both parties carried out negotiations and they agreed to continue the project construction by adjusting the agreement after reviewing the economics study and changing related provisions in the agreement, including extending the bank guarantee.

However, before implementing all negotiation resolutions, PT Pertamina claimed that PT WSU had breached the contract and withdrew the bank guarantee. Due to this nonperformance by PT WSU, PT Pertamina filed a lawsuit to the Court. In its defense against the nonperformance lawsuit, PT WSU defended itself on the grounds of force majeure.

In its legal reasoning, the Central Jakarta District Court stated that even though the financial crisis was not a condition of force majeure, the situation was quite inhibiting economic activity and the development of Indonesia and such a situation was generally applicable. Therefore, it can be used as an argument to suspend the Pertamina Gas Tower Building construction that the Defendant carried out.

Based on the above judges' considerations, although the judges understood that the change of circumstances caused by the financial crisis was not a force majeure, the judges accepted the Defendant's defense. They stated that the price increase was due to the financial crisis as force majeure. The judges broadly understood impediments in performing the contract as economic impediments. Hence, the Defendant was allowed to adjust the terms of the agreement to restore the equilibrium. The Plaintiff's action that rejected the renegotiation resolution's implementation was considered an act against the law (tort).

In the case of *Desilia Santoso v. PT Pioneers Grialoka, Teddy Wibowo Wong, Ong Ju Chi*, Court ruling No. 125 K / Pdt / 2007 dated May 13, 2007, it was also confirmed the defense of the Defendant that stated the financial crisis as a force majeure, freeing the defense of claims for compensation due to delaying its performance of the contract.

His case began when the father of the Plaintiffs entered a sale and purchase agreement with the Defendant to buy the Taman Gloria apartment unit located on Kyai Tapa Street No. 215 West Jakarta. The agreement was made on November 6, 1996. The agreed price was US$ 36,017, with advance payment set at 5% of the price or US$ 1,801 and the rest was paid over 20 times installments. Although the installments had been paid in full, the Defendant could not finish the apartment construction on time, no later than December 18, 1998. In its defense, the Defendant, among others, stated that the delay in the delivery of apartment units was due to force majeure in the form of riots and monetary crisis. Although the purchase price was specified in the form of dollars, the payment was converted into rupiah when the monetary crisis that resulted in the decline of rupiah value against the dollar resulted in the Defendant finding it challenging to complete its performance following the specified time.

The West Jakarta District Court, in its award No. 319/PDT.G/2005/PN.JKT.BAR, dated December 29, 2005, partially granted the Plaintiff's claim. In its legal considerations, the West Jakarta District Court stated that although the riot and monetary crisis occurred in 1998, the riots and financial crisis ended five years ago. However, there are no signs from the Defendant to deliver its performance. On the appellate court level, Jakarta High

Court, with its award No. 169/PDT/2006/PT.DKI dated July 31, 2006, revoked the West Jakarta District Court sentence. Jakarta High Court justified the Defendant's defense that the late delivery of the apartment units was caused by force majeure in the form of a public riot and monetary crisis. The Supreme Court later upheld the award No. 125 K/Pdt/2007 dated May 13, 2007. Thus, either physical or objective obstacles in the form of riots or economic obstacles in the financial crisis can be used as an argument for force majeure.

Aside from using the doctrine of change of circumstances based on force majeure situation as a defense of the Defendant, it can also be used as a basis for the Plaintiff to demand adjustment terms of the agreement. This can be inferred from the sentence of the case between *Ir. Adji BEP Satmoko v. Palalawan Local Government c.q. Head of Settlement and Regional Infrastructure c.q. Commitment Officer of Religious Facility Infrastructure Development, Chairman of Regional Representatives Council.*

In such case, Palalawan District Court, in its sentence No. 07/PDT.G/2012/PN.Plw awarded the Plaintiff that demanded the Defendant to adjust the price/escalation caused by force majeure such as the enactment of the Regulation of the Minister of Energy and Mineral Resources (ESDM) No. 16 2008 regarding Retail Prices of Fuel Oil for Kerosene, *Premium* Gasoline and Diesel Fuel to Customers, Small Business, Fisheries Business, Transportation and General Services. Such government policy led to a rise in the prices of goods, equipment and wages. Pekan Baru High Court upheld the district court award in its decision No. 38/Pdt/2013/PT.R. and the Supreme Court in its sentence No. 2817K/Pdt/2013.

In the case above, the Court declared Defendants to be in default, caused by not adjusting the price/escalation due to force majeure in the form of the issuance of government policy that resulted in the rising costs of delivery performance. In the agreement agreed upon by the parties, there was a provision that the government or local government policy in the monetary field was considered force majeure, which can be the basis for the Plaintiff to demand an increase in the price/escalation.

During the COVID-19 pandemic, there was also a court sentence confirming the extension of the contract due to the economic impact of the COVID-19 virus as force majeure. In this case, there is no physical or legal impediment for the Defendant to perform, making it impossible. However, the economic difficulties experienced by the Defendants due to the impact of the COVID-19 pandemic became the basis for the judges to decide the case as force majeure and make contract adjustments. This is as stated in the sentence of the Tebo District Court No. 11/Pdt.G/2021/PN.Mrt dated June 24, 2021,

between *Mujabir, Siti Rohayati Misbakhul Bisri v. Management of the Neo Mitra Usaha Cooperative.*

The case began when the Plaintiffs invested their capital in the Neo Mitra Usaha Cooperative, which the Defendant managed. The Plaintiffs were promised a monthly profit sharing and a return of capital after the contract period ended, which was 60 months. The monthly profit sharing is transferred automatically to the e-wallet of the Plaintiffs. However, during the COVID-19 pandemic, the Plaintiffs' e-wallet balances could not be withdrawn. The Plaintiffs were also asked to sign the minutes of contract extension by the Defendants. After one year, there was no certainty about the capital investment paid to the Defendant and the Plaintiffs filed a lawsuit through the Tebo District Court.

In their sentence, the judges stated that the Defendant was not in default due to force majeure. The judges stated that the COVID-19 pandemic was a non-natural disaster that had implications for socio-economic aspects in Indonesia. One of the impacts caused by the COVID-19 pandemic is the decline in national economic conditions. This also impacted the business units managed by the Defendant due to the drastic decline in the public's purchasing power of the goods and services offered and some even stopped. Therefore, no profit can be shared by the Defendant with the Plaintiffs.

In other cases, the judge also made contract adjustments due to the COVID-19 pandemic as force majeure. This is as stated in the decision No. 10/Pdt.G.S/2020/PN Pati between *Ayuk Puspita Deviana Sari (PT BPR Karticentra Artha Semarang branch) v. Fabien Firmansyah* whom the Pati District Court has decided.

The case began when the Defendant received credit facilities from the Plaintiff in the amount of IDR300,000,000,00 for a period of 3 months as stated in contract No. 201/KR/BPR-KCA/KP/VII/2019. The Defendant must pay in installments of IDR6,000,000,00 per month until his obligations are completed. In his defense, the Defendant stated that his business was directly affected by the COVID-19 pandemic, so he could not complete his obligations to the Plaintiff. Furthermore, the Defendant stated that prior to the COVID-19 pandemic, the Defendant had carried out his obligations according to the terms of the contract.

In its sentence, the judge stated that the Defendant was in default. However, the judge stated that the contract's obligation to pay the penalty was too high. Furthermore, the judge stated that to fulfill a sense of justice, since the Defendant's business is currently being affected by COVID-19, the judge

reduced the obligation to pay the penalty. The Defendant is only required to pay half of the penalty obligation.

In principle, the two cases mentioned above apply the doctrine of changing circumstances, which, based on the consideration that there are no physical or legal impediments to carrying out the contract. There are no impediments to making payments. What occurred was the decline in counter-performances received by creditors due to the COVID 19 pandemic. Loans or investments provided could no longer generate profits due to the drastic decline in people's purchasing power.

B. Court to Adjust Terms of Agreement Based on the Principle of Justice

Although there are no specific rules regarding the doctrine of changes in circumstances, the Court nevertheless adjusts the terms of the agreement due to a change of circumstances. This is exercised by the court even though it is not the parties' primary claim in dispute. This is reflected in some of the following court sentences.

In a case between *Napu Daega and Dueng Daega v. Ake, Haminsi and Masa'ud*, the Supreme Court considered changes in currency value about compensation over the mortgaged land.[53] In this case, the Respondent submitted an appeal, or the original Plaintiff had sued the Cassation Applicant or the original Defendants in the Great Assembly of Bolaang Mongondow that essentially requested that a plot of land that was used to be mortgaged by Plaintiffs be released from the mortgage. In his defense, the Defendant denied the Plaintiff's argument and stated that the land is a legacy of his ancestors.

In the trial, it was proved that the mortgage had taken place, so the Great Assembly decided in favor of the Plaintiff's demands. Officials of the Sulawesi Governor also affirmed the court award. On the cassation level, the Supreme Court's sentence corrected the Great Assembly by distributing the risk of price changes. In its legal consideration, the Supreme Court declared changes in circumstances on the exchange rate prevailing at the time of the mortgaged land and at the time of the appeal. At the time of the mortgage in 1943, the gold value was set at IDR 2,00 per gram; meanwhile, when the appeal was filed in 1954, the gold value was set at IDR 60,00 per gram. Since there had been a rise in value by 30 times, the Supreme Court judges considered that it was fair that each of the parties was required to bear the risk of value changes so that the

[53] *Napu Daega and Dueng Daega v. Ake, Haminsi and Masa'ud*, Supreme Court Decision No. 26 K /Sip /1955.

mortgaged land had to be redeemed 15 times the money it was first mortgaged hence the value prevailing at the time of the appeal was 15 × IDR 50,00 = IDR 750,00.

The case of *Diwana br Harahap v. Houw Eng Nio* also reflected a similar decision. In this case, the Supreme Court also distributed the risk of price increases in their loan agreement.[54] In this case, the Plaintiff filed a lawsuit against the Defendant to Padangsidempuan District Court. The Defendant borrowed money from the Plaintiff amounting to IDR 315,000,00 with a promise that the Defendant would pay back the loan no later than one month with profits from trading the money as much as 7% a month or IDR 22,050,00. It turned out that the Defendant did not pay back the loan and no promised profit was given.

In its decision, Padangsidempuan District Court partially granted the Plaintiff's lawsuit and sentenced the Defendant to pay its debts amounting to IDR 315,000,00 plus interest of 6% a year. Medan High Court later amended the court ruling that sentenced the Defendant to pay its debts of IDR 315,000,00 adjusted to the new currency in circulation plus interest at 7% per month. On appeal, the Supreme Court repealed the cassation motion filed by the Plaintiff and corrected the Medan High Court ruling to distribute the risk of the price change. In January 1962, the gold value was set at Rp 330,00 and at the time of cassation, the gold value was set at IDR 650,00. Based on this change of value on the gold standard, the amount that the Defendant must pay to the Plaintiff should be ½ × IDR 315,000,00 × IDR 650,00 = IDR 102,375,000,00

In the case of *Luther Dapu v. Paul Karundeng*, the Supreme Court distributed the risk of price changes to reimbursement obligations of cloves price owed by the Defendant.[55] In this case, the Plaintiff filed a lawsuit against the Defendant in Manado District Court. The Plaintiff claimed that he had purchased three plots of land for IDR 23.000,00. Both parties agreed that the Defendant might buy back the land with payment in the form of dried and clean clove as much as 1,200 kg no later than August 1958. The Plaintiff also had purchased 1,500 kg of cloves, but the Defendant did not deliver them. Thus, the total cloves the Defendant should deliver was 1200 kg + 1500 = 2700 kg. Since the Defendant had delivered 50 kg of cloves, the Defendant still had to deliver 2,650 kg.

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[54] *Diwana br Harahap v. Houw Eng Nio*, Supreme Court Decision No. 57 K/Sip/1968.

[55] *Luther Dapu v. Paul Karundeng*, Supreme Court Decision No. 74 K/SIP/1969.

In its decision, the Manado District Court partially granted the Plaintiff's claim and sentenced the Defendant to deliver as much as 2,650 kg of dried clove or replace them with cash amounting to IDR 2.65 million. In the appeal, the court ruling was upheld by Makassar High Court. At the cassation level, the Supreme Court corrected compensation money for clove prices by referring to gold value and distributing the risk of price changes to both parties. The price of 1 gram of gold in 1963 was IDR 1,800, 00 whereas at the time the appeal was submitted, the value was at IDR 600,00 and the cash compensation to be paid was ½ × IDR 2.65 million / 1,800 × IDR 600,00 = IDR 441,666.66.

In the case of *Jatimah v. Koesbandi R. and R. Soemoprajitno*, the Supreme Court imposed a risk to both parties in their purchase agreement due to price changes.[56] The case began when the Plaintiff purchased a plot of land and building from the Defendant I in March 1952 for IDR 8,000,00. In the purchase agreement, it was agreed that installments might have payment and if the Plaintiff had paid half of the price, the Plaintiff would no longer need to pay rent on the land and the house he lived other than that the land and the house would be handed over to the Plaintiff. However, although the Plaintiff had paid IDR 6,700,00, the Defendant I did not want to give up the land and the purchased house. Instead, he sold it to the Defendant II. As a result of this sale, the Plaintiff was asked to pay the rent to the Defendant II as the new owner.

In its decision, Surabaya District Court rejected the Plaintiff and the Defendant in favor of the counterclaim filed by the Defendant by requiring the Plaintiff to pay the rent behind. The Surabaya High Court then upheld the Surabaya District Court ruling. On the cassation level, the Supreme Court decided in favor of the Plaintiff's request and revoked Surabaya District Court and Surabaya High Court. Nevertheless, the Supreme Court required the Plaintiff to pay the rest of the house purchase price of IDR 1,300,00 by imposing the risk of price changes on both sides. The price of gold in 1953 was IDR 37,00 and at the time of the cassation was IDR 500,00. Hence, the original Plaintiff should pay ½ x 1,300 / 37 x IDR 500,00 = IDR 8,733.50.

Based on the cases above, the courts in Indonesia have long applied the doctrine of change of circumstances. The risk of currency changes becomes the contracting parties' shared responsibility. Each party is to bear half of the change in value that occurs. The basic principle of fairness takes into consideration the judge in order to share the risk. The application of the principle of justice in

[56] *Jatimah v. Koesbandi R. and R. Soemoprajitno*, Supreme Court Decision No. 475 K/SIP/1970.

order to share the risk due to the change of circumstances can be justified based on the following considerations:

First, judges are obligated to explore, follow and understand legal values and a sense of justice in society. It is stated in Article 5 (1) of Law No. 48 Year 2009 regarding Judicial Authority. Elucidation of the article states that this provision is intended so that the court sentence is under the law and a sense of justice in society. Thus, the principle of fairness becomes essential for the judge to decide the case brought to the court.[57] The judge should be more than just the statutory law enforcer in deciding the case. Justice is an important basis for the judge in deciding the case. The judge shall explore the values that live in the community in the event there are no statutory provisions that govern them.

Second, in legal proceedings, plaintiffs generally request judges to decide the fairest (*ex aequo et bono*/what is fair and just).[58] These claims are alternative or subsidiary if the primary claims are unmet. With this alternative claim, the judges can decide cases based on the principle of fairness. Based on that, other than as required by law, the judge must decide the case based on fairness and equitable principles, and in a good conscience,[59] because it is claimed or requested by the parties in dispute.

Third, there is a close relationship between the principle of justice and the principle of good faith, as outlined in paragraph 3 of Article 1338 of the Indonesian Civil Code.[60] Professor Subekti defined good faith in the performance of an agreement as propriety, which is a good assessment of the actions of a party in implementing what has been promised.[61] Based on this, good faith in the performance of the agreement uses external standards or

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[57] Equality before the law is the basis of the fairness principle in the judicial process. In making decisions, judges must pay attention to formal procedural aspects along with universal elements, which include justice and humanity. Rodiyah Rodiyah, Siti Hafsyah Idris, and Robert Brian Smith. "Mainstreaming Justice in the Establishment of Laws and Regulations Process: Comparing Case in Indonesia, Malaysia, and Australia." *Journal of Indonesian Legal Studies* 8, no. 1 (2023): 333-378.

[58] In Indonesia, ex aequo et bono is translated as "*demi keadilan dan kepatutan*," *see* Tan Kamello, "Ex Aequo Et Bono dalam Penyelesaian Kontrak Bisnis: Perspektif KUHPer", Paper Presented at the 43rd BANI Anniversary National Seminar on the Application of the Ex Aequo Et Bono Principle in Adjudicating Arbitration Cases in Indonesia, 24 November 2020.

[59] Mohsen Mohebi, *The International Law Character of the Iran-United States Tribunal*, Boston: The Hague, 1999, p. 115.

[60] Article 1338 paragraph (3) of the KUHPer states, "*Agreement must be implemented in good faith*".

[61] R. Subekti, *Aspek-Aspek Hukum Perikatan Nasional*, Bandung: PT. Citra Aditya Bakti, 1992, p. 18.

objectives to assess whether or not the parties have good faith in the performance of the agreement.

According to objective will, parties in agreement, rationally or objectively, expect equilibrium of performance in the reciprocal agreements (commutative justice). Performance by one of the parties in an agreement should be returned with an equal counter performance according to the first party's performance. Based on this, there is a close connection between the principle of equality or fairness along with the principle of good faith in an agreement as described by Siebert as follows:

> Contract law is not regarded as an avenue for the exercise of private autonomy complete abstracted from social elements. Rather, the contract is Viewed as possessing the social function of facilitating a meaningful exchange and balancing of interest. As such, the requirement that obligations be performed in and be subject to the standards of good faith is inherent in the concept of contract law.[62]

C. Confusion in the Courts Regarding a Change of Circumstances and the Force Majeure Doctrines

In the case between *PT Dua Cahaya Anugerah v. Made Sumartana & others,* the Plaintiff unilaterally terminated the Defendants' employment contracts to maintain their business, which suffered losses due to the issuance of government regulations regarding large-scale social restrictions to mitigate COVID-19.[63] The Plaintiff, a company in the tourism sector, was forced to close its operations for several months.[64] The Plaintiff argued that the unilateral termination was due to force majeure and asked the Court to declare COVID-19 as force majeure.[65] Meanwhile, according to the Defendants, COVID-19 is not force majeure because it does not result in the impossibility of performance and is supported by the statement of expert witnesses from the Defendants who argued that the obstacles experienced by the Plaintiff were hardship.[66]

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[62] Soergel Siebert,*Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: BGB, Kommentar,* 9th ed., I, Auflage: Kohlhammer, Section 242, Nos. 40-51 (1959), as cited in Hay, "Frustration and Its Solution in German Law", *The American Journal of Comparative Law*, p. 362.

[63] Denpasar District Court, *Court Decision No. 20/Pdt.Sus-PHI/2021/Pn.Dps*, p. 6.

[64] *Ibid.* pp. 8-9.

[65] *Ibid.* p. 13.

[66] *Ibid.* p. 35 and p. 69.

The Court recognized the doctrine of hardship with the ratification of UPICC in Indonesian regulations,[67] but the Court tended to accept COVID-19 as force majeure. The Court stated that the failure to include a pandemic as an example of force majeure in the employment agreement proved that the incident was unpredictable and, therefore, could be categorized as force majeure.[68] The Court divided force majeure into two types, namely, absolute and relative force majeure. It said that relative force majeure is another name for hardship, meaning that the Plaintiff can still carry out his obligations but with great sacrifice due to an unexpected event that changes the balance of the agreement or causes the implementation of the agreement to deviate from the initial assumption.[69] The Court provided an alternative consideration, namely stating that "the circumstances experienced by the Plaintiff constitute force majeure or at least "relative force majeure (hardship),"[70] and this hardship does not need to be proven because it is clear that other entrepreneurs around the world are experiencing difficulties like the Plaintiff.[71]

From the judge's considerations above, several conclusions can be drawn as follows:

First, the Court seems to have doubts about deciding the status of COVID-19 because it provides alternative considerations, namely "absolute force majeure or at least hardship (relative *overmacht*)." Generally, this kind of statement is submitted by the disputing parties, and the Court will determine which law is appropriate. Multiple considerations like this can confuse the readers regarding the status of COVID-19 in similar cases.

Second, the Court confuses the concept of force majeure with hardship because, in one paragraph, it states that COVID-19 is "force majeure or at least hardship (relative *overmacht*)" and describes the legal consequences of force majeure only, while in the next paragraph, it describes the legal consequences of hardship in general. This consideration is inconsistent because it provides two different legal consequences for the same two things (according to the Court): relative *overmacht* and hardship. In addition, although it states that COVID-19 is force majeure, the Court describes more of the Plaintiff's financial difficulties as an impact of COVID-19. This is because the Court considers hardship to be part of force majeure so that it has the same legal

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[67] *Ibid.* p. 35
[68] *Ibid.* p. 78.
[69] *Ibid.* p. 80.
[70] *Ibid.*
[71] *Ibid.* p. 79.

impact, only it has specific characteristics regarding its influence on the risk assumed by the debtor.

Third, the Court did not sufficiently analyze why the COVID-19 pandemic constitutes force majeure or hardship. In its decision, the force majeure argument was proven because the pandemic was not included in the force majeure clause, thus proving that the event was genuinely unexpected. The Court also did not elaborate in depth on the hardship experienced by the Plaintiff because the Court considered the financial difficulties experienced by companies in the event sector during the COVID-19 period to be a *notoir* fact. If the failure to include an event in the force majeure clause proves that the event could not have been predicted when the agreement was made, then by the same logic, the inclusion of an event in the force majeure clause causing the event cannot be considered as a force majeure because it could have been predicted in advance.

The disadvantaged party's failure to anticipate an event's probability to happen does not cause the event to become force majeure. In fact, COVID-19 is not the first pandemic in the world. Moreover, Indonesia has also been struck by some economic crises, especially the monetary crisis in 1998, which caused the rupiah exchange rate to decline from IDR2.000.00 per US$ 1 to IDR16.000.00 per dollar. This major event was not declared as force majeure. We cannot assume or expect that there will be no more pandemics or monetary crises in the future. The Plaintiff was still running his business and receiving income, although insignificant. Hence, that government policy did not result in the impossibility of performance but enabled the Plaintiff to carry out his obligations with great sacrifice, which did not reflect contractual equilibrium and basic assumptions when agreeing on the contract (hardship). This decision proves that there is confusion in understanding the difference between force majeure, hardship, and business risk in practice in Indonesia, which even occurs at the court level.

This confusion could have been avoided if Indonesia had provisions governing the application of the doctrine of change of circumstances or hardship. The obligation of the parties to renegotiate and the authority of the court to change the terms of the agreement at the request of the party who is harmed due to a change in circumstances that fundamentally alters the balance will provide a fair solution for the parties in accordance with the principle of good faith as stipulated in Article 1338 paragraph (3) of the KUHPer. In the case above, the employer, as the party affected by COVID-19, can renegotiate the employment contract or propose changes to the terms of the employment agreement to the judge in the form of a proposal to reduce working hours for

its employees as long as the company is still able or possible to operate. Reducing working hours will certainly ease the burden on the employer as the affected party in paying wages. On the other hand, the workers also bear the risk of loss by not receiving wages they would normally receive under normal conditions. This form of risk sharing is expected when applying the change of circumstances or hardship doctrine. Termination of the agreement is the last resort if the agreement is impossible to perform.

Limitation on the Doctrine of Change of Circumstances

As elaborated, parties in an agreement bear the predictable risk of events. Respective parties should bear the risk and responsibility of increases or decreases in an agreement's performance value if it could be predicted when the agreement is made. However, the increase or decrease in the value of the performance should be a joint responsibility if it is caused by unexpected events or changes in circumstances that are fundamental. The problem is to what extent increases or decreases in the value of performance should be deemed as changes in circumstances that are fundamental and can be used as a benchmark for the Court to distribute the risk.

Concerning the limitation of change of circumstances, the Supreme Court has set out a risk distribution despite changes in circumstances or decreases in the exchange rate only by 50.77%. This is reflected in Diwana br Harahap's case against Houw Eng Nio, as elaborated above. In this case, circumstances changed in the gold price of IDR330,00 on January 1962 to IDR 650,00 when cassation was filed. The price changes then become the basis for the Court to distribute the risk between the parties. Each party is to bear one-half (1/2) of the price changes that occurred.

Although it should become a general rule, changes in price by 50% can be used as the initial benchmark for the Court to investigate whether there is disequilibrium due to changes in circumstances. This is consistent with the concept of *lesion* (*laesio enormis*) as applicable in Roman law. This restriction would not apply to agreements for speculative or intended to bear the risk (*aleatory contract*). *Laesio enormis* is defined by Larry A. DiMatteo as the '*recission of contracts because of the inadequacy of the price based on a moral precept that there should be a fair exchange of values.*'[72]

[72] Eric Rasmusen, and Ian Ayres. "Mutual and Unilateral Mistake in Contract Law." *The Journal of Legal Studies* 22, no. 2 (1993): 309-343.

A change in price by 50% is a rational or objective benchmark to determine whether there has been a fundamental change in performance. This is based on the consideration that in commercial or reciprocal agreements, changes in price by 50% can result in a loss of 100% for the disadvantaged party because, in addition to causing damage to any of the parties, others benefit due to changes of circumstances. To give an idea, the following example can explain it:

A is a foreign exchange seller, while B is a buyer who intends to buy Dollars for his business interests. If B orders Dollars as much as 100 dollars with the price of 1 dollar = IDR 10.000,00 thus based on the principle of equilibrium, A is entitled to the money as much as IDR 1.000.000,00. If B has made payments against the Dollars ordered, but before the Dollars submitted by A, changes of circumstances so that the rupiah has strengthened by 50% or 1 Dollar = IDR 5.000,00, then A will bear a loss of 100%. It is because the counter-performance he received is IDR 1.000.000,00; he must carry out his performance as much as two times higher than before the change of circumstances; that is, he is originally required to submit 100 dollars, then it becomes 200 dollars after a change of circumstances (IDR1.000.000,00: IDR 5,000,00 = 200 Dollars).

Legislative Reform: Does Indonesia Need It?

Although the doctrine of changing circumstances has long been applied in Indonesia through court decisions, this is not enough to provide a complete understanding to business actors and judges who decide cases in court. This is because the consequences that arise do not physically or legally prevent the agreement's performance. In such circumstances, business actors and judges need clear rules on how the problem of changing circumstances should be resolved. Provisions of the law are needed that contain the elements that must be fulfilled by the disadvantaged party to demand changes to the terms of the agreement, either through a renegotiation process or through the mediation of a judge.

Albeit there is a provision in Article 1338 paragraph (3) of the KUHPer that explains that agreements must be implemented in good faith, this provision is still too abstract to be used as a basis for applying the doctrine of changing circumstances. Judges in Indonesia generally understand how to apply the principle of good faith in cases of imbalance or injustice from the beginning (initial disequilibrium). However, judges in Indonesia generally do not

understand how the principle of good faith should be applied in cases where the imbalance or injustice is caused by a change in circumstances (supervening disequilibrium)

It has become a legal principle in Indonesia through jurisprudence (case law), how judges exclude the principle of binding agreements (Pacta Sunt Servanda principle) in the case of an agreement that has been agreed upon by the parties whose contents are contrary to propriety or justice (initial disequilibrium). This is reflected in the case of *Ny Boesono and R Boesono v. Sri Setianingsih*. In this case, the Supreme Court decided that the loan interest of 10% per month was considered too high and contrary to justice. Furthermore, the Supreme Court lowered the interest rate from 10% to 1% monthly.

Different conditions occur when judges face cases of injustice caused by changes in circumstances. In the case between *PT Dua Cahaya Anugerah v. Made Sumartana & others*, as previously explained, the Judge should not have terminated the employment agreement or carried out a layoff because what happened was not an obstacle in the implementation of performance, but what happened was a change in circumstances that resulted in a change in balance. In the event of a change in balance, the Judge needs to restore the balance by adjusting the terms of the agreement to the new circumstances in the form of reducing working hours so that there is balance or justice for the parties in implementing the agreement. In the event of a change in circumstances, termination of the agreement can actually create an injustice where the burden or loss borne by the business actor shifts to the worker.

In other cases, the Judge also did not apply the principle of good faith as stated in Article 1338 paragraph (3) of the KUHPer when there is an imbalance or injustice due to a change in circumstances. In the case of *PT Radiant Hypar Engineering v. PT. Sinar Mas Multifinance*, the Judge rejected the Plaintiff's lawsuit to demand the cancellation of the agreement and the adjustment of the Plaintiff's debt to the rupiah exchange rate of IDR 2.200,00 per US Dollar. In this case, Plaintiff owed Defendant US dollars. When making a loan, the Dollar exchange rate was IDR 2.200,00 per US Dollar. Due to changes in economic conditions, the Dollar exchange rate increased to IDR 9.000,00 per Dollar. The interesting thing about the legal considerations of the panel of judges actually stated that performing the agreement in the form of debt payment according to the US dollar exchange rate is a form of implementing the principle of good faith. The decision was upheld at the Jakarta High Court's appeal level and the Supreme Court's Cassation level.

In addition to the principle of good faith, which is still too abstract to apply the doctrine of changing circumstances for business actors and judges, the

provisions of force majeure as regulated in Articles 1244 and 1245 of the KUHPer also do not provide clear guidelines for applying the doctrine of changing circumstances. Although force majeure can be interpreted relatively, there are no regulations regarding the obligation for the parties to renegotiate or the right of the disadvantaged party to request an adjustment to the terms of the agreement (contract adjustment) due to a change in circumstances through the intermediary of a judge. The absence of this provision makes it difficult for the disadvantaged party to request an adjustment to the terms of the agreement.

In the event of a change in circumstances, termination of the agreement is not always the right solution stipulated in force majeure. In the event of a change in circumstances that results in a significant change in the exchange rate, as in the case above, termination of the agreement will only transfer the risk or loss from one party to the other. In the case of the change in the exchange rate above, termination of the agreement will only benefit the plaintiff and harm the defendant. In the case of a change in circumstances that causes a change in the exchange rate, it is fair if the loss or risk of a decrease in the currency's value is divided in half between Plaintiff and Defendant. Thus, the exchange rate that should be the benchmark for the Plaintiff to pay his debt is IDR9.000,00 minus IDR 2.200,00 divided in two equals IDR 3.400,00.

The regulation of the doctrine of a change of circumstances in the law is also important because, as explained previously, many countries have adopted the doctrine of a change of circumstances in their laws in addition to regulating provisions on force majeure. This will avoid hesitation for business actors to renegotiate or judges in granting adjustments to the terms of the agreement (contract adjustment) when there is a change in circumstances. This is also useful for keeping Indonesian law relevant to the times and business needs and fulfilling a sense of justice in contractual relationships. The law needs to regulate the definition, elements, and rights of the disadvantaged party in case of a change in circumstances. The plan to adopt the doctrine of changes of circumstances in the provisions of the law has existed since 2013, which is contained in the Academic Manuscript of the Law on Counter-Catalogues initiative of the National Legal Development Agency. This shows the urgency of implementing the doctrine of changes of circumstances in the provisions of the law. However, until now, the law has not been implemented.

Conclusion and Recommendation

The doctrine of change of circumstances originates from Roman philosophy, which says that it is not appropriate for any party to be bound to the agreement if the circumstances have changed. Scholars and commentators then developed the doctrine as an implied condition and influenced the idea of civil law scholars until the 16th and 17th Century. The development of the principle of freedom of contract and the change of circumstances doctrine reappeared in the 20th Century along with the economic crisis in Europe because of war. The principles of good faith and fairness are the primary considerations for judges in derogating the principle of pacta sunt servanda.

Unlike the doctrine of change of circumstances, which allows exceptions to the principle of pacta sunt servanda in the event of a change of circumstances, traditionally, the force majeure rules can only exclude the principle of pacta sunt servanda if the performance of contract becomes impossible. However, the absence of the word impossibility in the force majeure rules makes defenses based on force majeure ambiguous. Therefore, applying the doctrine of change of circumstances other than force majeure rules in contract law is necessary to provide legal certainty and justice. The doctrine of change of circumstances has been applied in the civil code of several countries, such as Germany, Italy, the Netherlands, and France.

Even though the Civil Code does not mention the regulation regarding the doctrine of change of circumstances, the implementation of this doctrine in Indonesia has been applied for a long time, particularly regarding the change in currency value. In this case, the Supreme Court divided the risk based on the prevailing gold values. Each party endures 50% of the change in cost. The principle of justice becomes the main consideration for the judges to distribute the risk or to adjust the requirements of the agreement because of the change of circumstances. The principle of justice, which becomes the main consideration for the judges in deciding the sentence regarding change of circumstances cases, is part of implementing the good faith principle regulated in Article 1338 (3) of the KUHPer.

Aside from the good faith principle, several court sentences do not reject the use of force majeure rules as a basis for demanding contract adjustments due to changes in circumstances. The change of circumstances is considered an economic impediment for the debtor to fulfill his or her obligations. Therefore, the debtor cannot be considered to be breaching the contract if the creditor refuses to adjust the contract terms due to a change of circumstances.

Respective parties should bear the risk and responsibility of increases or decreases in an agreement's performance value if it could be predicted when the agreement is made. However, the increase or decrease in the value of the performance should be a joint responsibility if it is caused by unexpected events or fundamental changes in circumstances. It should become a general rule that changes in price by 50% can be used as the initial benchmark for the Court to investigate whether there is disequilibrium due to changes in circumstances. The Supreme Court has set out a risk distribution despite changes in circumstances or decreases in the exchange rate only by 50.77%.

Although several court decisions in Indonesia have adopted and applied the doctrine of change, there is no solid understanding among business actors or judges in applying the doctrine of change of circumstances. There needs to be a statutory provision that specifically regulates the application of the doctrine of change of circumstances in Indonesia. This is because the principle of good faith is still too abstract to be used as a legal basis for applying the doctrine of change of circumstances. The provisions of force majeure, as regulated in Articles 1244 and 1245 of the KUHPer, also cannot correctly fulfill the elements required to apply the doctrine of change of circumstances. The element of obstacles in regulating force majeure cannot be equated with the element of fundamental change in balance in the doctrine of change of circumstances.

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Acknowledgment
None

Funding Information
None.

Conflicting Interest Statement
The authors state that there is no conflict of interest in the publication of this article.

Generative AI Statement
None

Notification
Starting from the 2024 issue, our journal has transitioned to a new platform for an enhanced reading experience. All new articles and content will now be available on this updated site. However, we would like to assure you that archived issues from 2016 to 2023 are still accessible via the previous site. You can view these editions by visiting the following link: https://journal.unnes.ac.id/sju/jils/issue/archive.