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Covid-19 Pandemic: *Force Majeure* or *Hardship* Based on the Principle of Good Faith in The Employment Agreement

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Abstract

A Covid-19 pandemic is an event that occurs beyond the parties' control and the parties' fault. However, applying force majeure and hardship in the event of a failure to fulfill achievements in the work agreement is subjective and cannot be used as a general principle. Its application must be carried out by analyzing case by case because not all entrepreneurs are affected by the Covid-19 pandemic, which then causes entrepreneurs to be unable to fulfill their obligations as debtors in work agreements. The employment relationship between workers and the company must obtain legal protection. The method used in this research is normative juridical. Normative research is where the law is conceptualized as what is written in a statutory regulation (law is books) or the law is conceptualized as a rule or norm that is used as the basis for human behavior as a benchmark for good or bad. The purpose of this study is to obtain a solution to termination of employment due to the Covid-19 pandemic by applying the principle of force majeure or hardship in the employment agreement. Research findings suggest that the principle of hardship has not been regulated in positive law in Indonesia, so business activities in Indonesia in general still depend on the force majeure principle as a clause included in agreements and dispute resolution. Companies that terminate employment relations should be replaced by postponing regular work or renegotiating contracts known as hardship.

KEYWORDS: *Employment Agreement, Force Majeure or Hardship, Principle of Good Faith.*

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Introduction

A person who gets a job based on his expertise and is accepted by the company automatically establishes a working relationship between the employee and the company where he works.[1] With a working relationship, a legal relationship is created, which results in having rights and obligations. Rights are interests protected by law, while obligations are legal norms owned by individuals to do an act if it is not carried out, it will get sanctions as a stipulation[2].

Workers who have worked for the company are required to have a work agreement that is useful for guaranteeing themselves the rights and obligations that must be carried out based on the applicable laws and regulations. Companies must be able to provide welfare guarantees for workers who work in their companies to create a good working relationship between workers and the company so that there is no pressure from anyone who has more power (employers) against the weak (workers)[3].

The employment relationship between workers and the company must obtain legal protection. In the event of termination of the employment relationship, it must be carried out through procedures and requirements that must be met, especially by the company. This legal protection has not been able to run effectively since the occurrence of Covid-19 at the end of 2019. This Covid-19 case caused the company to take action to delay the hiring process, namely the recruitment of prospective workers who are not

[1] Sri Zulhartati, "Pengaruh Pemutusan Hubungan Kerja terhadap Karyawan Perusahaan", *Jurnal Pendidikan Sosiologi dan Humaniora*, Vol. 1, No. 1 (April 2010) : 77-88, https://dx.doi.org/10.26418/j-psh.v1i1.382

[2] Imas Novita Juaningsih, "Analisis Kebijakan PHK bagi para Pekerja pada Masa Pandemi Covid-19 di Indonesia", *Jurnal ADALAH : Buletin Hukum dan Keadilan*, Vol. 4, No. 1 (2020): 189-196, https://doi.org/10.15408/adalah.v4i1.15764

[3] Gusti Ayu Dewi Suwantari dan Ni Luh Gede Astariyani, "Perlindungan Hukum terhadap Para Pekerja yang Mengalami Pemutusan Hubungan Kerja karena Dampak Digitalisasi", *Kertha Semaya*, Vol. 6, No. (Juni 2019): 1-15, https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/53864.

yet tied to any company, and the layoff process, namely temporary termination due to company conditions and situations that do not improve or leave without pay and this is one of the ways that companies in Indonesia do by doing Termination of Employment (PHK) on workers who work at the company[4].

Companies have always used the Covid-19 pandemic as an excuse to terminate employees' employment due to force majeure. Force majeure is a situation where the debtor (company) has a barrier to carrying out its performance due to circumstances beyond expectations and control, so the company cannot account for the act, which is not good faith from the company[5].

There are differences of opinion among practitioners and academics regarding the Covid-19 pandemic, which can be categorized as force majeure. One of the opinions expressed by Coordinating Minister for Political, Legal and Human Rights Prof Mahfud MD said that Presidential Decree No. 12 of 2020 is not one of the reasons to be able to cancel a civil agreement, especially for a business contract which is a mistake. The status of Covid-19, a non-natural disaster, cannot be used as a benchmark or the reason for the cancellation of a contract due to force majeure[6].

The Civil Code does not regulate force majeure, making it difficult to find a definition of a state of coercion that must refer to the doctrines of legal and jurisprudential experts. In force majeure, there are no provisions governing renegotiation, even though this is very important in the

[4] Imas Novita Juaningsih, *Loc.cit*, p. 190.

[5] Desi Syamsiah, "Penyelesaian Perjanjian Hutang Piutang sebagai Akibat Force Majeure karena Pandemi Covid-19"*, Legal Standing*, Vol. 4, No. 1 (Maret 2020): 3016-313, http://dx.doi.org/10.24269/ls.v4i1.2783

[6] Mochamad Januar Rizki, "Penjelasan Prof Mahfud Soal *Force Majeure* Akibat Pandemi Corona" Hukumonline, April 25, 2021, retrieved from https://www.hukumonline.com/berita/a/penjelasan-prof-mahfud-soal-i-force-majeure-i-akibat-pandemi-corona-lt5ea11ca6a5956/

continuity of an ongoing agreement or contract so that it has the same equality for the parties who are bound[7].

An alternative to the force majeure principle is a principle known in international contracts as a development of the *rebus sic stantibus* principle called the hardship principle[8]. Hardship is one of the contractual methods that regulate the existence of a fundamental change in circumstances so that it affects the balance of the agreement made by the parties. The principle of hardship is derived from Roman philosophy, namely, the term rebus sic stantibus, which response to the principle of *pacta sun servanda*.

Agreement is the source of commitment. With the agreement or signing of the agreement, a legal relationship and legal consequences will arise between the parties. Each party is obliged to carry out its rights and obligations in accordance with the contents of the agreement. According to the principle of Pacta sunt servanda Article 1338 of the Civil Code, the obligation to implement the contents of the contract in principle is absolute because it is considered legally binding on the parties[9]. The principle of Pacta sunt servanda relates to contracts or agreements made between people in the sense that an agreement is the law for the parties who sign it and implies a denial of the obligations contained in it. will be made. agreement is a breach of promise or default[10].

The principle of "rebus sic stantibus" is a very basic and extreme change of circumstances that makes the implementation of the contents of

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[7] Taufik Armandhanto, Budiarsih, Yovita Arie M, "Paradigma Prinsip Hardship dalam Hukum Perjanjian Pasca Era New Normal di Indonesia", *Jurnal Hukum Bisnis Bonum Commune*, Vol. 4, No.1 (Februari 2021): 50-60, https://doi.org/10.30996/jhbbc.v4i1.4441

[8] Sheela Jayabalan, "The Legality of Doctrine of Frustration in the Realm of Covid-19 Pandemic", *Sociological Jurisprudence Journa*l, Vol. 3, Issue 2 (Agustus 2020): 84-90, https://doi.org/10.22225/scj.3.2.1900.84-90

[9] Abdulkadir Muhammad, *Hukum Perjanjian*, (Bandung: Alumni, 2006), p. 171

[10] Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda dalam Perjanjian Internasional", *Jurnal Mimbar Hukum*, Vol. 21, No. 1 (Februari 2019), 155-170, https://doi.org/10.22146/jmh.16252

the agreement completely different from when the agreement was originally made, thus creating a basis for forgiveness for parties who believe they will not do so, benefit from the agreement, change circumstances to avoid implementation or delay or renegotiate the agreement[11]. *Rebus sic stantibus* itself comes from the Latin "*contractus qui habent tractum succesivum et dependentiam de Futuro rebus sic stantibus intelligentur,*" which means "agreement to determine further actions to carry it out in the future must be interpreted subject to the requirements that the environment and conditions in the future will be the same"[12].

The doctrine of hardship provides explicitly that the event in question is an event of a fundamental nature, which then results in the balance of the covenant being changed. Unlike force majeure, the settlement in the event of hardship is directed at using the renegotiation method to restore balance in the agreement[13].

The Covid-19 pandemic has caused problems in the termination of employment (PHK) between workers and companies. It fails in the parties' performance in fulfilling their work agreements. Does a question arise whether the principle of force majeure or hardship can be applied to settle labor disputes? Or can it be done based on the principle of good faith in the agreement/contract in using these two principles to resolve labor disputes? For this, government intervention is needed to resolve this labor dispute. Considering that employment law is not only purely private law but is a public law.

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[11] Faisal Akbaruddin Taqwa, *Rebus Sic Stantibus dalam Khasanah Hukum Kontrak, Law Society (ILS) Utrecht School of Law, Universiteit Utrecht*, 2012, p.3

[12] Dwi Primilono Adi, "Absorbsi Prinsip *Rebus Sic Stantibus* dalam Kerangka Pembaharuan Hukum Perjanjian Nasional"*, Jatiswara*, Vol. 30, No. 1 (Oktober 2017): 71-91, https://doi.org/10.29303/jtsw.v30i1.91

[13] Agus Yudha Hernoko, "Force Majeure Clause atau Hardship Clause: Problematika dalam Perancangan Kontrak Bisnis"*, Perspektif : Kajian Masalah Hukum dan Pembangunan*, Vol. 11, No. 3 (Juli 2006): 203-225, https://doi.org/10.30742/perspektif.v11i3.276

Method

The method used in this research is normative juridical. Normative research is where the law is conceptualized as what is written in a statutory regulation (law is books) or the law is conceptualized as a rule or norm that is used as the basis for human behavior as a benchmark for good or bad[14].

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Result and Discussions

Application of *Force Majeure* or *Hardship* in Termination of Employment

a. Application of *Force Majeure*

Force majeure that causes the agreement to no longer function even though the agreement itself still exists, in this case are[15]:

a. The creditor cannot demand the performance of its obligations;
b. It cannot be said that the debtor is in a state of negligence so that he cannot demand;
c. The creditor cannot demand termination of the contract;
d. In reciprocal agreements, the obligation to underperform is eliminated. So basically, the trade union still exists and all that is missing is the labour force. For the alliance to be maintained, it is important to use temporary coercion. The union will become effective again when conscription ends;
e. The things you need to know about this duress situation are:
   - The debtor cannot make the existence of a compelling circumstance an objection (exception).

[14] Amirudin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum,* (Jakarta : PT. Raja Grafindo Persada, 2006), p. 118

[15] Mariam Darus Badrulzaman, Sutan Remy Sjahdeni, Heru Soepraptomo, H. Faturrahman Djamil, Taryana Soenandar, *Kompilasi Hukum Perikatan*, (Bandung: PT Citra Aditya Bakti, 2001), p. 26.

- In the judge's view, it is not possible to reject the petition due to the existence of a force majeure event, but it is the debtor's responsibility to prove the existence of a force majeure event.

According to Salim HS, force majeure is defined as a situation where the debtor (company) cannot perform its services to the creditor (labour), due to circumstances beyond its control, such as circumstances caused by nature, especially earthquakes, tsunamis, volcanic eruptions, landslides and floods. R. Setiawan also put forward the definition of force majeure, where he argued that the force majeure situation, the occurred after the agreement was made so that the debtor (company) was hampered in achieving its performance, while in this force majeure situation, the debtor (company) could not achieve its performance. the debtor (company) cannot be blamed because it cannot foresee future circumstances[16].

Force majeure in the Manpower Act is contained in Article 164 paragraph (1), which explains that companies can terminate their employment because the company is closed due to force majeure. However, in the explanation, there is a definition of force majeure. In fulfilling achievements in working relations, there is no clause that discusses force majeure. For this reason, it is returned to the rules in the Civil Code as lex generalli in the agreement.

The principle of lex specialis derogat legi generali is used to resolve conflicts between laws whose regulatory content is broader and laws whose regulatory content is narrower. For example, there is a conflict between the provisions of the Civil Code and the Labour Law regarding the issue of force majeure[17].

[16] Sufiarina dan Sri Wahyuni, "Force Majeure dan Notoir Feiten Atas Kebijakan PSBB Covid-19", *Jurnal Hukum Sasana*, Vol. 6, No. 1 (Juli 2020): 1-15, https://doi.org/10.31599/sasana.v6i1.209

[17] Shidarta dan Petrus Lakonawa, *Lex Specialis Derogat Legi Generali: Makna dan Penggunaannya*, April 25, 2022, retrieved from https://business-law.binus.ac.id/2018/03/03/lex-specialis-derogat-legi-generali/

The regulation of Article 164 paragraph (1) of the Manpower Law, which regulates the termination of employment in circumstances of force, has been revoked and replaced by Article 81 of the Job Creation Law, held in Article 154A paragraph (1) letter d of the Job Creation Law which stated that the termination of employment occurred because the company closed due to force majeure. Force majeure in Article 154A paragraph (1) letter d of the Job Creation Act, the definition of a state of coercion can be found in the Civil Code, namely Articles 1244, 1245, 1444, and 1445.

Based on the provisions of Article 154A paragraph (1) letter d of the Job Creation Law, it can be concluded as follows:

1. The company must close permanently; and
2. Employers and/or Workers/laborers who are in an employment relationship are unable to fulfill part of all their obligations as stipulated in the employment agreement due to an event that is beyond its control and cannot be foreseen at the time of the making of the employment agreement so that the party cannot be held accountable and does not have to bear the risk.

The definition of force majeure, according to experts, is as follows:

1. Subekti, a situation can be said to be a state of coercion in conditions beyond its control. This situation that arises is a condition that is not known when the agreement was made, or at least not borne by the debtor[18];

2. Rahmat S.S [19]Soemadipradja, a coercive situation is a condition where one of the parties in the agreement/contract is unable to fulfill its performance either in whole or in part due to an event beyond its control at the time of making the agreement/contract, so it cannot be blamed and does not bear the risk;

[18] Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta : PT Intermasa, 2001), p. 150.
[19] Rahmat S.S. Soemadipradja, *Penjelasan Hukum tentang Keadaan Memaksa*, (Jakarta: Gramedia, 2010), p. 8.

3. Purwahid Patrik[20], a state of coercion is a condition where the debtor does not perform his achievements because there are no mistakes due to a coercive situation that cannot be accounted for.

The application of force majeure in work agreements caused by the Covid-19 pandemic must be seen from the facts and circumstances of each case[21]. The application of force majeure in work agreements due to the Covid-19 pandemic is subjective. Due to the Covid-19 pandemic, not all entrepreneurs can fulfill their obligations as debtors in implementing workers' rights in work agreements. This force majeure must be applied case-by-case when achievements are not met because of the Covid-19 pandemic[22].

If it is related to the Covid-19 pandemic, it can be said to be an unexpected event in the agreement process. Therefore, if an agreement occurs when an outbreak hits Indonesia and leads to termination of employment, then this cannot be used as a reason for force majeure. Furthermore, in Labour Law Number 13 of 2003 Article 164 paragraph (3), the condition for terminating workers' employment is that the company has experienced a reduction in income or has suffered losses in the last 2 years, not due to force majeure, but for efficiency.

The Covid-19 outbreak is certainly not even 2 years old, so the reason for dismissal due to force majeure cannot be justified. Covid-19 is a situation that was unforeseen at the time of signing the employment contract. Therefore, if the agreement is reached when the outbreak is spreading and results in employee layoffs, the force majeure reason cannot be used. Therefore, it is necessary to protect workers so that they become

[20] *Ibid*

[21] Renjith Mathew, *Force Majeure Under Contract Law in the Context of Covid-19*, April 1, 2020, retrieved from https://ssrn.com/abstract=3588338.

[22] Fitri Yanni Dewi Siregar, "Pandemi As A Reason Force Majeure In Contract Procurement of Goods/Government Services", *Nomoi Law Review*, Vol. 1, No. 1 (Mei 2020): 101-110, https://doi.org/10.30596/nomoi.v1i1.4646

workers' basic rights, as a form of creating workers' welfare while still prioritising the interests of the business world[23].

Force majeure due to the Covid-19 pandemic must, however, be determined with certainty based on 3 (three) factors[24]:

1) the emergence of a Covid-19 pandemic that affects the implementation of the agreement must be required to occur after the agreement is agreed upon or closed and also appears before the debtor is declared negligent. The emergence of the Covid-19 pandemic is required to occur after the employer and the worker agrees upon the work agreement. It means that at the time of closing the work agreement, both employers and workers cannot predict or suspect the occurrence of a Covid-19 pandemic which will then have an impact on the implementation of the work agreement they have made. In addition, the failure to fulfill the achievement of work agreements by employers due to this pandemic is also absolutely required before employers are considered negligent. This means that the inability to fulfill achievements due to Covid-19 appears before the agreed or regulated fulfillment deadline.

2) it is necessary to consider whether the Covid-19 pandemic hinders debtors from making achievements. In other words, the existence of the Covid-19 pandemic directly impacts the situation faced by entrepreneurs in the context of their efforts to fulfill the achievements as agreed in the work agreement. Again, the Covid-19 pandemic generally impacts the company's situation, but it may not affect the entrepreneur in the context of carrying out his obligations in the work agreement. It is possible that the restrictions on the company's activities due to the pandemic will then affect the company's income,

[23] Imas Novita Juaningsih, *Op.cit*, p. 191

[24] Nindry Sulistya Widiastiani, "Pandemi Covid-19 : Force Majeure dan Hardship pada Perjanjian Kerja", *Hukum dan Pembangunan*, Vol. 51, No. 3 (September 2021): 698-719, https://doi.org/10.21143/jhp.vol51.no3.3130

but for example, the employer is still able to pay the wages and holiday allowances for workers. This means that the Covid-19 pandemic does not prevent entrepreneurs from excelling, so force majeure cannot be applied.

3) What is also important to note is the presence or absence of bad faith from the debtor in the failure to fulfill these achievements. It is necessary to investigate this matter further so that the Covid-19 pandemic is not used as a cushion and shield for debtors to intentionally release their obligations to carry out achievements, including in the context of entrepreneurs in this work agreement.

These three points need to be looked at more closely so that each case must be analyzed individually. In general, force majeure due to the Covid-19 pandemic can be applied in work agreements, but its application cannot be made immediately. It must look at the case condition by case.

Determining whether force majeure due to the pandemic can be applied is the duty of the judge in assessing the elements contained in each case, such as whether the Covid-19 pandemic has a direct impact on efforts to fulfill achievements to whether there is a bad intention of entrepreneurs in the effort to implement force majeure. In the event of force majeure, by the provisions of the Civil Code, the debtor cannot be required to pay fees, losses, and interest to creditors[25].

Regarding the fulfillment of achievements, if referring to the opinion of Sri Soedewi Maschoen Sofwan, it must be determined in advance whether the event that causes the force majeure is permanent or temporary. In the case that it is permanent, the fulfillment of achievements cannot be reclaimed. On the contrary, in the case of temporary, force majeure is only to delay the fulfillment of achievements until the situation returns to normal. It also needs to be analyzed case by case whether the force majeure caused by the Covid-19 pandemic is

[25] *Ibid*

blocking the fulfillment of the entrepreneur's achievements permanently or temporarily[26].

b. Hardship Implementation

The principle of hardship itself essentially also regulates civil interests and public interests. Hardship clauses often require a review of each party's contract performance based on changes. If the parties agree to renegotiate the agreement/contract, there are three possibilities[27]:

- They can agree that the current contract is cancelled and then negotiate an entirely new agreement;
- They cancel the terms of the old contract and replace it with a new contract;
- They leave the existing contract but change some of its provisions, which is called a variation of the original contract.

Hardship is defined as an event that is known or occurs after the execution of the agreement and does not depend on the will of the parties (unexpected or expected), which in turn creates a risk of fundamental changes in the business. because 'the increase in the cost of implementing the agreement creates a burden for the debtor or conversely reduces the cost of implementing the agreement so that it loses profits for the creditor[28].

The concept of hardship is similar to force majeure, relating to the occurrence of an event at the time of performance of the agreement that was unforeseeable, independent of the will and at the fault of the contracting parties. However, unlike force majeure, hardship clearly

[26] *Ibid*

[27] Taryana Soenandar, *Prinsip-Prinsip UNIDROIT sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional*, (Jakarta: Sinar Grafika, 2006), p. 1

[28] Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial*, (Yogyakarta: LaksBang Mediatama, 2008), p. 215

requires that the occurrence of the event will result in a fundamental change in the balance of the contract[29].

The definition of hardship it self is regulated in Article. 6.2.2 (Definition of arduous) UPICC says that arduous is an event that has fundamentally changed the balance of an agreement which has resulted in a very high implementation value for the party performing, or the value of the implementation of the agreement is drastically reduced for the party receiving, and the event occurs or is known to the injured party after the contract is concluded, the event cannot be reasonably predicted for the injured party after the contract is concluded, the event occurs beyond the control of the injured party, and the aggrieved party cannot estimate the risk of the event[30].

This provision explains two main things, namely:

1. The binding character of the contract is the general rule.

   The general rules emphasize that the contract is binding to be implemented as long as possible, regardless of the burden borne by the executing party. Even if some of the parties suffer heavy losses or the performance of the contract becomes meaningless to the other party, the agreement must be respected.

2. Relevant circumstances change only relate to specific contracts (contracts whose implementation has not been carried out or are still valid and long-term).

   The principle of the binding nature of the contract is not absolute in the event of a situation that causes a fundamental change to the balance of the contract. It is an exceptional situation.

The arduous principle itself can be interpreted as one of the alternative methods to resolve cases with characteristics of circumstances that fundamentally affect the contract balance, especially for commercial

[29] Nindry Sulistya Widiastiani, *Op.cit*, p. 706

[30] International Chamber of Commerce, "ICC Force Majeure Clause," *ICC force majeure and hardship clauses* (2020).

contracts by the principle of proportionality to share the burden of the exchange of rights and obligations in a balanced way[31].

In general, the hardship doctrine may also apply in the event of failure to meet work agreements due to the Covid-19 outbreak. However, as is the case in the discussion on force majeure, the application of arduousness cannot be carried out as a general principle by striking all accomplishments of work agreements during the Covid-19 pandemic. The application of hardship must also be made subjectively by looking at the situation and conditions in each case. An analysis of the certainty that the presence of Covid-19 directly affects the entire balance of the agreement needs to be carried out. It is important, considering that not all implementation of the agreement is involved, and the whole balance is disturbed due to the Covid-19 pandemic. If it fulfills the requirements in the teachings of arduous, then hardship can then be applied.

The main requirement in the application of hardship namely the existence of the intended event and whether it fundamentally affects the implementation of the agreement. Unlike in force majeure, which is sufficient in the analysis that the Covid-19 pandemic affects the fulfillment of the parties' achievements, in hardship, it is required that the impact of the Covid-19 pandemic on the agreement must be fundamental. The actual effect is meant to change the balance in the contract.

In the event of hardship, the legal consequences are open opportunities for the affected parties to apply for renegotiation. This renegotiation is intended to arrange and re-agreed clauses of obligations challenging to fulfill by debtors during these difficult times. The goal is to restore balance in the agreement. The cancellation of the agreement is not the main starting point in the difficult renegotiation. Still, it adheres to the agreement's implementation with new clauses or conditions that make it

[31] Ifada Qurrata A`yun Amalia dan Endang Prasetyawati, "Karakteristik Asas Proposionalitas dalam Pembentukan Klausul Perjanjian Waralaba", *Hukum Bisnis : Bonum Commune*, Vol. 2, No. 2 (Agustus 2019): 173-184, http://dx.doi.org/10.30996/jhbbc.v2i2.2513

easier for debtors who are in difficulty. Hardship adheres to the fact that the obligation to carry out the contents of the agreement is absolute[32]. In the context of work agreements, employers under challenging conditions can renegotiate with their workers as creditors in the event of hardship. For example, in the context of fulfilling achievements in the form of payment of wages and other benefits, renegotiation can be directed to delaying payments or making payments in installments by the stages of the period agreed by the parties.

Article 6.2.3 of the UPICCs 41 provides the following alternative solutions:

a) the aggrieved party has the right to request renegotiation of the agreement with the other party. The request must be made as soon as possible and include the basis for renegotiation.

b) A request for renegotiation does not automatically confer the right to stop performance of the agreement.

c) If renegotiation fails, the parties may apply to the court. The court may decide to:

    1) terminate the agreement; or

    2) modify the agreement by restoring the balance.

The principle of hardship itself looks more flexible and can accommodate finding solutions to possible problems. It can be seen in the more significant role of the parties in the agreement to renegotiate outside the court to minimize prolonged disputes. Of course, if negotiations outside the court fail, the parties can ask the judge to reconsider the agreement or even decide the end of the agreement. This renegotiation aims to obtain a balance of rights and obligations by the parties, the most

[32] Abdulkadir Muhammad, *Hukum Perikatan*, (Bandung: Citra Aditya Bakti, 1990), p. 27.

important of which is to fulfill the terms of good faith and cooperation by the parties concerned[33].

Principles of Good Faith Based on the Application of *Force Majeure* and *Hardship* in Employment Agreements

Article 1338 paragraph (3) of the Civil Code states: "Agreements must be carried out in good faith. Although good faith is an essential principle in contracts, in reality, it still raises several problems, including those related to the abstract meaning of good faith, which gives rise to different meanings from the perspective of time, place, and person, also in practice problems arise regarding the benchmark or function of the good faith.[34] It results in the meaning and benchmarks as well as the role of good faith relying more on the judge's attitude or the judge's view, which is determined on a case-by-case basis[35].

The search for and finding of solutions to the problem of good faith in contract law requires extensive interpretations indicating that good faith is carried out across the entire contract process, which then results in the provision that good faith applies not only to planning and implementation but also to the signing and pre-contractual phases (*pre-contractual phase*)[36]. In this case, good faith has three functions. The first function, all contracts, must be interpreted in good faith, and the second function is to add (aanvullende werking van goedetrouw). With this function, the judge can add to the contents of the agreement and add words to the laws and

[33] Luh Nila Winarni, "Asas Itikad Baik sebagai Upaya Perlindungan Konsumen dalam Perjanjian Pembiayaan", *DIH : Jurnal Ilmu Hukum*, Vol. 11, No. 21 (Oktober 2015): 1-11, https://doi.org/10.30996/dih.v11i21.442

[34] Agasha Mugasha, "Good Faith Obligation in Commercial Contract", *International Business Lawyer*, Arnhem: Gouda Quint, 1999, p.6.

[35] Ridwan Khairandi, *Kebebasan Berkontrak Pacta Sunt Servanda Versus Itikad Baik*, Yogyakarta, FH-UII Press, 2015, p.129.

[36] E. Allan Farnsworth and William F. Young, *Contacts (Case and Material),* The Foundation Press Inc., New York, 1995, p.375.

regulations relating to the agreement. The third function is limiting and eliminating (*beperkende en derogende werking van de goedetrouw*)[37].

Good faith, as the principle of contract law, has 3 (three) functions in the implementation of the contract[38]:

(1) Good faith functions to complete/add (*aanvullende werking van de goede trouw*) the contents of the agreement;

(2) good faith serves to limit the implementation of the agreement (*derogorende werking van de goede trouw*); and

(3) Good faith serves to abolish the implementation of the agreement.

Good faith as a legal principle is an element of nature in the contract, which is included in the innate nature of the contract (natuur) so that it is secretly attached to the contract. Its function is to complete the contract by filling legal voids, completing, adding, and removing the contents of the contract. However, the tasks of complementing, counting, and clearing are the judge's authority in deciding cases. The judge concretizes the legal principle of good faith in the form of a judge's decision. Based on this understanding, it can be concluded that the principle of good faith is not a source of law but a source of the rule of law.

In its development, good faith does not only refer to the good faith of the parties but must also refer to the values that develop in society because good faith is part of society. Good faith ultimately reflects society's standards of justice or decency. With this meaning, it makes good faith a universal social force that regulates their social relations. That is, every citizen must be obliged to act in good faith toward all citizens[39].

[37] Arthur S. Hartkamp dan Marianne M.Mtillema, C*ontract Law in the Netherlands, Deventer*. Kluwer, 1993, p. 48. Lihat juga: Martijn Hasselink, *Good Faith*, Nijmegen: Ars Aequi Libri, 1998, p 291.

[38] Ridwan Khairandi, *Itikad Baik dalam Kebebasan Berkontrak*, Program Pascasarjana Universitas Indonesia, Jakarta, 2003. p. 261.

[39] *Ibid*, p. 138

In general, the principle of hardship may also be applicable in the event of failure to comply with labour contracts due to the Covid-19 pandemic. However, as with the force majeure proposition, the application of hardship cannot be made a general rule, by applying an average penalty to all cases that reach a labour agreement during the Covid-19 pandemic. The application of this strictness must also be done subjectively by considering the circumstances and conditions of each case. Analyses should be conducted to ensure the existence of Covid-19 has a direct impact on the fundamental balance of the agreement. This is important because the implementation of the agreement has not been fully affected and the fundamental balance has been disrupted by the Covid-19 pandemic. If this fulfils the teaching hardship requirement, the hardship can only apply to a relative degree as it results in a delay in the implementation of the treaty[40].

The principle of Hardship is needed for the following reasons: It can be used as a basis for overcoming problems or failure to contract (frustrated), especially long-term contracts with very high values, more flexible and able to accommodate the wishes of the parties to renegotiate, share the burden of exchanging rights and obligations fairly. Balance so that the objectives of the contract are achieved. The benchmark for implementing a contract can be seen in the extent to which the parties properly carry out their rights and obligations.

Conclusion

The principle of hardship has not been regulated in positive law in Indonesia, so business activities in Indonesia in general still depend on the force majeure principle as a clause included in agreements and dispute resolution. Companies that terminate employment relations should be replaced by postponing regular work or renegotiating contracts known as hardship. Indeed as a country that adheres to a civil law legal system,

[40] Nindry Sulistya Widiastiani, *Op.cit*, p. 714

Indonesia does not recognize the arduous clause. The concept of force majeure solves every change of state. But the problem is that the power of the force majeure concept cannot help the workers to continue their work. Based on the principle of good faith, the arduous clause can be used to maintain the execution of the contract about workers affected by Covid-19. In this Covid-19 situation, the parties will renegotiate the contract to determine the adjustment of the work contract related to the changes that occur. Therefore, the settlement of work agreement disputes needs to be interpreted in good faith and not solely based on what the parties have agreed upon in the employment contract.

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