



## Covid-19 Pandemic as Force Majeure Unable to Fulfill Obligation in Financing Agreement

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### Abstract

The Covid-19 health pandemic as an example of a form of force majeure can affect how risk is assigned to the parties bound by the agreement regarding the inability to pay in a financing agreement caused by force majeure. The research was conducted using normative legal research methods by examining literature (secondary data). From the results of the research, it can be concluded that a dispute resolution institution or court in dealing with disputes regarding the termination of a financing agreement caused by the debtor's inability to pay due to the impact of the Covid-19 health pandemic must be able to assess the good faith of the debtor in implementing the financing agreement so that it can present the value of justice in the resolution of related disputes financing agreement. The role of the court is a sign of the presence of the state in presenting the value of social justice for the Indonesian people.



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## A. Introduction

Humans in meeting their daily needs cannot be separated from interactions with other humans, communities, legal entities including government and private institutions, as well as private organizations and non-governmental organizations.

The needs of life between humans are related to the field of personal law and the field of property law.<sup>1</sup> The fulfillment of life's needs in the field of property law has to do with the law of objects and the law of ties. Economic business activities are a form of relationship in the field of property law related to the law of objects and the law of ties.

Bung Hatta mentioned in economic business activities, there are three groups of economic actors, namely:<sup>2</sup> 1. The group that produces production; 2. The group that uses the results of the production, called consumption; 3. The group that moves the production goods from the production area to the place of consumption, namely commerce and distribution.

A financing agreement as an example of a form of reciprocal agreement and an agreement with a fixed time has the elements of an agreement. The financing agreement has elements that form a financing agreement, namely the element of providing money and the obligation to return the loan. The element of providing money is the obligation of the finance company. The element of returning money financing is the obligation of the financing user customer with the period specified in the financing agreement. A financing agreement has a similar concept to a credit agreement. The elements or elements of a credit agreement according to Mariam Darus Badruzaman in her dissertation, namely the element of providing money and the obligation to return the loan.

Business entities that carry out financing activities in the form of providing funds or capital goods can take the form of a finance company, which is a business entity

specifically established to carry out leasing, factoring, consumer financing, and credit card business. The legal basis for regulating financing institutions is Presidential Regulation Number 9 of 2009 concerning Financing Institutions.

The legal basis of the Financial Services Authority in regulating business licensing and financing company institutions is Financial Services Authority Regulation Number 28/POJK.05/2014 concerning Business Licensing and Financing Company Institutions. Consumers who use the services of finance companies are everyone, both individuals and institutions, who use financing in the form of funds or capital goods from financing institutions and are used to fulfill the interests of themselves, families, other people, and other institutions.<sup>3</sup>

Along with the implementation of the agreement, for various reasons, the debtor is unable to fulfill his obligations in the agreement, including paying principal and interest according to the amount of the agreement or not paying principal and interest on time, so that it becomes the creditor's reason to declare the debtor failed to fulfill the performance before the term of the financing agreement ends. The creditor's reason can be due to the fulfillment of the void condition clause contained in the agreement by the debtor. Elly Erawati and Herlien Budiono argue that according to Article 1265 of the Civil Code, a void condition clause means a condition that, if fulfilled, will abolish the obligation and bring everything back to its original state, as if there was no obligation.<sup>4</sup>

Article 1266 paragraph (1) of the Civil Code stipulates that the cancellation condition is always considered to be included in a reciprocal agreement if one party does not fulfill its obligations. In practice, the creditor terminates the agreement based on a clause in the agreement or contract stating that both parties to the agreement release and are not bound by the provisions in Article 1266

1 Achmad Busro, *Hukum Perikatan Berdasar Buku III KUH Perdata* (Yogyakarta: Pohon Cahaya, 2012), 1-3.

2 Mohammad Hatta, *Karya Lengkap Bung Hatta: Keadilan dan Kemakmuran* (Jakarta: Penerbit LP3ES, 2015), 202.

3 Renniwaty Siringoringo, "Karakteristik dan Fungsi Intermediasi Perbankan di Indonesia," *Buletin Ekonomi Moneter dan Perbankan. Bank Indonesia*, Volume 15 No.1 (2012): 3.

4 Sunaryo, *Hukum Lembaga Pembiayaan* (Jakarta: Sinar Grafika, 2019), 1.

paragraph (2) of the Civil Code which stipulates that the prosecution for the cancellation of the agreement must be requested to the court and based on the events of default clause or events that include a violation of the agreement which gives financial institutions banks and non-bank financial institutions the right to terminate the agreement and collect financing payments at once.

Article 1267 of the Civil Code provides options for parties who do not receive achievements from other parties to choose four possible demands, namely (1) fulfillment of the agreement; (2) fulfillment of the agreement accompanied by compensation; (3) cancellation of the agreement; (4) cancellation of the agreement accompanied by compensation. Because the agreement was terminated by the creditor unilaterally, there are parties who do not accept the creditor's attitude on the grounds that the debtor still believes that the term of the agreement is still there and has not been completed or ended and the assets owned by the debtor are still greater than his debts to the creditor, so that the debtor feels they can still fulfill the contents of the agreement obligations within the term or tempo of the agreement.<sup>5</sup>

The debtor, who believes that the term of the agreement is still running and they can actually pay even though there is a delay in payment due to force majeure that hinders the debtor's obligation to the creditor, then argues that there are force majeure circumstances that hinder the debtor's efforts to fulfill payment achievements for a while so that they will request a restructuring of financing from the funding provider institution and they reject the unilateral termination by the creditor without going through the process of proof in a civil court trial in accordance with Article 1266 paragraph (2) of the Civil Code which is *dwingend recht* or compelling rules.

The unilateral termination of the agreement as mentioned above is due to the creditor's reason that the void condition clause has been fulfilled, among others, regarding the acceleration of maturity caused by the debtor and on the other hand the attitude

of the debtor who wants to continue the agreement because the void condition clause has not been fulfilled, namely the term of the agreement is still there, causing problems for both parties, this must be addressed wisely by the civil dispute resolution institution. The pros and cons attitude are related to the attitude of the civil dispute resolution institution in handling the case which will affect the enforcement of contract law in Indonesia.<sup>6</sup>

Debt problems always lead to difficult situations for both debtors and creditors. Without following the settlement process based on existing regulations, the settlement can be more complicated, even though by following the appropriate procedures, the process is not necessarily smooth.

The function of civil law in the field of engagement is not only to protect the creditor, but also to provide equal or balanced protection to the debtor who is weaker and only consists of individuals who are financially and skillfully inferior to the creditor. According to Esmi Warassih, law enforcement is determined by the operation of various legal and non-legal factors, such as social, economic, political and cultural.<sup>7</sup>

Articles written by previous authors related to the author's discussion are 1. Analysis of Exemption from Fulfillment of Achievements Due to Overmacht Due to Corona Virus Disease 2019 (Covid-19) in Indonesia, written by Rachma Ayu Kusuma Dewi, Amelia Bellatrix Pantjo'u, Widya Dika Chandra, and Sa'baniah in SELAT Journal, Volume 8 Number 1, October 2020. This article mainly discusses whether Covid-19 can be used as an overmacht reason and what are the legal consequences of Covid-19 as an overmacht? While the author's research emphasizes more on whether covid-19 is a form of force majeure so that the financing agreement is not fulfilled and the role of the court in dealing with covid-19 force majeure in resolving financing agreement contract disputes, so that

5 Mariam Darus Badruzaman, *Perjanjian Kredit Bank* (Bandung: Alumni, 1978), 53.

6 Nindyo Pramono, "Problematika Putusan Hakim Dalam Perkara Pembatalan Perjanjian," *Jurnal Mimbar Hukum Fakultas Hukum UGM*, Vol.22, No.2 (2010): 225.

7 Elly Erawati dan Herlien Budiono, *Penjelasan Hukum Tentang Kebatalan Perjanjian* (Jakarta: National Legal Reform Program, 2010), 58.

the author's research is different and original. 3. Covid-19 as a Form of Overmacht and its Legal Effects on the Implementation of Credit Agreements, written by Merry Tjoanda, Yosia Hetharie, Marselo Valentino Geovani Pariela, and Ronald Fadly Sopamena in SASI Journal, Volume 27, Number 1, 2021. This article explains the legal consequences of covid-19 as overmacht in credit agreements, while the author's research is broader, namely the impact of force majeure caused by covid-19 on financing agreements, so that the author's research is different and original.

Based on this introduction, the author wants to write with the following problem formulation: 1. Is the covid-19 health pandemic a force majeure for non-fulfillment of the financing agreement?; 2. What is the role of the court in dealing with the effect of the covid-19 health pandemic on the non-fulfillment of the financing agreement?

## B. Method

The research conducted in writing this scientific work is doctrinal research by analyzing elements of legal norms in the form of legal principles, laws and regulations, agreements or contracts, and court decisions. The reasoning method uses the deductive reasoning method. The object of research is secondary legal material concerning the legal aspects of covid-19 as an example of force majeure so that the obligation of the financing agreement cannot be fulfilled. The findings in this research will be presented prescriptively.

## C. Results and Discussion

### Differences in the assessment of the concept of acceleration or acceleration of maturity as a reason for failure to fulfill the agreement (default) according to creditors and debtors

A time-bound engagement requires a time-bound element that indicates whether the engagement can be executed or terminated if the stipulated time is completed or the contracting party does not fulfill the performance within the time limit stipulated in the agreement.

Time provisions can be stated ex-

pressly in the agreement or tacitly. If the time provision has been implemented, the creditor's demand that the debtor fulfill his obligation can be collected (*opeisbaar*).

According to Article 1266 of the Civil Code, statutory time provisions can be divided into two types, namely time provisions determined by law (*term de droit*) and time provisions granted by judges based on discretion (*term de grace*).

Article 1269 of the Civil Code stipulates basically that in an agreement with a time provision, the creditor does not have the right to collect the performance of the agreement (demand payment) before the agreed time is fulfilled. This provision is complemented by Article 1270 of the Civil Code which stipulates basically that the law considers that the provision of time is in the interests of the debtor, unless from the nature of the agreement or circumstances, it turns out that the interests of the creditor need to be protected, then the provision of time will be made in the interests of the creditor.

Regarding the notion of lapse of time, according to Article 1946 of the Civil Code, expiration or lapse of time is an attempt to obtain something or to be released from an agreement with the passage of a certain time and on the conditions determined by law.

The Indonesian Civil Code itself does not provide a formulation of overdue debt. However, J. Satrio said that according to Article 1238 of the Civil Code the debtor is negligent, if by warrant, or by a deed of the same kind it has been declared negligent, or by its own obligation.<sup>8</sup> With the issuance of Supreme Court Circular Letter Number 3 of 1963, the submission of a lawsuit to the court can be considered as a substitute for a letter of warning or summons.

The execution of obligations that cannot be fulfilled by the debtor creates debt. The definition of debt itself is regulated in Article 1 number 6 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, which reads:

"Debt is an obligation that is stated or can be stated in the amount of money

<sup>8</sup> J. Satrio, *Hukum Perikatan Pada Umumnya* (Bandung: Alumni, 2020), 106.

either in Indonesian currency or foreign currency, either directly or will arise in the future or contingent, arising from an agreement or law and which must be fulfilled by the Debtor and if not fulfilled gives the right to the Creditor to get its fulfillment from the Debtor's assets."

Regarding the criteria for debt that is due and collectible itself, it is not regulated in the Civil Code, but is regulated in the explanation of Article 2 paragraph (1) of the Bankruptcy and PKPU Law, namely:

"What is meant by "debt that is due and collectible" is an obligation to pay a debt that has fallen due, either because it has been agreed, because of the acceleration of the collection time as agreed, because of the imposition of sanctions or fines by the authorized agency, or because of a court decision, arbitrator, or arbitration panel."

According to Catur Iriantoro, a former judge of the Medan Commercial Court, in practice, the due date occurs when:<sup>9</sup>

First, in agreements with time provisions, the due date is at the time specified or mentioned in the agreement, which is also the time of fulfillment of obligations by the debtor.

Secondly, if no time is specified for the performance of the obligation by the debtor in the agreement, then the due date is when the debtor has been reprimanded by the creditor to fulfill its obligations, so that if there is no such reprimand, then the debtor's debt obligation to the creditor is not considered due.

The parties who bind themselves in the engagement have rights attached to themselves and must respect the rights of the other party in the engagement, and vice versa. This right is called individual rights or in English called *rights in personam*.<sup>10</sup>

9 Catur Iriantoro. "Penyelesaian Utang Piutang Melalui Pengadilan Niaga." [https://www.pn-medankota.go.id/v3/index.php?option=com\\_content&view=article&id=160:penyelesaian-hutang&catid=101&Itemid=181](https://www.pn-medankota.go.id/v3/index.php?option=com_content&view=article&id=160:penyelesaian-hutang&catid=101&Itemid=181), (diakses tanggal 24 April 2022).

10 Milo J. Bowman, *Handbook of Elementary Law* (St.

According to Article 1238 of the Civil Code, in the type of obligation with a fixed time, what must be paid at a specified time cannot be collected before that time arrives. The debtor must be considered negligent with the passing of the specified time.

The Civil Code distinguishes negligence based on the existence of a time provision in the obligation and the absence of a time provision stipulated in the obligation. In the event that there is a time provision, the negligence is calculated from the passage of the period specified in the agreement. In the event that it is not determined in advance when the debtor is obliged to carry out his obligations, the debtor will only be considered negligent if he has been reprimanded to fulfill or fulfill his outstanding obligations which have still not been fulfilled.

The relationship between the obligation and the agreement is that the obligation comes from one of the agreements or from the making of an agreement, so that an agreement is a concrete event or situation.

Based on the break clauses, the bank or financial institution or financing institution has the right to declare the debtor negligent in fulfilling its obligations in the credit agreement or financing agreement. The occurrence of this event not only causes the debtor to be in breach of promise, but also gives the bank or financial institution or financing institution the right to collect immediately the return of credit along with the agreed interest and penalties.

With the creditor's unilateral statement that the debtor has defaulted, the agreement is terminated or stopped and the creditor then has the right to implement the contents of the agreement regarding the consequences of default committed by the debtor to the creditor, however, the implementation of the contents of the agreement by the creditor is sometimes not fulfilled by the debtor voluntarily, in the event that the debtor does not admit that they are unable to pay, resulting in the creditor having to take civil law to enforce the contents of the agreement. On the other hand, unilateral termination of the agreement by the creditor has risks because it

Paul Minn: West Publishing Co, 1929), 114.

can be categorized as an unlawful act. This is linked to the Supreme Court's Jurisprudence in Supreme Court Decision Number 5 K/Pdt/2018 dated February 27, 2018 which states that "Unilateral termination of an agreement is included in an unlawful act."

This paper explains that the creditor has the principle of fulfilling the right to repay the loan while the debtor has the principle of fulfilling the right to the remaining period of the agreement, so as not to let the collateral object be auctioned to fulfill debt obligations and interest or even fines.

### **Acceleration of maturity can provide unfairness to the debtor in the implementation of the financing agreement.**

The implementation of material civil law agreements with time provisions can take place secretly between the parties concerned without knowing officials or official agencies that are free from the influence of what or whoever by giving a binding and enforceable decision, namely the court.

In the process of resolving debt and credit problems through court means, the Plaintiff, in this case the creditor, who has a more privileged position, easily enters a lawsuit and argues that the Defendant, in this case the debtor, has made a default on the grounds that he is late in making payments of financing installments, even though the term of the agreement still exists and there are force majeure circumstances that result in the Defendant (debtor) being unable to make payments of financing installments. This is detrimental to the defendant or debtor who still has the ability to repay his debt. With the granting of the default lawsuit, the defendant is declared in default and if the defendant does not fulfill the contents of the decision voluntarily, the collateral is confiscated and auctioned off even though the property may be the only property belonging to the defendant, which can result in the defendant becoming poor, so that the defendant or debtor is on a very weak party in determining the acceleration of maturity.

According to H.P. Panggabean, a credit agreement case that often arises in the practice of litigation in court is the action of

the bank that terminates the credit agreement even though the grace period of the credit agreement has not ended.<sup>11</sup>

The clauses made by the creditor in the agreement, which if violated by the debtor results in the creditor declaring the debtor negligent, are actually provisions made by the creditor itself or also called standard agreements. The public can think that all credit agreements that have been signed by both parties are made based on the provisions of freedom of contract, even though according to Lord Denning MR as quoted by Budiono Kusumohamidjojo, said he did not believe in "freedom of contract" because that freedom actually lies more with those who are richer, stronger, or more powerful in position,<sup>12</sup> in this case the providers of capital, namely banks, financial institutions, and financing institutions.

### **Impact of Covid-19 on the economy**

Unforeseen things that cannot be accounted for by the debtor, among others, in the form of force majeure or *overmacht*, can be a reason for the debtor to escape lawsuits or claims from creditors, so the argument for the existence of force majeure must meet the conditions: 1. The fulfillment of the performance is hindered or prevented; 2. The obstruction of the fulfillment of the achievement is beyond the fault of the debtor; 3. The event that causes the obstruction of the performance is not the debtor's risk.

In several articles of the Civil Code, namely Article 1244 and Article 1245, it can be concluded that force majeure or *overmacht* or force majeure is a situation or condition in which one of the parties who has an obligation based on an engagement or agreement made, cannot fulfill its performance or obligations.

Events that can be categorized as force majeure in the implementation of a financing agreement include using the money borrowed in good faith for productive activities

11 H.P. Panggabean, *Praktik Standaar Contract (Perjanjian Baku) Dalam Perjanjian Kredit Perbankan* (Bandung: Alumni, 2012), 121.

12 Budiono Kusumohamidjojo, *Perbandingan Hukum Kontrak (Comparative Contract Law)* (Bandung: CV. Mandar Maju, 2015), 65.

such as a trading business, but the trading business is sluggish due to a health pandemic, economic crisis, humanitarian crisis, or social disaster, resulting in the debtor being unable to pay debts according to the specified time period. One of the recent force majeure events that affected the debtor's loan and business was the covid-19 virus pandemic. In Indonesia, covid-19 was declared a non-natural national disaster based on Presidential Decree of the Republic of Indonesia Number 12 of 2020 concerning the Determination of the Non-Natural Disaster of the Spread of Corona Virus Disease 2019 / Covid-19 as a National Disaster. The legal basis for establishing a health emergency due to the Covid-19 pandemic in Indonesia was then continued based on Presidential Decree Number 24 of 2021 concerning Determination of the Factual Status of the 2019 Corona Virus Disease (Covid-19) Pandemic in Indonesia, although finally through Presidential Decree Number 17 of 2023 concerning Determination of the End of the Status of the 2019 Corona Virus Disease (Covid-19) Pandemic in Indonesia, the health emergency due to the covid-19 pandemic in Indonesia has ended.

According to data from the Financial Services Authority (OJK), the Covid-19 pandemic has greatly affected people's ability to pay their credit repayment obligations, which has led to changes in the debtor's risk profile, causing an increase in NPLs (nonperforming loans), i.e. non-performing loans. Which shows that gross NPL as of December 2019 was only 2.53% and rose in March 2020 to 2.79%, 3.11% in June 2020, and 3.22% as of August 2020. In addition, the impact of covid-19 on the Indonesian economy is characterized by a decrease in the per capita income of the Indonesian population in 2020. Based on the report "World Bank Country Classifications by Income Level: 2021-2022." The per capita income of the Indonesian population, which amounted to 4,050 USD in 2019, decreased in 2020 to 3,870 USD. The declining per capita income of the Indonesian population was caused by the country's economic growth, which in 2020 contracted by 2 percent.

According to research by Febrian Ah-

mad Sulton, Givantoro Agma Ardira, and H. Hersugondo, the corona virus pandemic has resulted in changes in credit standards and reduced demand for various types of loans. The results of their research prove that non-performing loan variables affect ROA (Return on Asset) and non-performing loan variables have no effect on ROE (Return on Equity).<sup>13</sup>

Not only in Indonesia, in many countries, and for example in the United States, according to Robert Jay Dilger and Bruce R. Lindsay, the covid-19 pandemic has an impact on national economic losses, including a decrease in labor productivity, disruption in the distribution chain of goods and services, a general reduction in labor, and significant financial pressure on businesses and households.<sup>14</sup>

Dona Budi Kharisma in her article entitled Covid-19 Pandemic Is Force Majeure? concluded that as stipulated in Article 1245 of the Civil Code, Article 1444 of the Civil Code, and Article 1445 of the Civil Code, when related to the Covid-19 pandemic, the elements of force majeure in the form of elements of unexpected events, elements that cannot be held accountable to the debtor, elements of no bad faith from the debtor, and the element that prevents the debtor from performing is fulfilled by the Covid-19 pandemic, so that the Covid-19 pandemic can be said to be a relative force majeure, in the sense that the fulfillment of the performance of the contract cannot be carried out temporarily, but after the force majeure event stops, the performance can be carried out again according to the contents of the agreement (fulfillment of previously deferred performance).<sup>15</sup>

The covid-19 pandemic also has a negative impact on creditors from banking and

13 Febrian Ahmad Sulton, Givantoro Agma Ardira, dan H Hersugondo, "Pengaruh Rasio Kredit Bermasalah Terhadap Profitabilitas Bank Umum Selama Pandemi Covid-19: Kasus Indonesia," *Kompartemen: Jurnal Ilmiah Akuntansi*, Volume 19, No.2 (September 2021): 159.

14 Robert Jay Dilger and Bruce R. Lindsay, "Covid 19 Relief Assistance to Small Businesses: Issues and Policy Options," *Congressional Research Service* (October 2021): 4.

15 Dona Budi Kharisma, "Pandemi Covid-19 Apakah Force Majeure?" *Jurnal Rechtsvinding*, (29 Juni 2020): 2-4.

financing companies. As research conducted by Siti Epa Hardiyanti and Lukmanul Hakim Aziz concluded that the economic slowdown due to the covid-19 pandemic will result in erratic credit growth, can lead to financial stability risks and trigger an asymmetric effect on the macroeconomic system. This proves that the covid-19 pandemic is a form of disaster beyond human capabilities that has an impact on increasing the level of non-performing loans (NPLs) at commercial banks. According to research conducted by Merry Tjoanda, et al, the legal consequences of the spread of the covid-19 disease as a relative *overmacht* to the credit agreement so that the debtor still has to fulfill his obligations or achievements to the creditor after covid-19 ends.<sup>16</sup>

So that the economic crisis due to the Covid-19 pandemic does not immediately turn into a social crisis as Jürgen Habermas once said, the government needs to issue social protection policies that are in accordance with the interests of the wider community affected by the Covid-19 pandemic.

### The Role of the State in the Economy

In the government's efforts to reduce the negative impact of the Covid-19 pandemic on the Indonesian economy, the Financial Services Authority (OJK) issued OJK Regulation Number 11/POJK.03/2020 in conjunction with POJK Number 48/POJK.03/2020 in conjunction with POJK Number 17/POJK.03/2021 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Corona Virus Disease 2019 (POJK Stimulus Impact of Covid-19), which basically contains government policies for banking institutions in the form of: 1. Decrease in interest rates; 2. Increase credit/loan facilities; 3. Conversion/transfer of credit to equity participation; 4. Extending the credit period (restructuring); 5. Reduction of credit principal amount; 6. Increase credit facilities and reduce credit interest arrears.

<sup>16</sup> Merry Tjoanda, Yosia Hetharie, Marselo Valentino Geovani Pariela, dan Ronald Fadly Sopamena, "Covid-19 sebagai Bentuk Overmacht dan Akibat Hukumnya Terhadap Pelaksanaan Perjanjian Kredit," *Jurnal SASI*, Volume 27 Nomor 1 (Januari-Maret 2021): 100.

Although the government through the Financial Services Authority (OJK) has issued regulations regarding credit relaxation policies with various derivatives, it is not uncommon for creditors to ignore the OJK provisions and immediately register a default lawsuit with the court if the debtor is found to be in arrears with credit payments for more than two months.

### Role of Court

In the implementation of the law of obligations originating from agreements, unexpected things that cannot be accounted for by the debtor, among others, in the form of force majeure or *overmacht*, can be a reason for the debtor to release himself from lawsuits or claims from creditors, so the argument for the existence of force majeure must meet the conditions: a. The fulfillment of the performance is hindered or prevented; b. The obstruction of the fulfillment of the achievement is beyond the fault of the debtor; c. The event that causes the obstruction of the performance is not the debtor's risk.

In several articles of the Civil Code, namely Article 1244 and Article 1245, it can be concluded that force majeure or *overmacht* or force majeure is a situation or condition in which one of the parties who has an obligation based on an agreement or agreement made, cannot fulfill its performance or obligations.

Purwahid Patrick argues that in a state of force (*overmacht*) then the obligation has ceased to take effect, this does not mean that the obligation disappears, the obligation still exists only ceases to take effect, if the *overmacht* situation no longer exists then the obligation applies again.<sup>17</sup>

Events that can be categorized as force majeure in the implementation of a financing agreement include using the money borrowed in good faith for productive activities such as trade, but the trade business is sluggish due to a health pandemic, economic crisis, humanitarian crisis, or social disaster, resulting in the debtor being unable to pay

<sup>17</sup> Purwahid Patrick, *Dasar-Dasar Hukum Perikatan (Perikatan Yang Lahir Dari Perjanjian Dan Dari Undang-Undang)*. (Bandung: CV. Mandar Maju, 1994):19.



debts according to the specified time period.

The function of good faith is an important principle in the law of engagement, the Court can interpret the financing agreement based on good faith. Ridwan Khairandy borrowed the opinion of C.J.H. Brunner and C.T. de Jong, mentioning the function of good faith in the contract in addition to being able to add words to the provisions of the law regarding financing agreements can also limit or reduce or exclude certain conditions in the contract, which the terms of the contract are considered by the court to cause injustice in its implementation.<sup>18</sup>

The author takes several examples of Court Decisions that have permanent legal force, namely: 1. Bekasi District Court Decision Number 129/Pdt.G/2020/PN Bks; 2. Denpasar District Court Decision Number 28/Pdt.G.S/2021/PN Dps; 3. Pematangsiantar Religious Court Decision Number 14/Pdt.G/2022/ PA Pst; and 4. Tulungagung District Court Decision Number 34/Pdt.G/2020/PN Tlg. The author describes the analysis of the four Court Decisions as follows:

In the case of Decision Number 129/Pdt.G/2022/PN Bks, between Fatmawaty Manao as the Plaintiff against the Director of PT Wahana Ottomitra Muliarta, Tbk, and Bekasi Branch Head of PT Wahana Ottomitra Muliarta, Tbk. As the Defendant, where in the statement of claim, the Plaintiff was affected by Covid-19 so that he experienced congestion and the economy, then submitted a request for restructuring and rescheduling or rescheduling installments to the finance company as a form of good faith. However, the finance company did not provide an opportunity for the debtor to carry out restructuring even though Presidential Decree Number 12 of 2020 concerning the Determination of Non-natural Disasters for the Spread of Coronavirus Disease 2019 has been determined as a force majeure, where the debtor cannot be declared in default because the non-performance of contractual obligations is not due to intent or negligence

18 Ridwan Khairandy. *Kebebasan Berkontrak & Pacta Sunt Servanda Versus Iktikad Baik: Sikap yang Harus Diambil Pengadilan*. (Yogyakarta: FH Ull Press, 2015), 65-67.

ce but due to the Covid-19 pandemic. Parties with contractual obligations cannot be indemnified in the event that there are circumstances that cannot be foreseen or are beyond reasonable control due to external factors. In its decision, the Panel of Judges did not grant the Plaintiff's claim and in its ruling rejected the Plaintiff's claim in its entirety and in the counterclaim, the Panel of Judges basically decided: granting the claim of the counterclaim Plaintiff and declaring the counterclaim Defendant to have defaulted and ordering the Defendant in counterclaim to pay material damages to the counterclaim Plaintiff in the amount of Rp210,457,980, - (two hundred and ten million four hundred and fifty-seven thousand nine hundred and eighty rupiah).

The author analyzes a small claims courts case at the Denpasar District Court with case number 28/Pdt.G.S/2021/PN Dps between Any Aryani as the Plaintiff and PT Bali Buzz Coffee as the Defendant.<sup>19</sup> This case basically relates to a cooperation agreement, namely the Plaintiff is willing to provide a place or room leased to the Defendant to run a coffee kiosk business on June 20, 2019 and an addendum dated May 15, 2020, which then made the formality of a cooperation agreement letter dated May 15, 2020. The cooperation agreement runs from January 1, 2021 to February 24, 2026 with the obligation to pay monthly rent not exceeding the 1st of each month. Article 5 of the Cooperation agreement includes the covid-19 pandemic as a factor in slowing down trade so as to limit the opening hours of the coffee kiosk business, however in August 2021, the Defendant no longer made rental payments to the Plaintiff, in addition the Defendant no longer paid taxes and electricity that should have been charged to the Defendant. The Plaintiff in his petitum basically claims that the Defendant has committed an act of default. The Defendant in its reply argued that the Defendant could not pay rent to the Plaintiff and other obligations because

19 Suci Ramadhani dan Harjono, "Penolakan Coronavirus Disease Sebagai Alasan Force Majeure Debitur Wanprestasi (Studi Putusan Nomor 28/Pdt.G.S/2021/PN Dps)" *Jurnal Hukum Acara Verstek*, Volume 11 Nomor 1 (Januari-April 2023):70.

of the impact of covid-19. The Panel of Judges in considering the Decision argued in essence that the impact of covid-19 on economic activity is a force majeure that is relative or temporary in nature because the covid-19 pandemic can be anticipated and its arrival is not sudden like earthquakes and tsunamis or other natural disasters. Therefore, the solution that can be taken is the renegotiation of the agreement by the parties because force majeure relatively does not cause the agreement to be canceled but only suspends it. Force majeure cannot be used as a reason for canceling a contract just like that which makes the debtor not carry out its obligations to the creditor. Therefore, the Panel of Judges in its verdict basically granted the Plaintiff's claim in part and stated that the Defendant had committed an act of default.

The author also analyzes decisions in religious courts regarding tort claims related to the co-19 pandemic in the form of Pematangsiantar Religious Court Decision Number 14/Pdt.G/2022/ PA Pst between Andung Iskandar bin Rusman as Plaintiff against PT Bank Syariah Indonesia Tbk. Retail Collection, Restructuring & Recovery Area Pematangsiantar as the Defendant. The Plaintiff filed a lawsuit with the postulate that in essence the Plaintiff had received an Al-Murabahah financing facility from the Defendant within a period of 60 (sixty) months from the signing of the contract, but after several installment payments were made, due to the Plaintiff's deteriorating financial condition due to the co-19 pandemic which had a negative impact on the Plaintiff's economy and disrupted the Plaintiff's economic turnover so that the Plaintiff could not pay the credit facility provided by the Defendant, The Plaintiff argues that in this case the Defendant was indifferent and did not want to know, did not provide a solution to the payment difficulties faced by the Plaintiff in the form of the Defendant giving three warnings for the Plaintiff to pay his obligations and the Defendant did not provide leeway or adjustments to the circumstances experienced by the Plaintiff, so based on this, the Plaintiff considers the Defendant to have committed a tort against the Plaintiff. Against the postulates of

the Plaintiff's lawsuit, the Defendant gave an answer basically that the Plaintiff had stopped paying its obligations to the Defendant since October 31, 2018 or at the time before the co-19 pandemic occurred, so according to the Defendant this was not the reason for the Plaintiff not to pay its obligations. In the Court Decision, the Panel of Judges was of the opinion that the Plaintiff's reason regarding the deteriorating financial condition coupled with the impact of the spread of covid 19 was an incorrect reason because the spread of Covid 19 occurred long before the Plaintiff began to default on payments to the Defendant, namely since October 31, 2018, while the Government announced the spread of Covid 19 in Indonesia for the first time on March 2, 2020. Thus, based on this, it has been proven that the Plaintiff has not paid installments for more than 1 year and it is clear that therefore the Plaintiff falls into the category of being unable to pay, not a customer who has decreased his ability to pay, Page 58 of 63 pages Decision Number 14/Pdt.G/2022/PA Pst so that it is not suitable for restructuring as stipulated in Article 55 letter a POJK Number 16/POJK.03/2014. This is also in line with the decision of the Supreme Court of the Republic of Indonesia Number 138K/Ag/2017 dated March 24, 2017 which was taken over by the Panel of Judges into consideration which states that "Restructuring of murabaha financing contracts may not be carried out against Debtors who are clearly unable to pay installments according to the agreement". With these considerations, the Religious Court rejected the Plaintiff's claim in its entirety.

In a case that has been heard at the Tulungagung District Court with the number of Decision Number 34/Pdt.G/2020/Pn Tlg, between Sri Liani, SE. as the Plaintiff against PT Wahana Ottomitra Muliarta, Tbk. Or called WOM Finance Tulungagung Branch as the Defendant, in this case the debtor experienced the impact of Covid-19 so that he was considered negligent and defaulted by the creditor (finance company). The debtor in good faith applied for restructuring, relaxation, and rescheduling of credit but was not responded to by the creditor, at a later date

the creditor forcibly took the collateral object, namely TOYOTA INNOVA GRAND NEW G DIESEL 2.5 M/T which was being used at that time. Through the evidentiary process, it was found that the forced taking had occurred, so that the Panel of Judges in their decision gave consideration to granting the debtor's claim in part because of the good faith of the debtor by submitting a request for a postponement of installment payments for 1 year, as well as the elements of unlawful acts committed by the creditor as stated in the Covid 19 Pandemic as a Determination of Force Majeure in a Multipurpose Financing Agreement, so that in the verdict, the Panel of Judges decided in essence: Stating that the Defendant has committed an unlawful act, Punishing the Defendant to pay material losses in the amount of Rp150,000,000, - (one hundred and fifty million rupiah), and declaring the object of dispute in the form of a car Brand / Type: TOYOTA INNOVA GRAND NEW G DIESEL 2.5 M/T, Frame number: MHFXS-42G5F2563962, Engine no: 2KDS547422, CPCP no: L12691972, Color: Metallic Gray, Year: 2015, Police No: AG1640RJ with an order to determine the object of dispute in the form of a car Brand/Type: TOYOTA INNOVA GRAND NEW G DIESEL 2.5 M/T, Serial Number: MHFXS42G5F2563962, Engine no: 2KDS547422, CPCP no: L12691972, Color: Metallic Gray, Year: 2015, Police No: AG1640RJ is valid to be returned to the Plaintiff immediately after this decision is pronounced.

The court's decision in accepting a lawsuit for default or unlawful acts where the creditor ignores the OJK provisions is that it should look at the contract clause made by the parties, whether the financing agreement was made during the Covid-19 period or before Covid-19 occurred, then whether the debtor's inability to pay occurred during the Covid-19 period. This is important because one of the conditions for force majeure according to Purwahid Patrik is that it is not caused by circumstances that are the risk of the debtor. So, if the debtor signs a financing agreement with the creditor during the Covid-19 emergency, of course the Covid-19 emergency has a risk that has an im-

pact on the business experiencing a decline which results in the fulfillment of the debtor's obligation being disrupted. Therefore, the inability to pay the performance at the time the financing agreement is signed in the Covid-19 emergency period is not a reason for force majeure. If the financing agreement is signed before the pandemic, then due to the covid-19 pandemic the debtor is unable to pay the obligation, the covid-19 pandemic is a form of force majeure that results in the inability to fulfill the obligation by the debtor due to relative force majeure, so that the court through a Judge's decision can decide that the obligation to fulfill the debtor's obligation in the financing agreement can be suspended until the covid-19 health emergency is lifted by the President of the Republic of Indonesia, which has been lifted on June 21, 2023.

#### **D. Conclusion**

The Covid-19 pandemic is a form of relative force majeure that can suspend the implementation of the agreement. If in a force majeure situation, the performance is still enforced, it will cause great losses in the implementation stage of the performance. If the Covid-19 pandemic has ended, debtors affected by the economic downturn due to the Covid-19 pandemic can return to fulfill their obligations to creditors.

The District Court and Religious Court in resolving cases or disputes relating to default and tort due to force majeure, including the Covid-19 pandemic, which has an impact on the debtor's inability to carry out the obligation to pay financing returns to creditors, are of the opinion that the risk of the Covid-19 pandemic in the financing agreement is borne by the debtor if the financing agreement is executed when the Covid-19 pandemic occurs if the financing agreement is agreed before the Covid-19 pandemic occurs and the debtor's ability to carry out the contents of the financing agreement is affected by the Covid-19 pandemic, then the Covid-19 pandemic becomes a form of force majeure or a relative nature or also called force majeure or temporary force majeure which results in the creditor not being able

to request the fulfillment of the debtor's performance until the end of the force majeure. Renegotiation is needed as a solution in postponing the obligation to fulfill achievements by debtors affected by the economic downturn due to the covid-19 pandemic.

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