



Comparative Analysis of Legal Policies Regarding Force Major During Covid-19 Pandemic in Indonesia and China

Dolot Al Hasni Bakung¹, Mohamad Hidayat Muhtar², Nabih Amer³

^{1, 2, 3} Faculty of Law Negeri Gorontalo University, Gorontalo, Indonesia

E-mail: dolot.bakung@ung.ac.id



Submitted: 14/01/2022

Revised: 09/04/2022

Published: 16/05/2022

Info Artikel

Keywords:

**Covid-19; Force Majeure;
Indonesia; China.**

DOI:

[10.47268/ballrev.v3i1.721](https://doi.org/10.47268/ballrev.v3i1.721)

Abstract

Covid-19 as a pandemic in the 20th century has brought consequences in many aspects, one of which is the force major aspect. The force majeure policy in Indonesia is still incomplete, unlike China, which already has a more complete policy. The purpose of the research is to be able to find out about the Covid-19 policy in Indonesia and to compare the Indonesian and Chinese force major policy settings. The research method uses a normative research type with a statutory approach. The results of the study show that Indonesia's policy in dealing with covid 19 has problems in two policies, namely: the provision of information and the Lockdown policy. Meanwhile, the comparison problem with China is better by providing a mechanism with more legal certainty, namely providing access to the determination of force major against the Supreme Court, while Indonesia does not have a similar mechanism.

1. Introduction

Corporate activities both nationally and globally had received a huge impact as a result of the spread of Corona Virus Disease 2019 (Covid-19), a very fast transmission rate and a high risk of death made the government take appropriate policies to prevent the addition of corona Virus Disease 2019(Covid-19), the impact caused by the spread of Corona Virus Disease 2019 (Covid-19) cannot be denied that it has been in a very alarming condition. The fact that the widespread coverage of the affected areas, as well as having implications on the broad socioeconomic aspects in Indonesia, along with the increasing number of victims and property losses, is evidence that the impact caused by the spread of Corona Virus Disease 2019 (Covid-19) can no longer be underestimated. With the covid-19 pandemic, the government then took policy on the existence of PSBB so that it had an impact on debtors who experienced economic difficulties resulting in the cancellation of the agreement. In a business environment, failure to fulfill an agreement or default can often be justified by law if a person who does not fulfill an achievement can prove that there is an unavoidable obstacle.

Related to the covid-19 pandemic, whether legally this global pandemic can be used as a force major reason not to carry out the agreement, a practitioner who has

been studying contract law, Ricardo Simanjuntak, believes that force major is an obstacle where one of the parties does not have the ability to avoid the obstacle even though he has made his best efforts. Another element that supports the occurrence of force major, the party can never predict when an obstacle occurs, and it does not have a contributing factor to the occurrence of the obstacle (Online law).

In the event of non-performance of a contract, one of the possible legal remedies by the plaintiff is to claim damages. Another solution could be the termination of the contract. Moreover, being able to make a lawsuit in court with the request of one of the parties to terminate the contract is possible only if the purpose of the contract cannot be realized due to an epidemic situation or an outbreak of the disease. prevention and control measures (Commission, 2018: 184).

What about damage? The indemnity shall fully reimburse the losses caused by breach of contract. Therefore, the problem of causality arises here. All losses, which will not occur" but for " such violations must be compensated. But they should not exceed certain limits. The limit is indicated by losses that the infringing party may or should have foreseen, at the time of termination of the contract, as a possible (unlikely) result of such breach, based on facts from which that party is known. The court cannot punish the party who committed the offense with higher damages than those caused by the foreseeable consequences of the offense.

The issue of force major itself in the covid-19 pandemic is an important note that must be resolved. This is because the negative impact of covid-19 pandemic is felt by almost all sectors, especially the business sector caused by the policy PSBB. Therefore, there are many financial plans that cannot be implemented, one of which is the problem of credit payments. In Indonesia regarding force major contained in Article 1244 of the Criminal Code stated:"If there is a reason for that, the debtor must be punished to reimburse costs, losses and interest if he cannot prove that it is not or not at the right time the implementation of the engagement, because of something unexpected, cannot be accounted for to him, all of it even if bad faith does not exist on his part". Furthermore, in Article 1245 of the criminal code mentions: "There is no cost of loss and interest to be replaced, if due to forced circumstances or due to an accidental occurrence in debt is unable to give or do something that is required, or because the same things have committed prohibited acts."

In contrast to Article 1244, article 1245 talks about losses that arise because there is an obstacle for the debtor to give or do something that is required because of forced circumstances or because of an accidental incident. According To J. Satrio, the formulation of these two chapters speaks of the obstacles that arise after the engagement is born. In other words, a hindrance in the implementation of the obligations of the engagement. There are four things mentioned in articles 1244-1245 of the Civil Code, which cause the debtor to be unable to carry out his obligations, that is, unexpected things, cannot be blamed on him, unintentional, and there is no bad faith in him (Andrianti et al., 2021: 328).

In comparison article 590 of the Chinese Civil Code states in the same way that "in the event that a party cannot perform a contract due to force majeure, the party is

relieved of liability in part or in whole based on the impact of force majeure, unless otherwise provided by law. In such a case, the party shall promptly notify the other party to reduce the harm that may be caused to the other party and provide evidence within a reasonable time limit. If force majeure occurs after one of the parties delays the performance, that party will not be relieved of responsibility for the violation." (Herbots, 2021: 7).

Force major means an event that cannot be foreseen in advance, but also cannot be avoided, and cannot be overcome (article 180 of the general provisions of the Chinese Civil Code of March 15, 2017; Article 117 of the contract law of March 15, 1999). The definition is not repeated in Article 590 of the Civil Code. The party that requests it must show a hindrance, a hindrance, beyond its control. Difficulties due to his personal financial problems (insufficient liquidity) for example are not considered as such. Typical categories are: natural disasters (earthquakes, floods and volcanic eruptions), collective social events (Wars, labor restriction strikes) and government actions (quarantine, seizure in due process). China's 1992 maritime law lists some typical events that can be considered force major events in maritime transport, such as war or armed conflict, fire, or quarantine restrictions (Article 51) (Berger & Behm, 2020: 138).

It can be seen that there are fundamental differences in arrangements in Indonesia and China. China's own setting more specifically mentions some things that cause force major in the civil code this can be understood to provide certainty both to creditor and debtor while in Indonesia is not provide specific arrangements that do not provide legal certainty. Therefore, it is necessary to conduct a comparative study on the above problems.

As for the following scientific accountability in the attach some previous research, namely:

1. Interpretation of the Covid-19 pandemic as a reason for Force Major that resulted in the cancellation of the agreement (Andi Risma, Zainuddin Zainuddin), this study focused on discussing, the Covid-19 pandemic which was designated as a non-natural national disaster as the basis for force major that has implications for the cancellation of the agreement. The difference lies in the comparative study conducted by the researcher.

2. Covid-19 pandemic: Force Major and Hardship in the work Agreement (Nindry Sulistya Widiastiani), research focusing on the covid-19 pandemic can be used as a basis for postulating the application of force major and hardship in the event of failure to fulfill achievements in the work agreement by employers as debtors. Differences in research exist in the aspect of comparative studies conducted by researchers.

2. Methods

This research is categorized into normative legal research types it is based on the issues and or themes raised as research topics. The research approach used is philosophical and analytical, which is research that focuses on rational, critical and

philosophical analytical views, and ends with a conclusion that aims to produce new findings as an answer to the main problem that has been established (Ishaq, 2017: 44). And will be analyzed by analytical descriptive method, namely by describing the applicable legislation related to legal theory and positive law enforcement practices related to the problem (Marzuki, 2016: 22).

3. Results And Discussion

3.1 Legal Policies In Covid-19 Pandemic Affect Force Majure

Seeing from the increasing number of cases to claiming dozens of fatalities, any government policy related to handling this outbreak must continue to be a concern. Moreover, it can be said that basically the government's actions related to handling this outbreak are a little late. This can be seen when the beginning of the Corona virus began to spread in China, a number of countries have taken preventive measures such as closing flights from and to countries infected with the virus, providing strict supervision at state borders and providing accurate information for their citizens related to the spread of the Covid-19 virus, but Indonesia at that time had not shown its seriousness in dealing with the spread of this virus.

Furthermore, after the appearance of two positive cases of corona the government then carried out a series of policies to overcome the rapid spread of the virus. First, the government set up hundreds of referral hospitals used to handle the case. Second, the government compiled a protocol for handling Covid-19 disease. Third, the government formed a task force to track cases of the spread of the Covid-19 virus. Fourth, the government is reallocating the budget to focus on preventing and handling the Covid-19 pandemic. Related to this, the Minister of Finance has issued Decree of the Minister of Finance No. 6/KM.7/2020 on the distribution of special allocation funds for the health sector and health operational assistance funds in the context of mediation and/or handling of Corona Virus Disease 2019 (Covid-19).¹⁴ fifth, the government seeks social distancing and encourages people to avoid activities related to mass gathering. Sixth, the government formed a task force for the acceleration of Covid-19, coordinated by the chairman of BNPB, Doni Monardo (Bramasta, 2020).

As for some government policies that affect the occurrence of force major or difficulty creditors in paying achievements are as follows:

1. Information problems regarding the Covid-19 Virus

The slow and chaotic handling of corona caused distrust from the public, coupled with various controversial statements by the government since the beginning of the Covid-19 outbreak in China, which is like underestimating Covid-19 until now, which often generates many protests from the public. For example, one of the statements just issued by Achmad Yurianto as the government spokesman for the task force for the acceleration of handling COVID-19 is related to the appeal to work from home in the context of physical distancing, which is as follows: "If this can be done together with everyone, protect each other. The rich protect the poor in order to live naturally, the poor protect the rich in order not to spread the disease"

(Tuwu et al., 2021: 99), of course, such a statement will cause various kinds of speculation such as degrading the lower class society, causing noise in society that causes economic uncertainty to impact business activities.

2. Lockdown Policy Issues

Lockdown policy when referred to in the vocabulary in the language is synonymous with health quarantine. If we refer to Article 1 point 1 of Act Number 6 year 2018 on health quarantine (Act 6/2018), what is meant by health quarantine is an effort to prevent and ward off the exit or entry of diseases and/or public health risk factors that have the potential to cause public health emergencies. Furthermore, it is also explained in Article 49 of Act 6/2018 which clearly regulates the following: "in order to take measures to mitigate risk factors in the region in situations of Public Health Emergencies, home quarantine, regional quarantine, hospital quarantine, or large-scale social restrictions are carried out by officials Health Quarantine. Home quarantine, regional quarantine, hospital quarantine, or large-scale social restrictions as referred to in Paragraph (1) shall be based on epidemiological considerations, threat magnitude, effectiveness, resource support, operational technical, economic, social, cultural, and security considerations. Regional quarantine and large-scale social restrictions as meant in Paragraph (1) shall be stipulated by the Minister". Thus, based on these rules, lockdown and social distancing are both aimed at suppressing the potential for disease transmission. However, the government does not provide other prevention mechanisms so that the pressure on community recognition is very large and strengthens the potential for barriers to payment of achievements to creditors.

The variety of problems above certainly have a big impact on both creditors and debtors who are economically experiencing a slowdown. This is at risk of triggering a delay in performance or default on performance to the debtor. The problem is that there is no clear regulation on force major about limits and indicators of what results in force major can be done. In the absence of legal certainty, the concept of force major during the covid-19 pandemic can be interpreted independently.

3.2 Comparative concept of Force Major Indonesia and China

Under the laws of the PRC, both the general rules of Civil Law and Contract Law define a "force major event" as an unpredictable, unavoidable and unconquerable situation, viewed objectively. A Chinese court can state whether an event constitutes force majeure. For example, in 2003, shortly after the SARS outbreak, the Supreme Court of China issued a judicial interpretation stipulating that, in the event that the contract cannot be executed due to the SARS outbreak or any administrative measures taken against SARS, such a situation should be considered a force majeure event. Until this warning is published, China's Supreme People's Court has not officially argued whether the current Coronavirus outbreak should be considered a force majeure event. (Grace, 2001: 139). However, courts in various provinces and cities have issued various guidelines and opinions over the past two months to guide trials over contract disputes caused by the outbreak.

- 1) According to Article 180 of the Civil Code of the PRC, if civil obligations fail to be carried out due to force major, no civil liability should be borne. If the law determines otherwise, the provision shall apply. Force major refers to unexpected, unavoidable and insurmountable objective events.
- 2) According to Article 194 of the Civil Code of the PRC, restrictions on actions are terminated for the last six months of the limitation period if the right to demand cannot be exercised due to force major. In such a case, the restriction of action will expire after six months from the date the obstacle that caused the suspension (i.e. the force major event) is eliminated.
- 3) According to Article 563 of the Civil Code of the PRC, the parties to a contract may terminate the contract if the purpose of the contract becomes unattainable due to force major.

Therefore, a contract can be terminated due to force major only if the force major event still does not allow the achievement of the purpose of the contract. This threshold is quite high and, despite force major, termination of the contract may not be possible for many contracts under such conditions. According to Article 590 of the Civil Code of the PRC, in the event that a contract is unenforceable due to force major, the obligation is partially or completely waived due to the consequences of a force major event, unless otherwise provided by law. If one of the parties to a contract is unable to perform the contract due to force major, then the party shall notify the other party in time to reduce the harm that may be caused to the other party and provide evidence within a reasonable period of time. time limit. If force major occurs after one of the parties delays its implementation, then the obligations of that party are not excluded.

The above provisions indicate that the consequences of force major and the extent of the exemption from liability depend on the specific circumstances of the case in question. Each case must be examined individually and even if force major is generally present, this does not always lead to an exemption from liability in a particular case. As mentioned above, the party suspected of being affected by force major must inform the contract to the other party as soon as possible. For evidentiary purposes, this must be done in writing. Furthermore, one of the parties suspected of being affected by force majeure must take reasonable steps to mitigate the other party's losses. Otherwise, the alleged force majeure party may still face liability. In addition, evidence must be provided within a reasonable time limit. For this, the relevant government authorities should be contacted if they can issue the relevant certificate.

After the outbreak of COVID-19, the Supreme People's Court ("SPC") of China issued a Guiding Opinion on several matters regarding civil cases worthy of trial involving COVID-19 in April, May and June 2020, respectively. Opinions contain SPC views on how to deal with certain aspects of covid-19 related civil cases, including but not limited to dispute resolution, contract execution, Employment Relations, judicial assistance, more flexibility in property preservation measures, deadlines related to civil procedure, application of law, foreign related commercial cases, transport contract related cases, admiralty and maritime disputes ([Herbots, 2021: 151](#)).

Even if a court finds that force majeure has occurred, in order to claim the occurrence of a “force majeure” event, China's Civil Code requires the defaulting party to (i) notify the party or other party of the force major event in a timely manner to minimize potential damage and (ii) to provide certification documents (including, but not limited to, the notice of the Chinese Council for the promotion of International Trade (CCPIT) described below) within a reasonable period of time. Assuming these requirements are met, either the defaulting or non-defaulting party may terminate the contract in question, or the non-defaulting party may waive part or all of the contract execution obligation in the event of a force major event (Liu & Bai, 2020).

When compared in Indonesia, the condition of force or also referred to as *overmacht* or force major is a situation beyond human control that occurs after the holding of the agreement, which prevents the debtor to fulfill his performance to the creditor, while according to R. Setiawan in question a forced state is a state that occurs after the approval is made, which prevents the debtor from fulfilling his achievements, that is, the debtor cannot be blamed and does not have to bear the risk and cannot suspect at the time the approval is made, such as natural disasters, earthquakes, tsunamis, and landslides. Due to this forced situation all the inability of performance can be tolerated (Adonara, 2014: 67), if reviewed in developed countries, such as the Netherlands, Germany and France, there have been more flexible provisions to be used as a basis for forgiveness (excuse) for the non-implementation of agreements based on the doctrine of change of circumstances (change of circumstances) or difficult circumstances (Muru, 2016: 13).

This doctrine is a form of exception to the principle of binding him to the covenant (*pacta sunt servanda*). This doctrine does not require any obstacles in the implementation of performance so that the implementation of performance becomes impossible (impossible), but it is sufficient if there is a change in circumstances that fundamentally change the balance of the agreement either due to the increase in the cost of performance performance or the decrease in the value of performance performance.

If the clause provides protection provided against losses caused by fire, flood, earthquake, rainstorm, hurricane or other natural disaster, power outage, catalyst damage, sabotage, war, invasion, civil war, rebellion, revolution, military coup, terrorism, nationalization, blockade, embargo, labor dispute, strike, and sanctions against a government in essence each such circumstance is translated as a forced and unforeseen circumstance for the parties at the time, then defaulting or delayed performance can be justified.

If it is not contained in the delay of achievement clause in an emergency, then this makes the fulfillment of the achievement unaccountable to each party. If it is associated with the condition of the COVID-19 pandemic that comes suddenly, then it can be said that the COVID-19 pandemic is a forced state that cannot be predicted in advance by the parties at the time a contract is made.

Moreover, in the concept of force majeure there is a division of variables, namely absolute force majeure and relative force majeure, as well as objective force

majeure and subjective force majeure. For the concept of absolute force majeure, the debtor is in a state of force if the fulfillment of the feat is impossible (there is an element of impossibility) carried out by anyone or by everyone. In this teaching the minds of scholars are fixed on a natural disaster or a great accident that causes a certain party to be in an impossible position to fulfill the feat. In contrast to the concept of relative force majeure which marks the condition of the debtor that still allows fulfilling the routing as its obligation to carry out the performance, but requires a large unequal sacrifice if the performance is carried out or the strength is beyond human ability or and causes very large losses (Adhari, 2019: 156).

So is the concept of objective and subjective force major. In the concept of objective force major, one of the parties is in a condition that the promised goods are destroyed or lost, so that the achievement cannot be carried out as promised. This is contained in Article 1444 of the Civil Code which states that, "if certain goods that are subject to approval are destroyed, can no longer be traded or lost in such a way that it is completely unknown whether the goods are still there, then delete the engagement" (Sukarmi, 2008: 40).

In addition, the subjective force majeure of events that occur not against the object that is the object of the contract in question, but rather in relation to the circumstances or capabilities of the debtor himself, for example, if the debtor is seriously ill or disabled for life so that it is no longer possible to perform the feat. This is what causes this concept to be said to be subjective force majeure because the reason for whether or not the achievement is fulfilled returns to the subjective value of each party.

Based on the above explanation of the concept of force majeure, the condition of business actors or debtors who are unable to fulfill achievements can be classified into relative force major and subjective force major. This is because the condition of the COVID-19 pandemic that spreads outside in Indonesia is temporary (relatively), so that debtors can carry out their performance obligations if the COVID-19 pandemic has been completed or at least can be controlled by the government through good handling. The comparison of force majeure Indonesia and china is as follows:

Table
Comparison of force majeure Indonesia and China

Nation	Analysis
Indonesia	1) Article 1244 of the Civil Code: "The debtor shall be punished for reimbursement of costs, losses and interest if he cannot prove that the non-execution of the engagement or the
	Force major is an unforeseen circumstance that results in the creditor experiencing delay or inability to pay performance. Indonesia itself has substantively

	<p>timing of the engagement is due to something unexpected, which cannot be insured against him even if there is no bad faith in him.”</p> <p>2) Article 1245 of the Civil Code: “There is no reimbursement of losses and interest if due to force or accidental circumstances, the debtor is prevented from giving or doing something that is required, or doing an act that is forbidden to him”</p> <p>3) Determination of Force Major by agreement of the parties</p> <p>4) Force major can also be obtained thanks to a lawsuit in court</p>	<p>regulated in the civil code in case of force major but does not regulate specifically the indicators used as force major and depends on the interpretation of each party.</p> <p>In addition, the determination of force major circumstances cannot be done by the court/Supreme Court which makes force major not have legal certainty. This is in contrast to china, which has a better legal certainty mechanism by giving the authority of the Chinese Supreme Court to determine Covid-19 as a force majeure circumstance that provides legal certainty to the parties.</p>
<p>China</p>	<p>1) Article 180 of the PRC "if a civil obligation fails due to force major, no civil responsibility shall be borne. If the law dictates other, those provisions will apply. Force major refers to unforeseen, unavoidable, and insurmountable objective events”</p> <p>2) Article 194 of the PRC "the limitation of action is terminated for the last six months of the limitation period if the right to claim cannot be exercised due to force major. In such a case, the</p>	

-
- limitation of action shall expire after six months since the date of the restriction that caused the suspension (i.e. the event of force major) is removed”
- 3) Article 563 of the PRC "the parties to a contract may break the contract if the purpose of the contract becomes impossible due to force major”
 - 4) The ruling of force major can be set by the Supreme Court and must be carried out by the whole party.
 - 5) The ruling of force major in china has legal certainty because it has given an indication of force major.
-

Based on the above explanation, it can be said that the Indonesian civil code regulation still has weaknesses in providing certainty to the parties in determining force major. This tends to have legal consequences because the debtor can sue if the creditor is unable to pay the performance. Unlike china, which provides legal certainty by determining covid-19 force major through the Supreme Court. Meanwhile, Indonesia Force major is interpreted independently by each party.

4. Conclusion

The Indonesian government's policy in dealing with covid-19 has a lot of impact on the community's economy, which makes income decline and causes difficulties to pay for achievements. Some of these policies include: information issues regarding the Covid-19 Virus and Lockdown policy issues. While the difference in the regulation of force major Indonesia and China lies in the mechanism of determining the circumstances of force major that can be determined by the Supreme Court. China gave the Supreme Court the authority to be able to determine the state of force major that can provide legal certainty to creditors and debtors. Indonesia does not have a mechanism like China that makes force major circumstances in the interpretation unilaterally or make a lawsuit against the court. Therefore, it is necessary to improve the Indonesian civil code in determining the conditions of Force major and legal certainty of the parties.

References

- Adhari, A. (2019). Ambiguitas Pengaturan Keadaan Bahaya Dalam Sistem Ketatanegaraan Indonesia. *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi*, 11(1), 43–61. <https://doi.org/10.28932/di.v11i1.1960>
- Adonara, F. F. (2014). *Aspek-Aspek Hukum Perikatan*. Mandar Maju.
- Andrianti, W. P., Santoso, B., & Prasetyo, M. H. (2021). Pandemi Covid-19 Sebagai Justifikasi Force Majeure dalam Kontrak Bisnis. *NOTARIUS*, 14(2), 739–756.
- Berger, K. P., & Behm, D. (2020). Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study. *McGill Journal of Dispute Resolution*, 6(4), 78–130. <https://doi.org/10.2139/ssrn.3575869>
- Bramasta, D. B. (2020). *Menyelisik Tugas dan Fungsi Gugus Tugas Percepatan Penanganan Covid-19 yang Dibubarkan Jokowi*. KOMPAS.Com. <https://www.kompas.com/tren/read/2020/07/22/124500765/menyelisik-tugas-dan-fungsi-gugus-tugas-percepatan-penanganan-covid-19-yang>
- Commission, E. (2018). *Regulation Of The European Parliament And Of The Council: addressing situations of crisis and force majeure in the field of migration and asylum*.
- Grace, D. L. (2001). Force Majeure, China & (and) The CISG: Is China's New Contract Law a Step in the Right Direction. *SAN DIEGO INTERNATIONAL LAW JOURNAL*, 2(1), 173–207.
- Herbots, J. H. (2021). Covid-19 and contracts in China and Europe. *China-EU Law Journal*, 1–9. <https://doi.org/10.1007/s12689-021-00091-5>
- Ishaq, H. (2017). *Metode Penelitian Hukum*. Alfabeta.
- Liu, J. Y., & Bai, C. (2020). *Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change*. Pillsburylaw.Com. <https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html>
- Marzuki, P. M. (2016). *Penelitian Hukum*,. Kencana.
- Miru, A. (2016). *Hukum Perikatan: Penjelasan Makna Pasal 1233 sampai 1456 BW*. Raja Grafindo Persada.
- Sukarmi. (2008). *Cyber Law: Kontrak Elektronik Dalam Bayang-Bayang Pelaku Usaha*. Pusaka Sastra.
- Tuwu, D., Laksmono, B. S., Huraerah, A., & Harjudin, L. O. (2021). Dinamika Kebijakan Penanganan Pandemi COVID-19 Dalam Perspektif Kesejahteraan Sosial. *SOSIO KONSEPSIA: Jurnal Penelitian Dan Pengembangan Kesejahteraan Sosial*, 10(2), 97–110. <https://doi.org/10.33007/ska.v10i2.2158>