Public Procurement Contract for Goods and Services Following the Presidential Decree Number 12 of 2020 on the Stipulation of the *Coronavirus Disease* (Covid-19) Pandemic as a National Disaster

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DOI: https://doi.org/10.22304/pjih.v7n2.a5

Submitted: July 7, 2020 | Accepted: August 24, 2020

Abstract

The Covid-19 Pandemic affects many sectors. Therefore, the Indonesian Government passed the Presidential Regulation Number 12 of 2020 to manage the Pandemic. Unfortunately, this regulation has evoked various interpretations on the disaster contingency as a foundation to apply *force majeure* condition. The Government's policies of budget refocusing and reallocation to manage the Covid-19 Pandemic have brought significant effects on goods and services procurement contracts. This condition may lead the Government into default, and it is *force majeure*. Therefore, the Government is discharged from any liabilities. Consequently, it may injure contractors of procurement. This study aims to investigate the actuality of such procurement contracts following the Presidential Regulation. This study is a normative law research. Based on the Presidential Regulation, the force majeure condition is likely to be applied on procurement contracts. However, the condition does not immediately nullify or terminate the contracts. They remain legally valid and binding. In case of a condition permanently prevents debtor to fulfill obligations, contract can be terminated. In case of a condition temporarily prevents the contract's implementation, the best solution to encourage conducive business climate is renegotiation that is legalized by contract addendum.

Keywords: Covid-19, force majeure, public procurement contract of goods and services.

Kontrak Pengadaan Barang dan Jasa Pasca Berlakunya Keppres No. 12 Tahun 2020 tentang Penetapan Bencana Non-Alam Penyebaran Coronavirus Disease 2019 (Covid-19) sebagai Bencana Nasional

Abstrak

Pandemi Covid-19 berdampak pada banyak faktor dan membuat pemerintah Indonesia memberlakukan Peraturan Presiden No. 12 tahun 2020 (Perpres 12/2020). Akan tetapi, peraturan ini memunculkan banyak interpretasi tentang kemungkinan bencana untuk menjadi alasan penerapan keadaan kahar. Kebijakan pemfokusan ulang dan realokasi anggaran oleh pemerintah untuk mengatasi Covid-19 membawa dampak signifikan pada kontrak pengadaan publik. Kondisi ini dapat dikategorikan sebagai keadaan kahar, karena

PADJADJARAN Journal of Law Volume 7 Number 2 Year 2020 [ISSN 2460-1543] [e-ISSN 2442-9325]

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menyebabkan pemerintah gagal memenuhi kewajiban dalam kontrak. Oleh sebab itu, pemerintah diberhentikan dari tanggung jawab apa pun, dan hal ini dapat merugikan kontraktor. Penelitian ini bertujuan untuk menganalisa eksistensi Kontrak Pengadaan Publik setelah berlakunya Perpres 12/2020. Penelitian ini merupakan penelitian hukum normatif. Mempertimbangkan Perpres 12/2020, keadaan kahar kemungkinan akan diterapkan pada kontrak pengadaan. Namun, kondisi ini tidak serta merta membatalkan atau mengakhiri kontrak. Kontak tersebut tetap sah secara hukum dan terbatas. Hal ini harus mempertimbangkan apakah pandemi saat ini dapat mengakibatkan keadaan kahar. Dalam hal suatu kondisi yang secara permanen mencegah debitur untuk melakukan kewajibannya, kontrak akan berakhir. Dalam hal suatu kondisi yang secara sementara mencegah kontrak untuk dilaksanakan, negosiasi ulang yang ditindaklanjuti dengan adendum kontrak adalah solusi terbaik yang mendorong iklim bisnis yang kondusif.

***Kata kunci**: Covid-19, keadaan kahar, kontrak pengadaan publik.*

A. Introduction

The massively spread of *Coronavirus Disease 2019* (Covid-19) has resulted global instability. The Covid-19 Pandemic does not only cover health issue, but it also has stroked economic, social, and living environmental sectors of exposed states. Responding the danger, on March 11, 2020, the World Health Organization (WHO) announces Covid-19 as a *global pandemic*. The WHO asked states of the world to take 'aggressive and urgent actions' to manage the pandemic.[1]

Certainly, Indonesia is affected by the pandemic also. As of May 28, 2020, Indonesia has recorded 24.538 cases of Covid-19. The pandemic is estimated to reduce the domestic economy to minus 3% in the second quarter of 2020. Such condition seems to bring significant impact on business. Businesspersons may feel difficult to run their businesses because they have to reduce their business activities and employees.[2]

Taking into consideration the pandemic effects, the Indonesian Government passes the Presidential Decree Number 12 of 2020 on the Determination of Non-Natural Disaster of the 2019 Virus Disease (Covid-19) Spread as a National Disaster. Following the decree, there have been many opinions and interpretations on the issue, including from the business figures. Some business figures argue that the decree can be the foundation to declare the *force majeure* condition on business contracts and, thus, it worries the exposed parties.

The restlessness on the possibility of *force majeure* clause does not only experienced by parties having private contracts but also, they who have public procurement contracts due to the policy of budget reallocation that is shifted to

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[1] Tirto.id, "WHO Umumkan Corona COVID-19 Sebagai Pandemi", https://tirto.id/eEvE, accessed on May 28, 2020.

[2] Katadata.co.id., "Kadin Prediksi Ekonomi Kuartal II Minus 3%, Pengangguran akan Meledak", https://katadata.co.id/berita/2020/05/20/kadin-prediksi-ekonomi-kuartal-ii-minus-3-pengangguran-akan-meledak, accessed on May 28, 2020.

countermeasure the Covid-19. This policy of budget reallocation may lead to business contract adjustment, or even termination, by the Government, including the public procurement deals. The Governor of East Kalimantan has already done this. The Governor issued a policy to terminate the process of public procurement contract 2020 on April 14, 2020, up to unspecified time. This policy was due to the failure of the target of Local Government Budget 2020 projected at IDR 11.84 billion. Consequently, there was adjustment policy on the Local Government Budget to cope with the Covid-19 management to follow the Central Government's policy. Then, many activities are canceled; and their budgets are shifted to the efforts of overcoming the Covid-19.[3]

Based on the example, it can be concluded that the Presidential Decree Number 12 of 2020 affects the cessation of public procurement contract. It may injure the contractors since they often have completed their contract obligations but the Government does not pay based on the *force majeure* assumption discharging them from any liabilities. In fact, a force majeure condition does not automatically happen by the announcement of Covid-19 Pandemic as a national disaster. In addition, contract termination opposes a principle of contract that contract cannot be nullified unless both contracting parties agree to do so or due to particular causes considered satisfactory by law.

In general, a contract contains a clause of *force majeure*. The clause covers natural disasters such as flood, earthquake, erosion, etc. as well as non-natural disaster such as wildfire, sabotage, warfare, etc. However, many businesspersons do not expect that particular pandemic such as Covid-19 to happen. For that reason, a study on the issue appears to be essential to address the appropriateness of the Presidential Decree Number 12 of 2020 as the foundation of put *force majeure* condition into effect. The study is also necessary to analyze the prospects of public procurement contracts following the sanctioning of the presidential decree. The study is necessary to ensure legal protection for contracting parties in the future.

This study employed normative law study that collected legal regulations as the primary substances and gathered supporting references or literatures as the secondary substances. The study explored legal laws, scientific works, journals and articles, and other relevant sources from the internet, especially they that deal with public procurement and *force majeure* condition. The collected legal substances were analyzed in qualitative way and the result is presented descriptively.

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[3] Kaltimtoday.co, "Lawan Corona di Kaltim, Isran Noor Hentikan Seluruh Proses Lelang dan Kontrak Pekerjaan 2020", https://kaltimtoday.co/lawan-corona-di-kaltim-isran-noor-hentikan-seluruh-proses-lelang-dan-kontrak-pekerjaan-2020/, accessed on May 28, 2020.

B. The Prospect of Public Procurement Contracts Following the Presidential Regulation Number 12 of 2020 on the Determination of Non-Natural Disaster of the 2019 Virus Disease (Covid-19) Spread as a National Disaster

1. Definition of Public Procurement Contract

Public procurement contract of goods and services on behalf of a public authority by government is also known as *government contract or procurement contract*. It is a contract made by government regularly to fulfill governmental needs.[4] It is commonly seen as a contract that puts government as one of contracting parties and public procurement as the object.

The involvement of government in public procurement contract of goods and services has specific characters. Simamora argues that such contract is different from ordinary contract involving all private parties.[5] The government's position as a public authority implies the implementation of public law on the contract. In addition, public procurement contract contains the elements of both private and public laws simultaneously.[6] Contractual relationship among contracting private parties is restricted by regulations for government contract.

The Government's Public procurement contract is set under the Presidential Regulation Number 16 of 2018 on Government Procurement. The regulation replaces the previous Presidential Regulation Number 54 of 2010 on Government Procurement that had been amended frequently. The provision of Article 1 (1) of the Regulation defines government procurement as an activity of supplying goods and services by ministries/departments/local authorities funded by National/Local Budget. The activity starts from identifying the needs up to reporting the result. The regulation covers (1) the goods and services procurement in ministries, departments, and local authorities using either national or local budget; (2) the national or local budget as mentioned earlier comprising funds that are partly or entirely from domestic loan and/or grant from national and/or local government receives; and/or (3) partly or entirely funded by foreign loan or grant.

Furthermore, Article 1 (44) of the Regulation defines public procurement contract as a written agreement between the budget users/ representatives/ commitment-making official and goods and service suppliers or self-management organizers. If it involves supplier, the suppliers provide all the goods and services. If it involves self-management, the ministries/ departments/ local authorities, societal organization, or societal community organizes all processes. As mentioned in this regulation, public procurement includes goods, construction needs, consultation, and other services.[7]

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[4] Yohanes Sogar Simamora, *Hukum Perjanjian (Prinsip Hukum Kontrak Pengadaan Barang dan Jasa oleh Pemerintah)*, Yogyakarta: LaksBang PRESSindo, 2009, p. 1.

[5] *Ibid.,* p. 54.

[6] Yohanes Sogar Simamora, *Hukum Kontrak (Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia),* Surabaya: LaksBang Justitia, 2013, p. 3.

[7] Based on Article 27 of PR 16/2020, the kinds of public procurement contract of goods/construction needs/other services consist of lump sum, unit price, the combination of lump sum and unit price, turnkey,

In general, the public procurement by the Government, according to the Presidential Regulation Number 16 of 2018 is organized in written agreement between the Government and business performer or non-governmental organization. In addition, the Government can manage it single-handedly. The provision of the Presidential Regulation is valid for procurement using national/local budget. The sources of national/ local budget may be derived from either domestic or foreign loans and/ or grants.

2. The Legitimacy of Public Procurement Contract

In general, the parameter of contract legitimacy is determined under the Article 1320 of the Civil Code that a contract is considered legal if it cumulatively satisfies four terms: (1) confining agreement among contracting parties; (2) capacity to make contract; (3) covering particular matter; and (4) permissible cause. As like other contracts, the Government is obliged to obey the Article.

In the Government's public procurement contract, an agreement is a realization of both user and supplier contract signing. Contracting parties should perform several stages before accustoming personal interests respectively. The contract may be completed with the establishment of specific procedures for the purpose of legitimacy.

In addition to time limit, the fulfillment of public procurement is measured based on authorities of contracting parties. As a contracting party, the Government's authorities arise from delegations. Vice versa, for corporation, the authorities lie on directors as company leaders.

The third and fourth requirements of Article 1320 of the Civil Code are the covering particular matter and permissible cause. Particular matter implies specific object in contract. Based on contract's name, the object must be goods, services, or construction. Permissible cause means that the content cannot oppose valid laws and regulations.

In addition to the four terms, the legitimacy the Government's contract includes[8] procedures, authority, and substances. The legitimacy of government's action that deals with letters (a) and (b) in public procurement contract may refers to the term *agree* and *capable*. However, the subsection (c) that deals with particular condition refers to the object of procurement, as well as the allowed *cause.*

In addition to the terms stated by Article 1320, there is a specific term to be fulfilled in procurement contract. It is written agreement as required by Article 1 (44) of the Presidential Regulation Number 16 of 2018. The Government's contracts

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and umbrella contract. In addition, based on Article 20 of this Presidential Regulation, the kinds of public procurement contract consist of lump sum, assignment date, and umbrella contract.

8 Yohanes Sogar Simamora, *Hukum Perjanjian*, *op.cit.*, p. 12. Also see Anton Cahyono, Ninis Nugraheni, "The Liability of Uniteral Termination by Government on Goods and Service Procurement Contract", *Hang Tuah Law Journal*, Vol.2, Issue. 1, 2018, p. 17.

involving private sectors should rely on universal principles. The principles include consensus decision-making, legal assurance, personality, freedom of contract, and good intention. Into the bargain, there should be principles of transparency and proportionality.

Consensus decision-making refers to consensus among contracting parties. Agreement reached right after the consensus among the parties. Legal assurance (*pacta sunt servanda*) defines that among the contracting parties make agreement based on valid law and regulation. Therefore, parties has an obligation to obey all agreed provisions. Personality means that contract's content binds only contracting parties personally. It does not bind other parties.

Freedom of contract is a fundamental principle of contract law. Based on Article 1338 (1) of the Civil Code, every agreement legally made applies as regulations for those who made the agreement. In indicates that every party is free to make and set the content of a contract, as long as they obey several provisions as follow.[9]

a. It is qualified as a contract.[10]
b. It is allowed by law;
c. It is as long as that it holds good intention.

Article 1338 of the Civil Code reads that every legitimate contract is regulation for contracting parties. This statement implies that a legitimate contract binds contracting parties. Normally, a contract or an agreement cannot be nullified unless both contracting parties agree to do so, or due to some causes as mentioned by law. Every agreement should be made with good intention so that the implementation may not oppose the principle of morality and fairness.[11]

Next, as mentioned in Article 1338 (3) of the Civil Code, a contract should be implemented with good intention (*goeder trouw, bona fide*). Good intention is required for the implementation of a contract, not for making a contract, as it is actually included in "allowed cause" set by Article 1320 of the Civil Code.[12]

Nevertheless, the term *good intention* aims to have the contracting parties do their rights and obligations that bind them in a contract. Ulpianus defines the term '*fairness*', as "*justicia est constans et perpetua voluntas ius suum cuique tribuendi*" (a willing to constantly give what other deserves as their rights) or "*tribuere cuique suum*" (to give everybody his own).[13] Relying on the theory of fairness by Ulpianus, Yustinianus states "*juris praecepta sunt haec honeste vivere, alterum non laedere,*

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9 Munir Fuady, *Hukum kontrak*, Bandung: Citra Aditya Bakti, 1999, p. 30.

10 For the sake of legality, it needs four requirements: 1. Confining agreement, 2. Capacity to make an agreement, 3. Particular matters, 4. Allowed cause.

11 Subekti, *Pokok-pokok Hukum Perdata*, Jakarta: PT Intermasa, 2003, p. 139.

12 Munir Fuady, *op.cit.,* p. 81.

13 Luh Nila Winarni, "Asas Itikad Baik Sebagai Upaya Perlindungan Konsumen dalam Perjanjian Pembiayaan", *DiH: Jurnal Ilmu Hukum*, Vol. 11, No. 21, 2015, p.5. Also see Bertens, *Pengantar Etika Bisnis*, Yogyakarta: Kanisiun, 2000, pp. 86-87.

suum cuique tribuere" (basic rules of law deal with a proper life, not hurting others, and giving people what they deserve).[14]

Good intention refers to honesty. An individual with good intention may totally trust partner without hiding any other intentions that make difficulties in the future.[15] Along with current development, Article 1338 of the Civil Code has an extensive interpretation and generates a provision that good intention does not only cover implementation but also the process contract signing and pre-contractual phases.[16]

Transparency is the mechanism of legal assurance for supplier to avoid any discrimination in pre-contractual phase. This principle works primarily during the process of contract drafting. However, the function constantly works in the next phases. For the sake of state financial protection, the principle is vital to avoid any practice of collusion. In procurement contract, transparency is useful to control contract implementation along with its legal assurance all at once. It is valid for both supplier/contractor and the Government.[17]

Proportionality sets a contractual relationship that generates duties among the contracting parties. The duties can be either positive or negative. *Positive duties* basically refer to *duty to perform*; while *negative duties* refer to *duty not to perform*.[18]

In proportionality evaluation of duty allotment, every contracting party is considered to have proportional duties for each other. The recognition of subjects' (the Government and supplier/partner) rights is manifested in equal chances and opportunities of proportional rights and obligations. In fact, proportionality is useful as a test to shift contractual rights and obligations into relevant and important ones.[19]

Furthermore, organization and implementation of the Government contract are related to the contract legality. The existence of public procurement contract is legally valid if contracting parties have fulfilled of terms of agreement, as mentioned in Article 1320 of the Civil Code. If it is incomplete on terms of agreement, the contract may be nullified (for subjective terms) or even null and void (for objective terms). In other words, contracting parties of public procurement contract should uphold all the principles that it relies on.

3. *Force Majeure*

In commercial business contract, *force majeure* is a clause that is always be mentioned. This clause aims to anticipate debtor's failure to fulfill contractual

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[14] Agus Yudha Hernoko, *Asas Proporsionalitas Dalam Konrak Komersiil*, Yogyakarta: Laksbang Mediatama, 2008, p. 36.

[15] Subekti, *Aspek-aspek Hukum Perikatan Nasional*, Bandung: Penerbit Alumni, 1984, p. 25.

[16] Yohanes Sogar Simamora, *Hukum Kontrak*, *op.cit.,* pp. 42-43.

[17] Yohanes Sogar Simamora, *Hukum Perjanjian*, *op.cit.,* pp. 47-48.

[18] *Ibid.,* pp. 49-50.

[19] Agus Yudha Hernoko, *op.cit.,* p. 102.

liabilities due to particular circumstance out of their capacity, including any occurrence that happens during the contract. This clause enables debtor to be discharged from any liabilities when the *force majeure* happens and debtor is prevented to fulfill liabilities due to particular circumstances.

The presence of *force majeure* explicitly indicates that law gives a right to debtor to protect their contractual rights from creditor's claim through several ways as follow.[20]

a. Debtor fills an exception or resistance based on 'waiver' doctrine (*rechtsverwerking*). It is in accordance to creditor's attitude that impresses debtor's performance although it does not correspond to previous agreement. This attitude may occur either explicitly or implicitly.
b. Debtor fills an exception or resistance based on *'exceptio non adimpleti contractus*' doctrine. It is an act of caring for debtors against the creditor's claim. The doctrine states that creditor is default. *'Exceptio non adimpleti contractus*' is only valid if it is not mentioned in regulation. In this case, Article 1602 (b) of the Civil Code mentions that performance works at first before the payroll. It is also applied if it is not mentioned in the contract (for instance, both contracting parties agree that payment is conducted in fourteen days after goods delivery). Unless both contracting parties do not determine who should perform at first, the *exceptio non adimpleti contractus* doctrine is acceptable.
c. Debtor fills an exception or resistance due to *overmacht* (*force majeur*e).

The Civil Code does not explicitly define *force majeure.* However, it mentions the *force majeure* in several articles such as in Chapter IV about Reimbursement of Expenditure, Loss, and Interest due to Contract Default (Article 1244-1245) and Chapter VII about the Abolishment of Owed Goods (Article 1444-1445). To be precise, the provisions of *force majeure* are as follow.

Article 1244:

> *"For such reason, debtor must be charged to compensate any expenditure, loss, and interest on which debtor is unable to verify that the contract is not implemented in the right period due to unexpected occurrence, as well as no liability should be charged on debtor. All of those may happen only if debtor has no bad intention within."*

Article 1245:

> *"No compensation of any expenditure, loss, and interests is charged when it comes to force majeure due to unexpected occurrence, debtor is prevented to give or do any liability or, due to any similar matter, debtor did illicit behavior."*

Article 1444:

[20] Agus Yudha Hernoko, *op.cit.,* p .270.

"If particular goods that becomes a matter of contract has gone, been unable to be sold, or lost, which makes its existence totally unidentified, contract will be null, the origin of the goods is considered destroyed or lost out of the debtor's default and before he neglectfully forgets to deliver it.
Even although the debtor forgets to deliver the goods and he is not responsible on any unexpected occurrence, the contract remains null if the goods is just about destroyed on his hand, unless it has been delivered.
Debtor must verify the unexpected occurrence that he claims about.
Through any such a way, any goods that has been stolen, destroyed, or lost will not definitely discharge the thief from any liabilities to compensate the price."

Article 1445:

"If the goods is owed, out of the debtor's default, or no longer to be sold, or lost, the debtor –if he has rights or claims for compensation on that goods- must give the rights or claims to the creditor."

Based on the articles, *force majeure* refers to an unexpected occurrence out of debtor's default after contract termination and it prevents debtor to fulfill obligations before considered default. Therefore, debtor is discharged from any liability due to the occurrence. As a media for debtor to avoid creditor's claim, therefore, *overmacht* doctrine must fulfill several terms as follow. [21]

1. The fulfillment of performance is prevented or obstructed.
2. The obstruction of achievement is out of the debtor's default.
3. The presence of particular occurrence that prevents the performance to be achieved is not the debtor's risk.

The presence of such occurrence defined as *force majeure* brings several legal consequences as follow.

1. Creditor may not claim for performance achievement.
2. Debtor is no longer considered default.
3. Debtor is not in charge of giving any compensation of loss.
4. Risk is not shifted to the debtor's part.
5. Creditor may not claim any nullification in mutual contract.
6. Contract is considered null.

Overmacht is related to the risk of liability among contracting parties. The risk denotes liability to bear any loss due to unexpected occurrence out of default of one of contracting parties that affects object of the contract or may prevent

[21] *Ibid.,* p. 5.

fulfillment of obligations. Some acts provide mechanism of solution that deals with the risk of *overmacht* in mutual contract (Articles 1545, 1553, and 1563 of the Civil Code).[22]

Explaining Articles 1244 and 1245 of the Civil Code, Subekti argues that the two articles only regulate the issue of *force majeure* in relation to giving compensation of loss and interest. However, the articles can also be used as the basis to define *force majeure*. The basic thought of enacting regulations about *force majeure/overmacht* is a rationale of discharging from any liability to pay compensation of loss.[23]

Kusumaatmadja argues that *force majeure* or *vis major* is acceptable as a rationale not to fulfill any liability since object or purpose mentioned as the core of contract has lost. This condition refers to the physical implementation and sentences, not only due to the impediment to do contract obligations. Kantaatmadja has similar view as follow.[24]

1. The change of circumstance is not mentioned at the time of establishing a contract.
2. The change deals with a fundamental condition for the contract.
3. The change is unexpected by the contracting parties.
4. The impact of the change must be radical, shifting the scope of obligations to be fulfilled in the contract.

This principle may not be implemented in border agreement and if the changed circumstance is due to any default by party who files the claim.

Muhammad argues that *force majeure* has several elements as follows.[25]

1. Performances are not achieved due to particular occurrence that destroys the object of a contract.
2. Performances are not achieved due to particular occurrence that prevents debtor to achieve the performances.
3. The occurrence happens unexpectedly and it is not predicted at the time of contract drafting.

Furthermore, Muhammad argues that the *force majeure* with elements 1 and 3 refers to an objective or absolute *force majeure,* which terminates contract since debtor is impossible to fulfill obligations due to the conditions of object. In other words, the contract is legally null.

In addition, the *force majeure* with elements 2 and 3 refers to subjective or relative *force majeure.* The rationale of this *force majeure* is the impediment of

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

[23] Subekti*, Hukum Perjanjian*, Jakarta: PT Intermassa, 1979, p. 55.

[24] Sefriani, "Pengakhiran Sepihak Perjanjian Perdagangan Internasional", *Padjadjaran Jurnal Ilmu Hukum,* Vol. 2, No. 1, 2015, p. 98.

[25] Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Bandung: PT Citra Aditya Bakti, 2014, p. 243.

obligations fulfillment due to particular occurrence that prevents debtor to achieve it. Although debtor is able to fulfill obligations, it takes much time and cost. In this case, the *force majeure* is temporary, which may not produce contract termination but only result contract suspension. If the impediment is no longer happen, the fulfillment must be continued. However, if the performance is no longer valuable for the creditor since the creditor is no longer need, the contract can be null.[26]

4. The Legal Consequence of *Force Majeure*

Force majeure deals with the issue of compensation in a contract since it has legal consequences that cover not only the nullification or adjournment of obligations fulfillment. It also discharges contracting parties from providing any compensation due to the failure of the contract. Article 1237 of the Civil Code explains that in terms of a contract to give particular object, therefore, since the contract is established, the object is on creditor's responsibility. When it comes to *force majeure* in a unilateral contract, creditor bears the risk. However, the risk will belong to debtor if debtor is negligent in fulfilling obligations.

If debtor has been expected or able to expect that *force majeure* prevents the obligations fulfillment at the time of contract termination, and if the occurrence truly happens, it must be charged to debtor. In case that debtor is negligent in fulfilling obligations, Article 1243 of the Civil Code regulates debtor's obligation to pay compensation. The article mentions that debtor is charged to compensate any loss along with its interest if debtor is found negligent in fulfilling obligations, or exceeding predetermined time of fulfillment.

If debtor successfully verifies that this happens due to *force majeure*, debtor is discharged from any liabilities. To reveal the *force majeure*, debtor should verify the following requirements.

a. Debtor has no default on the occurrence of impediment.
b. The impediment is unexpected.
c. Debtor does not bear any risk, both based on legal regulations and the contract provision or due the tenet of good intention to bear the risk.[27]

In addition, the consideration should count the nature of *force majeure* on the likelihood of fulfillment. Firstly, the absolute *force majeure* makes the achievement impossible to reach. Secondly, relative *force majeure* makes the achievement impossible to reach in normal way, or may still be achieved through another way, or suspended until it is possible to fulfill obligations.

Some theories has their own argumentations on the risk of liability due to *force majeure* as follows.[28]

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[26] *Ibid.,* pp. 243-244.
[27] *Ibid.,* p. 267.
[28] Agus Yudha Hernoko, *op.cit.*, pp. 7-8.

a. Objective Theory

This theory assumes that '*achievement is impossible for every party*'. It refers to an absolute impossibility for every party (*vide* Article 1444 of the Civil Code). For instance, a debtor has a responsibility to deliver a horse. Unfortunately, the horse dies on the delivery due to lightning strike. Its death prevented the debtor to fulfill obligation. The similar is valid to every party that stood on the debtor's position. However, along with its development, this theory is no longer absolute. Otherwise, it tends to be similar to subjective theory that what is considered objective for everyone, eventually should also consider the contracting subjects that feel the consequence of the *force majeure*.

b. Subjective Theory

This theory assumes that '*achievement is impossible for the debtor*'. It refers to relative impossibility given the condition of debtor. For instance, a small-scale crafter, a debtor-fostered partner of state-owned enterprise, is responsible to deliver handicraft to a state-owned enterprise. On the other hand, the price of raw materials increases and the crafter is unable to deal with the price. The increasing price of raw materials is the part of business risk that commonly happens. However, it is classified into *force majeure* for micro business.

c. Theory of Risk by J.L.L. Wery

This theory assumes that '*force majeure starts when the risk stops*'. It means that debtor must be charged to pay any compensation if debtor is unable to verify that the impediment happens due to unexpected occurrence. In other words, although debtor is considered default, if it is positive, debtor should bear the risk of liability.

Considering all the explanation above, *overmacht* doctrine may not be accepted under the following conditions.

(1) *Overmacht* happens out of the debtor's default; however, the debtor remains negligent.
(2) The impediment is expected at the time of terminating the contract,
(3) The impediment is due to one's default that participates in the contract,
(4) The impediment is due to the object defects the debtor uses in the contract.

Niew Burgerlijk Wetboek (NBW –New Netherlands Civil Code) provides a legal instrument for a debtor to escape from any liability if the failure of his contractual achievement is due to particular circumstances. The conclusion of Article 6:58 of NBW reads that '*debtor is default…but the impediment of achievement may not be charged on him*'. Similarly, Article 6:74 NBW mentions that '*every default of achievement makes the debtor responsible to pay compensation for the creditor's loss, unless the default is not charged on him.*' Further explanation about the likelihood for debtor to postulate *overmacht* doctrine is mentioned in Article 6.75 NBW that '*the default of achievement may not be charged on the debtor if it is out*

of his default, based on the applied law and general premise.' Substantially, the postulates of *overmacht* in NBW are similar to of the Civil Code.[29]

Soemadipradja explains that the scope of *force majeure* is no longer limited to natural phenomenon or the loss of contracted object. It has extended to any administrative decisions by public authorities and political condition such as warfare. The scope development includes the following.[30]

a. The risk of war, the loss of contracted object due to the power of God such as lightning strike, wildfire, or seized by Japanese army in warfare. (The Supreme Court Verdict Number Reg. 15 K/Sip/1957);
b. *Act of God*, administrative decisions by public authority, resolution, any determinant or confining administrative measures, or unexpected occurrence beyond the capacity of the contracting parties (The Supreme Court Verdict Number 3389 K/Pdt/1984);
c. Government Regulations (The Supreme Court Verdict Number Reg. 24 K/Sip/1958); both District Court and High Court state that the claims of the defendant (Super Radio Company NV) may not be used as the rationale of *force majeure* since the defendant fails to get the motorbike from NV Ratadjasa or through another way, as long as not breaking any rules. Both courts state that the defendant has neglected the obligation.
d. Naval crash, such as sinking due to big wave that hits the ship side (The Supreme Court Verdict Number 409 K/Sip/1983);
e. *Force majeure* (The Supreme Court Verdict Number Reg. 1180 K/Sip/1971); unexpected and/or forceful circumstance beyond the capacity of contracting parties (Verdict Number 21/Pailit/2004/PN.Niaga.Jkt.Pst).
f. The Covid-19 Pandemic is the one unexpected occurrence that brings into *force majeure.*

The term *pandemic* is an outbreak of disease extensively in many geographical areas. The outbreak classified into *pandemic* is infectious disease with continuous infection line. Therefore, if such case happens in some states besides the state of origin, it is *pandemic*.[31]

The Presidential Regulation Number 12 of 2020, according to some parties, seems to be a rationale to apply *force majeure*. The consideration of this regulation is that the outbreak of Covid-19 has affected the increasing number of victims and material loss, the extensive scope of exposed areas, and the extensive implication of social-economy aspects in Indonesia. The Covid-19 Pandemic is announced as

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[29] *Ibid.,* pp. 8-9.

[30] Agri Chairunisa Isradjuningtias, "Force Majeure (Overmacht) dalam Hukum Kontrak (Perjanjian) Indonesia", *Veritas et Justitia*, Vol. 1, No. 1, 2015, pp. 153-154.

[31] Warta Ekonomi.co.id, "Apa Itu Pandemi?", https://www.wartaekonomi.co.id/read276620/apa-itu-pandemi, accessed on June 2, 2020.

non-natural disaster.[32] The announcement refers to the Law Number 24 of 2007 on Management of Disaster.

Based on the Law Number 24 of 2007 on Management of Disaster, Non-natural disaster is a disaster caused by non-natural events such as technology default, modernization default, epidemic, and disease. The responsibility of managing the disaster lies on both central and local governments. Their responsibility includes allocating adequate budget for disaster management (both central and local budgets) in addition to ready-to-use budget.[33] In managing disaster, the Government should uphold the principles of management as mentioned in the Law, which one of those is the principle of priority. When a disaster happens, the first priority is rescuing the exposed people.[34]

Therefore, considering the danger and impact of Covid-19 Pandemic in Indonesia, *force majeure* condition may be valid for government contracts, especially that deal with public procurement. The Covid-19 seems to bring negative impacts on people's life. Thus, the Presidential Regulation Number 12 of 2020 is crucial. It enables the Government to take any necessary actions to handle the Pandemic.

Public procurement should complete several stages, such as planning, preparation, and execution. In execution stage, there is a subsection about "*force majeure*". Article 55 of the Presidential Regulation Number 16 of 2018 mentions that contracting parties may either terminate or continue contract in case of *force majeure*. If the implementation continues, they may do some alteration on the content of the contract. However, Article 55 provides neither definition nor benchmarks of *force majeure* as it has mentioned, and leaves the issue to the contracting parties.[35]

Furthermore, Article 56 of the Presidential Regulation Number 16 of 2018 mentions that if the suppliers of public procurement fail to fulfill their obligations until the end of contract, commitment making official, on behalf of the Government, is allowed to give them chance to fulfill obligations based on the consideration that the supplier is ability of fulfillment. The commitment making official mentions the second chance in contract addendum in which it sets the time of fulfillment, fine sanction due to unpunctuality, and the prolongation of implementation assurance.

In this context, the Presidential Regulation Number 26 of 2018 does not clearly regulate the issue and leaves it to the contracting parties to make decision either contract termination or adjournment. On the other hand, the regulation allows

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32 See the preamble of the Presidential Regulation Number 12 of 2020.

33 What it means with "ready-to-use" budget is particular budget allocated by government for urgent needs due to unexpected disaster (the explanation of Article 6f of the Law Number 24 of 2007).

34 See the explanation of Article 3 subsection (2) letter b of the Law Number 24 of 2007.

35 See Article 55 (4) Presidential Regulation Number 16 of 2018.

commitment making official to give a second chance for the default supplier along with fine sanction etc. Particularly, this chance may go beyond the fiscal year.[36]

5. Public Procurement Contract Following the Establishment of the Presidential Regulation Number 12 of 2020

The Presidential Regulation Number 12 of 2020 essentially does not standardize the goods and services procurement contracts in the wake of Covid-19 as non-natural disaster. In spite of this, the Regulation implicitly commences the probability of *force majeure* on contract implementation. When it comes to *force majeure*, contracting parties must judge at the first place whether the Pandemic is absolute or relative *force majeure*. In case that the Pandemic causes loss of object in terms of goods and services triggering debtor to be incapable to fulfill obligations, it is an absolute *force majeure*. It brings permanent impediment and leads to contract termination.

Another forceful concurrence is relative *force majeure*. It is temporarily since the condition prevents fulfillment without eliminating debtor's ability to fulfill obligations. In such cases, debtor is capable to fulfill obligations but debtor needs more time and cost. For instance, a construction company is forced to reduce its employees and construction tools as the consequence of the income decrease after the policy of big-scale social distancing to manage the Covid-19 Pandemic. Accordingly, it decreases the availability of construction services for government buildings. In this case, the contract is not terminated automatically. Rather, it shall be renegotiated between the Government and the contractor (goods and services supplier) to delay the process of construction until the contractor is available to supply goods and services. The supplier of goods and services may propose similar effort (i.e. contract renegotiation) to the Government since it is in economic crisis.

In public procurement contract, in case of *force majeure* condition, Article 55 of the Presidential Regulation Number 16 of 2018 provides an option to either terminate or continue contract with some alterations on content. The Regulation leaves it to contracting parties for the decision. In addition, observing impediment due to Covid-19 Pandemic in Indonesia, it is relative *force majeure*. For this reason, it prevents debtor to fulfill obligation temporarily during the Pandemic. It is in line with the statement of the Coordinating Minister of Politic, Law, and Security, Moh. Mahfud MD., that Presidential Regulation Number 12 of 2020 cannot become a rationale to terminate contracts under the excuse of renegotiation to change the content of contract, relying on Articles 1244, 1245, and 1338 of the Civil Code.[37]

Regardless from the assumption that although Indonesia is late in anticipating the Pandemic and no one knows the end, the Government has conducted massive

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[36] See Article 56 (3) of the Presidential Regulation Number 16 of 2018.

[37] Moh. Mahfud MD., "Bencana Covid-19 dan Pembatalan Kontrak dalam Bisnis", *Pidato*, Webinar Perkembangan, Problematik, dan Implikasi Force Majeure Akibat Covid-19 bagi Dunia Bisnis, diselenggarakan oleh Asosiasi Pengajar Hukum Keperdataan (APHK), 22 April 2020.

activities to control the Covid-19 Pandemic. They are, among others, the Big-Scale Social Distancing, the system of health protocols, tracing carriers, and rapid tests. In addition, the vaccine of Covid-19 in Indonesia has been found.[38] Thus, the Pandemic can be categorized as relative *force majeure*. Contracting parties may organize contract renegotiation as a settlement.

Furthermore, if contracting parties are unwise in defining the condition as *force majeure* (either absolute or relative), it may lead to prolonged conflict causing business dispute that is ended by litigation. Business dispute in commercial contract often begins from default in contract due to various factors and causes such as the following.[39]

a. Misconception about business process. This condition happens when business subject is profit-oriented and gambling-based without having estimation on possible risks.
b. The incapability to recognize business partners. Some businesspersons only focus on performance or physical appearance of their business partners without identifying their record of accomplishment and proficiency in further way. Some businesspersons are easily impressed and interested to cooperate with foreign partners based on the consideration that foreigners are always better in everything without considering the principle of *know your partner.*
c. No *legal cover* underlying their business process. They have less experience and appreciation on laws that cover their business.

The settlement of civil cases through litigation is happened commonly due to:[40]

a. default of a contracting party, in which the claim must be based on contract privity among contracting parties (i.e. plaintiff and defendant); and
b. violation of law (*onrechtmatigedaad*). In this case, it is not necessary to consider contractual relationship among contracting parties since the most elementary aspect refers to the act that injures another party, as well as the causal relationship between the act and the loss it causes.[41]

As an alternative to dispute settlement, negotiation is a means among parties to settle problem without involving third party as either mediator with no authority to make decision (i.e. mediation) or mediator with authority to make decision (i.e.

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[38] Gridhealth.id, "Bukan Akhir Tahun, Ahli Epidemi Sebut Berakhirnya Pandemi Covid-19 di Indonesia Belum Bisa Dipastikan", https://health.grid.id/read/352156357/bukan-akhir-tahun-ahli-epidemi-sebut-berakhirnya-pandemi-covid-19-di-indonesia-belum-bisa-dipastikan?page=all, accessed on June 25, 2020.

[39] Agus Yudha Hernoko, *op.cit.,* p. 305.

[40] I Gusti Ngurah Parikesit Widiatedja, "Rekonstruksi Pengaturan Confidential Principle Bagi Komunikasi pada Mediasi Sengketa Perdata di Indonesia : Studi Perbandingan Dengan Praktik di Amerika Serikat", *Padjajaran Law Journal* , Vol. 3, Issue 1, 2016, p. 98.

[41] Agus Yudha Hernoko, *op.cit.,* p. 308.

arbitrage and litigation).[42] Hence, the dispute settlement should match several terms as follow.[43]

a. Contracting parties agree to negotiate sincerely with full consciousness (willingness).
b. The contracting parties are ready to negotiate (preparedness*).*
c. They have authority to make decision (authoritative).
d. They have relatively equal bargaining power that makes them dependent to one another (*relative equal bargaining power*).
e. They have willingness to settle their problem (*willingness to settle*).

The current contract law doctrine regulates that one should be responsible if she/he breaks off negotiation without any reasonable arguments. This is in line with the concept of NBW mentioning three conditions related to the cessation of negotiation. First, contracting parties are free to stop negotiation without paying any compensation as the consequence. Second, based on the principle of propriety and fairness, party is allowed to stop the negotiation by paying compensation. Third, based on the principle of propriety and fairness, party is no longer have right to stop the negotiation and once the party breaks this regulation, another party has right to claim particular expenditure and interest.

Furthermore, Article 56 of the Presidential Regulation Number 16 of 2018 mentions that if the suppliers of public procurement fail to fulfill their obligations until the end of contract, commitment making official, on behalf of the Government, is allowed to give them chance to fulfill obligations based on the consideration that the supplier is ability of fulfillment. The commitment making official mentions the second chance in contract addendum in which it sets the time of fulfillment, fine sanction due to unpunctuality, and the prolongation of implementation assurance.

More to the point, the Presidential Regulation Number 16 of 2018 gives discretion among parties in terms of discrepancy between circumstances at the time of implementation and the illustration and/or technical specification/framework mentioned in contract document. Commitment making official, together with supplier, may renew contract. When it comes to renewing the contract that causes addition on contract value, the alteration should add the value of the final contract no more than 10% of the price mentioned in the previous contract. Article 54 of the Presidential Regulation Number 16 of 2018 sets that contract renewal covers:

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[42] Ros Macdonald and McGill defined negotiation as an alternative solution for dispute settlement that people mostly chose as the best option to settle their business disputes.. See Ros Macdonald & McGill, o*p.cit.*, p. 299.

[43] M. Zaidun*, "*Mekanisme Alternatif Penyelesaian Sengketa (MAPS)", Workshop of Marketing Law and Management for Law Counsultant and Entrepreneur, held in cooperation with Directorate General of PDN of Department of Marketing and Industrial Affairs, East Java Regional Office, together with Zaidun & Partners Law Firm, Hotel Sahid, Surabaya, November 18 to December 10, 1998, p. 7.

"*a. increasing or reducing volume mentioned in contract;*
b. adding and/or reducing kinds of activities;
c. renewing technical specification in accordance to circumstances; and/or
d. renewing schedules of implementation."

Based on the Presidential Regulation Number 12 of 2020, the budget management to handle the Pandemic (i.e. by budget refocusing and reallocation), and Article 54 of the Presidential Regulation Number 16 of 2018, public procurement contract that encounter obstacles because of the Pandemic may be renewed. The renewal may cover substances. Thus, the Covid-19 Pandemic that prevents the Government to pay public procurement contract may not be categorized as a *force majeure* condition. The obstruction of implementing this contract is temporary. When the Pandemic has been handled successfully and the budget management is back to normal, contract can be continued. Alteration in contract substances is result of negotiation among contracting parties. It can be related to either volume, specification, or number of goods that is the object of contract.

A "win-win solution" business contract always avoids any issues that may harm partnership system among parties during the process of establishing the contract to its implementation. Therefore, dispute settlement must be a "win-win solution" settlement. As a whole and coherent process of settlement in business contract, negotiation exists in pre-contractual stage, contract establishment, up to the implementation of the contract. It also covers contract dispute. Negotiator must be able to set steps, procedures, and styles, as well as strategies to negotiate problems. Negotiation is expected to generate an appropriate and profitable relationship among parties. The win-win solution may create conducive business climate.

The Covid-19 Pandemic is not *force majeure* condition that permanently prevents debtor to fulfill obligations. It is temporary. Then, debtor is not discharged from liabilities to fulfill obligations and business contract remains valid and binding. Contract is not terminated automatically due to the *force majeure* caused by the Covid-19 Pandemic. After the end of the Pandemic, debtor must fulfill obligations. If debtor takes the Pandemic as a reason to nullify contract and refuse to fulfill liabilities, it is an indication that the debtor has no good intention. In other words, the debtor tries to take advantages from creditor's misery.[44]

Nevertheless, a debtor that claims *force majeure* condition remains responsible to verify that contract is prevented due to inevitably unexpected occurrence beyond debtor's capacity. Article 1244 of the Civil Code regulates that debtor can verify *force majeure* condition. Article 1245 of the Civil Code, subsequently, rules

[44] Basuki Rekso Wibowo, "Bencana Nasional Covid-19 sebagai Alasan Force Majeur terkait Eksistensi dan Pelaksanaan Kontrak Bisnis", https://wartapenilai.id/bencana-nasional-covid-19-sebagai-alasan-force-majeur-terkait-eksistensi-dan-pelaksanaan-kontrak-bisnis/, accessed on May 29, 2020.

that debtor is discharged from any liabilities to pay compensation of loss and interest.

C. Conclusion

This study concludes that the presence of public procurement contract is not nullified automatically following the establishment of the Presidential Regulation Number 12 of 2010. Such contract remains valid, legal, and binding contracting parties. The Covid-19 Pandemic that concurrently comes about should be at first considered one cause of either absolute or relative *force majeure* in procurement contract. Contract can be terminated only when the Pandemic serves as absolute *force majeure* preventing debtor to fulfill obligations perpetually. On the other hand, when the Pandemic serves as relative *force majeure,* which only prevents debtor fulfilling obligations temporarily, contract can be renegotiated based on consensus of parties. The negotiation should bring the Presidential Regulation Number 16 of 2019 into consideration.

During the Pandemic, any conditions that prevent the fulfillment of procurement contract due to budget management (such as reallocation and refocusing) by government are categorized as relative *force majeure*. Therefore, the contract can be postponed or delayed. According to Article 55 of the Presidential Regulation Number 16 of 2018, renegotiation that involves contracting parties (either related to period, volume, specification, and number of goods) can be held. Renegotiation enables contractual relationship among parties maintained. In addition, the initial purpose of contract can be fulfilled, despite the fact that funding and period of contract will change. The process of renegotiation can be followed up by procurement contract renewal. Therefore, mutual understanding and profitable relationship among parties is preserved satisfactorily.

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