



Croatian
International
Relations
Review

—
CIRR

—
XXVII (89) 2022,
259-268

—
DOI 10.2478/
CIRR-2022-0015

—
UDC 327 (4-6 EU:
73:55)

Force Majeure Parameter in Goods and Services Procurement Contract by The Government

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Abstract

Key words:

Force Majeure,
Services
Procurement,
Government

The 2019 Corona Virus Disease (Covid-19) pandemic has significantly contributed to global insecurity. The Decree of the President of the Republic of Indonesia about the Designation of Covid-19 as a National Disaster serves as the basis for enforcing force majeure clauses in business contracts, including contracts for the procurement of goods and services. Typically, a contract includes a force majeure provision. However, no corporate actors regulate the onset of certain diseases' pandemics, like the present Covid-19 pandemic. Therefore, it is required to conduct a thorough analysis of the characteristics of the government's failure to fulfill the contract for the acquisition of goods and services, which can be classed as a kind of force majeure. The force majeure parameters must satisfy the following conditions: (a) the government's failure to perform as a result of a circumstance that cannot be anticipated or that is beyond the parties' control, and (b) the occurrence of such a circumstance impedes or prevents the fulfillment of the obligation specified in the contract. Keywords: Covid-19 Pandemic, Procurement Contract, Force Majeure Parameter.

Introduction

The massive outbreak of the *Corona Virus Disease 2019* (Covid-19) pandemic has caused global instability [Akpan, Udoh, and Adebisi \(2022\)](#); [James et al. \(2022\)](#); [Sherman \(2021\)](#). The problems caused by Covid-19 are not limited to health problems but also spread to the exposed countries' economic, social, and environmental sectors. Decree of the President of the Republic of Indonesia No. 12 of 2020 on the Determination of the 2019 Corona Virus Disease Outbreak as a National Disaster [Cendhani, Putri, and Tambunan \(2020\)](#). The opinion of Presidential Decree 12/2020 can be used as the basis for the enforcement of *force majeure* on business contracts, including the procurement of goods and services contracts made by the government [Lekhraj Rampal and Seng \(2020\)](#). This is owing to the government's funding reallocation program, which has been redirected towards Covid-19 countermeasures. The budget reallocation policy can cause delays or even the termination of government business contracts, particularly in the acquisition of goods and services.

It should be noted that what is meant by a state of coercion (*force majeure*) is intended to anticipate the debtor's failure to fulfill their contractual obligations caused by circumstances that are beyond the ability of the parties, including events that occur after the conclusion of the contract [Isradjuningtias \(2015a\)](#). There is a clause or *force majeure* arrangement in a contract [Katsivela \(2007\)](#). The clause includes natural disasters such as floods, earthquakes, landslides, and non-natural disasters such as fire, sabotage, war, etc. However, it is known that businesspeople do not restrict the incidence of certain pandemic diseases, such as the currently occurring Covid-19 [Isradjuningtias \(2015b\)](#). Therefore, it is required to conduct a thorough analysis of the characteristics of the government's failure to fulfill the contract for the acquisition of goods and services, which can be classed

as a kind of *force majeure*. This is regarded essential for the future legal protection of the contracting parties. This study aims to review the parameters of the government's lack of achievement in the contract for the procurement of goods and services, which can be categorized as a form of *force majeure*. Although previous studies considered *force majeure* contracts [Alfadil, Kassem, Ali, and Alaghbari \(2022\)](#); [Li, Nai, Yang, and Yu \(2022\)](#), these contracts are not considered in relation to the Covid-19. The execution of *force majeure* in Covid-19 is of the utmost importance due to the lockdown scenario in Covid-19, which disrupted all commercial industries. Most industries were unable to produce goods and services on schedule. Consequently, the issue of *force majeure* is crucial in the case of Covid-19. In analyzing the *force majeure* in the satiety of Covid-19, the current study makes a substantial contribution to the body of knowledge.

Literature Review

Force majeure is a standard clause in contracts that generally releases both parties from liability or any obligation when an unusual event or condition beyond their control, such as war, strike, riot, crime, epidemic, or sudden legal changes, prevents one or both parties from fulfilling their contractual obligations. This is one of the most significant contracts since it protects both parties in fulfilling their obligations [Tripone and Sherman \(2020\)](#). In any unclear circumstance, the non-fulfillment of an agreement can be safeguarded by the *force majeure* clause, which is a standard provision in contracts between two parties. For example, in a contract between two parties, one party must provide specific services by a given date. However, due to a pandemic or other natural disaster, the company cannot deliver the services by the specified date. In this case, a *force majeure* clause can protect the company and release it from its obligation. The objective of a *force majeure* provision is to absolve a party of its contractual duties when an unforeseen, external event occurs.

Therefore, this form of contract language is quite important when purchasing goods and services. *Force majeure* has central importance in Covid-19 [Alfadil et al. \(2022\)](#); [Älgå, Eriksson, and Nordberg \(2021\)](#); [Li et al. \(2022\)](#); [Milovanovic and Domic \(2021\)](#). Due to the rapid spread of Covid-19, the business sector was severely disrupted. [Gursoy and Chi \(2021\)](#). The condition of locked down in this situation causes enormous losses to the businesses. During the climax of Covid-19, the business industry ceases operations, causing severe harm to all business industries. The buying of products and services remained halted in this circumstance. The pandemic engulfed the entire planet and spread rapidly among the population. This circumstance compelled people to stay at home and maintain a certain distance from other people. This circumstance has a negative impact on enterprises, as the manufacture of various commodities and delivery of services are halted for a period of time. ([Wang, Wang, Abbas, Duan, & Mubeen, 2021](#)).

Before the onset of the pandemic, several businesses execute a variety of agreements regarding the procurement of products and services. These contracts stipulate the delivery of products at a particular time. It also covers delivering services by a specified date and at a specified quality level. Before the onset of a pandemic, various business-to-business and business-to-consumer transactions are initiated. However, fulfilling multiple agreements and contracts in the pandemic was not easy for the companies. As the process of companies manufacturing different products was stopped. And the services were suspended due to the spread of pandemic. Therefore, the companies could not fulfill the agreements with other businesses and various consumers in this situation. Consequently, it could be a violation of the arrangements. In this situation, the *force majeure* clause in the contract can be used to free the parties from the agreement. The *force majeure* contract can help the companies avoid various commitments during the pandemic. Therefore, implementing *force majeure* contracts in the Covid-19 [Septyanun \(2021\)](#); [Styawati, Subawa, and Sancaya \(2021\)](#) is mandatory for the government and the regulatory authority. However, it is observed that the government and regulatory authorities could not wholly implement the *force majeure* clause in the contract. Due to the low-level implementation of *force majeure* contract in various business activities and the activities related to the government in goods and services disturbed the business industry. Most of the studies in the literature considered *force majeure* contract [Augenblick and Rousseau \(2012\)](#); [\(Majumder & Giri, 2020\)](#); [Triponel and Sherman \(2020\)](#), however, these studies have not discussed this contract concerning the low-level implementation in Covid-19.

Methodology

The method selection for every research project is of the utmost importance. Because the method chosen influences the study's outcomes. Inappropriate research methods cannot produce original findings. Therefore, selecting research methods is the most crucial factor in achieving correct results [Tinh, Thuy, and Ngoc Huy \(2021\)](#). In determining the research methodology, the current study examined prior research. The past research on the topic of *force majeure* contracts is reviewed. These studies on *force majeure* contracts utilize various research methodologies. Few studies employed quantitative and qualitative research methods, respectively. Based on a review of prior research and a consideration of the gap in the technique used in *force majeure* contracts, the current study was conducted to fill this gap. The findings of the literature inform the study's outcomes. Secondary data from research articles, books, reports, and the Internet were utilized to perform this study.

Discussion

Based on the provision of Article 1 number 1 of Presidential Regulation 12/2021, what is meant by government procurement of goods and services is the activity of procuring goods and services by

ministries/institutions/regional apparatuses financed by the APBN/APBD whose process starts from the identification of need, until the handover of the result of the work. A project carried out to procure goods and services has special conditions; namely, the agreement must be in writing Black, Akintoye, and Fitzgerald (2000). In addition, an agreement for the procurement of goods and services must still fulfill the validity of the contract regulated in the provisions of Article 1320 BW. A contract is considered valid if it meets four conditions cumulatively, namely: (1) their agreement is binding; (2) the ability to make contract; (3) the existence of a certain thing; and (4) the existence of a permissible cause.

If the conditions outlined in Article 1320 BW are met, the existence of a contract for the acquisition of goods and services is deemed genuine. If one of the conditions is not fulfilled by the parties, the contract can be canceled (for the subjective term) or even null and void (for the objective term). In the pre-contractual process, namely making a contract and signing a contract, it becomes a critical phase to formulate clauses regarding the right and obligation of the parties in the contract (freedom of contract). This means that the parties are free to make contract and regulate the contents of the agreement themselves as long as it fulfills the contract's legal requirements as stated in Article 1320 BW. Next comes the contract implementation process, which can be described as fulfilling the parties' contractual rights and duties. Regarding implementing the parties' contract, a contract applies as law to the parties (*Pacta Sunt Servanda*). Therefore, parties should adhere to all agreed-upon terms. However, a *force majeure* event can arise beyond the parties' control during the contract's execution.

In the context of government goods/services procurement contracts, to determine whether an act can be categorized as a result of *force majeure*. Considering that related to the determination of *force majeure*, this still causes different perspectives. So, in this case, the parties need first to review the *force majeure* clause in the procurement contract to understand its scope and limitations. Then, the parties also need to examine the choice of forum and the dispute resolution procedure contained in the contract [Israhadi \(2020\)](#). If the *force majeure* parameters have been sufficiently determined in the contract, the follow-up to *force majeure* just refers to the clauses in the contract. If the parties do not include explicit language in the procurement contract on *force majeure* and its consequences, the parameter determination reverts to the more general terms of Presidential Decree 12/2021 jo. Presidential Decree 16/2018. Article 1, number 52 of Presidential Regulation 12/2021 defines *force majeure* as a condition that arises against the parties' desire to the contract and cannot be foreseen in advance, making it impossible to perform the contractual obligation. Based on the wording of Article 1, number 52, the *force majeure* requirements of Presidential Decree 12/2021 are as follows:

- a. The circumstance that occurs outside the will of the contracting parties;

- b. At the time of drafting the contract, these circumstances cannot be expected to occur;
- c. As a result, the obligation specified in the contract cannot be fulfilled.

The *force majeure* parameter as regulated in Presidential Decree 12/2021 above is following the concept of *force majeure* according to BW and the doctrine, which in essence must meet 3 conditions, namely:

- a. The fulfillment of achievement is hindered or prevented;
- b. The obstruction of the completion of these achievements is beyond the fault of the debtor;
- c. The event that causes the achievement to be restricted is not a debtor's risk [Hernoko \(2006\)](#).

However, in the event of absolute or relative *force majeure*, the parties must determine whether the occurrence constitutes absolute or relative *force majeure*. The Deputy for Strategy and Policy Development of the Government Goods/Services Procurement Policy Agency issued Decree No. 3 of 2018 concerning Standards for Selection Documents through Tenders, Selection, and Quick Tender for Procurement of Goods/Other Services/Consulting Services (Deputy I Decree No. 3/2018) which contains additional information on *force majeure* in the context of government procurement of goods/services. In part A concerning the Standards for the Selection of Post-Qualification Tenders for the Procurement of Goods, Chapter XI of the General Conditions of Contract, point 34, it is explained that "*force majeure*" in this contract refers to an event that is beyond the control of the parties and cannot be foreseen so that the contractual obligation cannot be met. This term corresponds to the definition of *force majeure* outlined in Presidential Decree 12/2021.

In addition, it is specified that *force majeure* is not limited to the following: (a) Natural disasters; (b) Non-natural disasters; (c) Social disasters; (d) Strikes; (e) Fire; (f) Extreme weather conditions; and/or (g) Other industrial disturbances as determined by a joint decision of the minister of finance and related technical ministers. Please note that *force majeure* does not include circumstances that result from the actions or omissions of the parties. In *force majeure*, the provider must notify the Contract Signing Officer within fourteen (14) calendar days of discovering or having reason to discover the event or *force majeure* event, along with supporting documentation. Procurement delays due to *force majeure* are not subject to penalties. In addition to *force majeure*, Deputy I Decree No. 3/2018 also regulates the so-called Compensation Event. However, there is no definition of compensation event or the term compensation itself in the deputy's decision and other laws and regulations. Therefore, the term compensation referred to in Deputy I Decree No. 3/2018 follows the notion of compensation in a general sense, namely compensation or settlement of receivables by providing goods at the price of the debt or compensation in the form of money or not money (in kind), which is given to employees in a company or organization. Deputy I Decision No. 3/2018 Chapter XI

concerning the General Conditions of Contract at point 27. Events of compensation can be given to the provider in the following cases:

- a. The Contract Signing Officer changes the schedule, which may affect the execution of the work;
- b. late payments to providers;
- c. The Contract Signing Officer instructs the provider to carry out additional testing after the test has been carried out, and it turns out that no damage/failure/deviation is found;
- d. The contract signing official does not provide drawings, specifications, and/or instructions according to the required schedule;
- e. The provider has not been able to enter the location according to the schedule in the contract;
- f. The Contract Signing Officer orders the postponement of the execution of the work; or
- g. other provisions stipulated in the Special Conditions of Contract.

If there is a compensation event that causes the completion of the work to exceed the completion date, the provider has the right to request an extension of the completion date based on supporting data. The Contract Signing Officer may ask for the input of the work supervisor (if any) before extending the deadline for completion of the task. Providers are expected to provide the government with advance notice of any compensation event to anticipate and mitigate the impact of compensation. If the work is not completed on the completion date, not due to *force majeure* or not due to compensation event, or due to the fault or negligence of the provider, the provider is subject to a late fee.

If observed, compensation events resemble *force majeure* in that one of the parties (the government) is unable to fulfill its contractual obligations or performs actions that are not regulated by the contract, causing the other party's (the provider) fulfillment of achievements to be late and/or inappropriate. It should be so that the other party (provider) is hurt, but the victim is not punished (risk). In contrast, the form of the compensation event has been limitedly specified, and the injured party (provider) retains the right to get compensation (from the government). Unlike *force majeure*, which encompasses both natural and unnatural disasters, the scope of the force of nature is limited. In addition, the occurrence of *force majeure* is not a risk for the debtor. Thus the creditor cannot demand attainment except in relative *force majeure*.

In light of the provisions regarding *force majeure* and what is known as a compensation event in the contract for the procurement of government goods and services, the parties must be able to identify which government action is not carried out due to *force majeure* and which acts are included in the compensation event to determine the government's form of accountability. Given that in *force majeure*, the government can be freed

from risk, while in the event of compensation, the government should provide compensation to the provider as the injured party.

Conclusion

Based on the descriptions above, it can be concluded that to measure the government's lack of achievement in goods/services procurement contract that can be categorized as a form of *force majeure*, it is determined based on the following parameters:

- a. the government's non-performance as a result of circumstances that cannot be expected to occur or occur beyond the ability of the parties;
- b. The presence of such a scenario impedes or prevents fulfilling an obligation established in the contract. If the government claims to have suffered *force majeure*, it must demonstrate the existence of such a condition and that the government's capacity to meet its obligations has been impeded or blocked by *force majeure*. As a result of *force majeure*, the government may be relieved of responsibility or obligation.

Implications Of The Study

Although *force majeure* is discussed several times in the literature, the current study covered the most significant literature gap. The area of *force majeure* is significant potential to research various available gaps in the literature. Previous studies comprehensively considered *force majeure* through different research methods, but the *force majeure* is less addressed concerning the Covid-19. Therefore, this study contributed to the literature by considering the relationship between *force majeure* and Covid-19. Although previous studies addressed the relationship between *force majeure* and Covid-19, research is not carried out to discuss the parameters of *force majeure* in the Covid-19 era. Thus, this study extended the body of knowledge by considering the *force majeure* parameter in the government's goods and services contract. Hence, the contribution of the current research provided several theoretical implications. The study is helpful for study results are beneficial for the government to implement *force majeure* in pandemics through a valuable strategy-making process.

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