Impact of Covid-19 on the Principle of Force Majeure in A Cross-Border Contract

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Abstract. The Covid-19 pandemic has caused a decline in the economy of most of the world community. As a result, many parties must appropriately perform their obligations in their agreements. This situation has led to the idea of implementing the force majeure clause in the contract based on the Covid-19 pandemic situation. There are many arguments about whether this pandemic is automatically the basis for force majeure. In addition, there is also the thought of mixing the hardship criteria in the force majeure clause in a contract. The research method used is primary and secondary data. From the research results, it is formulated that the rebus sic stantibus principle can be used as a basis for canceling or delaying a consideration in a cross-border contract, and the solution for regarding the fulfillment of consideration during the Covid-19 pandemic is to renegotiate the contract.

Keywords: Cross Border Contract, Covid-19, Force Majeure, Hardship.

1 Introduction

1.1 Background

In this borderless era, businesses increasingly look beyond the national boundaries of goods and services. This international expansion is driven by the desire for higher profits and the need to find new markets, especially when domestic demand is insufficient [1]. Businesses compete in global markets, often leading to increased innovation, improved efficiency, and more significant economic growth [2]. This global outlook is crucial for businesses and companies to remain competitive and thrive in the modern economy.

A cross-border contract is a trading activity carried out by the people of one country with the people of other countries based on a mutual agreement [3]. This type of trade is underpinned by the importance of diplomacy and international relations in facilitating these transactions. International trade is not just an economic activity but also a catalyst for forging strong relationships between nations. Border countries benefit from each other's strengths by engaging in trade, leading to a more interconnected and interdependent world economy [4]. This interdependence is vital for global stability and growth, as it encourages nations to collaborate and work towards common economic goals.

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These transactions are complex, often involving multiple legal jurisdictions and regulatory frameworks [5]. The parties engaged in international trade typically come from different countries and must navigate the intricacies of various national laws. This complexity requires a robust legal framework at both national and international levels to ensure smooth and fair transactions. International trade laws and agreements, such as those governed by the World Trade Organization (WTO), play a crucial role in standardizing regulations, resolving disputes, and fostering a fair trading environment [6].

Acknowledging the necessity for a unified legal framework in international trade, the United Nations (UN), through UNCITRAL (United Nations Commission on International Trade Agency Law), pioneered the development of a comprehensive legal agreement [7]. This led to the formation of the United Nations Convention on Contracts for the International Sale of Goods (CISG), a key document born out of diplomatic efforts. The CISG was established to harmonize differing legal traditions across the globe, particularly bridging the gap between civil law traditions (such as those in France and Germany) and common law traditions (like those in the UK and the USA) [8]. This was achieved by standardizing laws related to the international sale and purchase of goods. The Convention, which took effect on January 1, 1988, lays down the rules for creating international sales contracts and delineates the rights and obligations of buyers and sellers. This policy includes legal remedies available to them, reducing the complexity of relying on individual countries' laws in cross-border trade contracts. The CISG applies to sales agreements where the trading parties are based in different nations.

The CISG's primary goal is to facilitate smoother international transactions by eliminating legal obstacles arising from conflicting national laws. It serves as a comprehensive guide for international trade contracts, addressing issues such as contract formation and the responsibilities and rights of the involved parties [9]. Convention has been widely recognized as an effective legal tool that caters to the diverse interests of countries worldwide. Seventy-nine countries with varied legal systems participate in the CISG, highlighting its global acceptance and utility. However, Indonesia remains one of the nations that has not yet joined the CISG. The absence of certain countries, like Indonesia, from the Convention underscores the ongoing challenge of achieving universal agreement on legal standards in cross-border trading.

Realizing the above needs, the United Nations (UN), through one of its agencies, took the initiative to compile an international legal instrument, which became known as the United Nations Convention on Contracts for the International Sale and Purchase of Goods/The United Nations Convention on Contracts for the International Sale of Goods ("CISG") [10]. Convention establishes one of the documents created through the diplomatic efforts of the United Nations Commission on International Trade Law ("UNCITRAL"). CISG regulates the making of international buying and selling contracts, as well as the rights and obligations of buyers and sellers (including legal remedies for them), which aims to eliminate the need to show the laws of certain countries in international trade contracts to make it easier for the parties in the event of a conflict between legal systems. The CISG entered into force on January 1, 1988, for countries that were participants then. CISG applies to contracts for the sale of goods made between parties whose trade places are in different countries; CISG has gained recognition

as a legal instrument that can accommodate all countries' interests [11]. With a membership of 79 nations from various backgrounds with other legal systems, Indonesia has yet to become a participating member of the CISG.

In today's global era, the Indonesian contract law system, which is based on the civil law tradition, must be able to interact and meet with various other legal systems, such as the Anglo-American legal system. Undeniably, many things are still the same or similar in Indonesian contract law to the contract law of countries with the Anglo-American legal system. Still, there are also very sharp differences between the two, which occur both at the drafting stage of the contract and at the implementation stage. Therefore, it is necessary to renew the cooperation outlined in the agreement for it to take place properly and achieve its goals.

A cross-border contract is a cooperation agreement between two or more companies from different national backgrounds, intended to provide benefits for all partners needed by each organization independently. In essence, every agreement is made for the parties' mutual benefit. When starting the contract, good faith proves that the agreement was created with the parties consent. Arrangements made and approved by the parties will apply when the agreement is made so that they have their respective obligations to fulfill the achievements.

Force majeure is a condition or event that occurs beyond human capabilities. The majority of the affected areas cannot avoid it, so an activity or agreement that is carried out cannot run according to the agreement agreed upon by the parties [12]. Force majeure usually refers to natural conditions, such as natural disasters, epidemics, wars, etc. Similar to what happened in other international countries, many other countries still do not stipulate COVID-19 as a threat and a force majeure situation, which can lead to the cancellation of contracts or obligations to carry out a performance. Therefore, it is necessary to have a meeting point in the settlement, namely applying choice of law in international treaty law.

Therefore, in this case, the authors highlight the provisions contained in the CISG as guidelines used in cross-border agreement contracts in the field of international trade regarding COVID-19 and its impact on a country.

1.2 Research Questions

The research question of this paper is can be seen in figure 1.

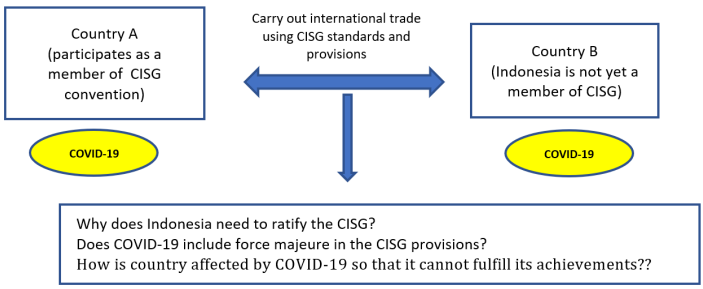

Fig. 1. Research questions.

2 Research Methods

Methods for collecting legal materials consist of 1). CISG terms. 2). A literature study is used to look for conceptions, theories, and opinions related to the formulation of the problems in this study. The collected legal materials are analyzed by identifying legal facts and eliminating irrelevant matters to determine the legal issues to be resolved. Second, non-legal materials are included in the collection of legal materials considered relevant. Third, to review the legal problems proposed based on the collected legal materials. Fourth, conclude in the form of legal arguments that address legal issues. And fifth, provide a prescription based on the arguments' built-in conclusion. The conclusion is based on analyzing the main problem used as a prescription.

3 Results and Discussion

Cross-border contracts are carried out between countries based on an agreement between individuals, individuals, and the government or between a country's government and another country's government. Cross-border trade is exchanging goods or services based on voluntary will be carried out between two or more countries to meet mutual needs through export and import activities. The types of international trade include 1) exports and imports, 2) barter or exchange of goods, 3) consignment, and 4) border crossing. International Trade has characteristics, namely: 1) Using an agreed foreign currency; 2) Has a broader scope and knowing no national borders; 3) Trade disputes will be resolved by international law; 4) Having exceptional quality standards that must be met, such as ISO 4000, ISO 9000, and others.

CISG is a convention that regulates material legal rules that apply to every international trade transaction [13]. In this view, conventions related to the choice of law are not conventions that control the regulation of law in international trade transactions but only apply domestic legal provisions to international trade transactions. The sale and purchase contract has a clause regarding the parties' freedom to determine the choice of law from one of the parties to the international trade agreement contract. The application of the CISG itself contains a provision that the CISG does not provide a specific definition of an international goods sale and purchase agreement.

The reason for how to apply CISG is that there must be an objective relationship factor because it has to be seen whether the choice of law includes CISG or because the choice of law contains domestic sales law. If the CISG has become domestic law, then the CISG will apply and vice versa; based on Article 6 CISG, the parties can use the CISG. This means that Article 1 (b) is not being applied. As a compromise, there is a provision in Article 95 of the CISG that allows participating countries to declare at any time when depositing documents of ratification, acceptance, approval, or accession that they are not bound by Article 1 (b).

The Preamble to the 1980 Convention stated, "bearing in mind the board objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on establishing a New International Economic Order." This shows that

the CISG pays attention to the UN General Assembly Resolution establishing the New International Economic Order (NIEO). There are ten (10) NIEO principles, namely:

- The duty of all states to cooperate for global property and welfare.
- The duty of developed states to assist the developing states in their development efforts both in terms of transfer of natural net financial resources; both in terms of transfer of natural net financial resources and of transfer of scientific knowledge and technology.
- The right of all states to economic self-determination.
- The right of all states of permanent sovereignty over their natural wealth and resources (and all economic activities), including the right to nationalize such wealth and resources (and all economic activities).
- The granting of preferential treatment by developed countries to developing countries in all fields of international economic cooperation.
- The right of developing countries to full and effective participation in the global economic decision-making process.
- The right of all states, territories, and peoples under foreign domination or apartheid to restitution and compensation for external exploitation.
- The effort to strengthen economic and technical cooperation among developing countries is intense.
- Identifying the mineral resources of the sea-bed and ocean floor, beyond the limits of national jurisdiction, as the common heritage of humankind.
- All states are responsible for promoting sustainable development, i.e., environmentally sound economic development.

In the CISG considerations, it is also stated that the development of international trade is based on justice and the principle of mutual benefit. Issues of justice and the principle of mutual benefit are essential elements in promoting relations between countries. Therefore, CISG ratification can be the first step in reforming Indonesian contract law, especially international buying and selling contracts, while pushing toward legal harmonization in the trade sector, especially harmonizing international buying and selling contract law.

The CISG preamble also states that the development of international trade is based on justice and the principle of mutual benefit. Fairness and the principle of mutual benefit are essential elements in promoting relations between countries. Therefore, CISG Ratification can be the first step in reforming Indonesian contract law, mainly international sales and purchase contracts, and pushing towards legal harmonization in the trade sector, particularly harmonizing international sale and purchase contract law.

4 Force Majeure in the Post-Covid-19 CISG Provisions

Force majeure is a condition where something that has been agreed upon in the contract by the parties is not implemented due to circumstances or things that cannot be predicted or are beyond the limits of human ability [14]. Thus, the debtor cannot act or act to fulfill the contract agreement agreed upon at the beginning of the contract agreement

agreed upon. Force majeure or overmatch are the same terms. The law explicitly contains no formulation concerning engagements, contracts, or agreements. Still, it can be concluded from several that force majeure is a condition or situation in which one of the parties with an obligation based on an agreement or agreement cannot fulfill its achievements or obligations.

An agreement must be carried out and disciplined when events occur outside human control. So, this is where the role of force majeure is to provide legal consequences due to unforeseen circumstances or events that cause the agreement not to be implemented smoothly by one of the parties. However, this is not said to be a default or not fulfilling obligations for specific reasons.

Based on its nature, force majeure has two types: absolute force majeure and relative force majeure [15]. Fundamental force majeure is a situation where the debtor is entirely unable to carry out his performance to the creditor, which is due to earthquakes, floods, and the presence of lava. Relative force majeure is a situation that causes the debtor to fulfill his performance. However, fulfilling these achievements must be accomplished by giving an immense sacrifice that is not balanced or using mental strength beyond human ability or the possibility of being subjected to the danger of such a significant loss.

Force Majeure conditions can delay or cancel and even release the debtor from the agreement made. The elements of achieving a Force Majeure condition make the contract changeable [16]. Determination of circumstances or conditions by the government can be a vital element in changing agreements by the parties. The Force Majeure condition becomes a pardon for debtors who are not carrying out achievements.

Force Majeure is the cause of default. Default in a Force Majeure condition does not mean a negative connotation for the debtor not to perform according to the agreement that binds the parties. The majority of an affected area cannot avoid Force Majeure situations. With the provisions of Force Majeure, the status of civil law is a law that compels but does not torment the parties, especially the debtor [17].

Force Majeure is a solution for debtors to continue to obtain human rights in circumstances that make it impossible to fulfill achievements. Laws and regulations in Indonesia, which provide an understanding of force majeure, include rules regarding construction services, procurement of goods and services, banking, and traffic and transportation services [18]. However, force majeure provisions in banking, road traffic, and transport regulations are unrelated to agreements or contracts.

The presence of COVID-19 is often used as an excuse for force majeure since it can disrupt various sectors, especially agreements or contracts. With the existence of COVID-19, the debtor argued that there was a default. First, can COVID-19 be declared as a force majeure? With the presence of this coronavirus, can the debtor immediately postpone or cancel the agreement? [19].

If we refer to the CISG provisions, Article 74 CISG to Article 79 CISG states:" 3.3.2.5.- The only legal consequence of an unlikely impediment for which notice was given is the non-payment of damages under Article 74 of the CISG; all other remedies remain available (3.1.5)...The only legal consequence of an impossible impediment for which notice was given is non-payment of damages under Article 74 CISG; all other solutions remain available."

Based on these provisions, it can be concluded that:

- The impact of a political lockdown decision due to SARS-CoV-2 is not a reason for exclusion from responsibility for violations under Article 79 of the CISG.
- The violating party is not released from responsibility for actions caused by a third party, which is directly or indirectly chosen by the offending party, which has been affected by SARS-CoV-2 and has an impact on performance.
- Financial problems, bankruptcy proceedings, disruptions in payment chains, etc., caused by the pandemic are no excuse for exclusion.

This means that the impact of COVID-19 cannot be used as an excuse for not fulfilling its achievements in an international trade agreement. Every agreement entered into by the parties must comply with or carry out all the agreement's contents, which are jointly prepared and made. However, if one reneges on the agreement in the contract, then the breach of the promise can be brought to court to force the party that broke the promise to fulfill its achievements.

Changes to the agreement for specific reasons cannot be made unilaterally by one of the agreement makers. A unilateral change in the contract will result in default and loss of the agreement mutually agreed upon by the parties. The agreement must take place according to what was agreed upon by both parties, and changes due to specific reasons must be discussed together.

Even though the parties want to carry out the achievements by the agreement's contents, certain circumstances make a deal impossible. These circumstances are commonly referred to as force majeure or coercive circumstances. Cases in which the parties or one of the parties cannot fulfill their achievements are not due to personal mistakes but because of the nature that arises as an obstacle to accomplishing accomplishments, which impacts specific sectors, especially the economy.

In essence, the pacta sunt servanda principle used in domestic and foreign agreements also requires the parties to fulfill their obligations to each other. The pacta sunt servanda principle will apply when the parties ratify the deal [20]. Thus, if the parties categorize COVID-19 as a force majeure has an impact that is beyond their control which causes the achievement of an agreement to be not fulfilled, then it must be negotiated between the parties agreeing because COVID-19 is not sudden, which is a natural disaster as specified in the force majeure clause so that if necessary, the parties include force majeure provisions in the agreement clause, related to COVID-19 which is categorized as force majeure. Still, if it is not stated in the agreement clause, the defaulting debtor may not necessarily postpone or cancel the agreement on the grounds of COVID-19.

5 Conclusion

From the explanation above, it can be concluded that a clause of the agreement (sales of goods contract) always focuses on obligations or achievements in carrying out obligations (self-imposed obligation). Free will in the contract (freedom of contract) and freedom to choose (freedom of choice) is a form of the contract itself.

This principle is sacred in agreements emphasizing freedom of contract or autonomy. Due to unforeseen circumstances, force majeure circumstances happen when the debtor cannot carry out what was promised in the contract agreement. Force majeure is when the debtor cannot fulfill his obligations or achievements because there is no mistake. Two things result from force majeure: freeing compensation and delaying obligations. Violation in fulfilling obligations to the agreement by one of the parties can make claims based on default on the agreement's contents from the opposing party. This principle means that whoever makes a promise must fulfill it, or whoever owes money must pay it off. In the case of COVID-19, the CISG provisions state that COVID-19 cannot be used as a reason for the debtor to postpone or cancel the agreement. Things that cause a force majeure situation or are beyond the power of force majeure and can delay or cancel the principle of pacta sunt servanda must be contained in the preparation of the contract agreement, setting out articles regarding force majeure and dispute resolution when there is a default or an unlawful act.

COVID-19, in general, is not a force majeure in an international trade agreement contract clause unless otherwise stipulated in the article clauses and provisions of the agreement. COVID-19 is a hardship under certain conditions that make it challenging to earn achievements. This is only for one party and can be anticipated by pouring out the COVID-19 clause and its solution between the parties involved so as not to cause harm to one party or cancel it.

Thus, if the parties categorize COVID-19 as a force majeure in the agreement clause, then either party can postpone or cancel the agreement. In another case, even though the parties stated the force majeure provisions in the agreement clause, if COVID-19 is not categorized as a force majeure, then the defaulting debtor cannot necessarily postpone or cancel the agreement on the grounds of COVID-19.

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