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Force Majeure Clause in the Covid-19 Vaccine Purchase Contract between Kimia Farma Tbk and Sinopharm

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ABSTRACT
Force majeure clauses in contracts are usually used as a complement to business agreements. The absence of special regulations that regulate in detail the force majeure clause often causes problems in the preparation of contracts. The force majeure clause became important and was widely used during the Covid-19 pandemic as a legal basis to overcome obstacles in the implementation of the parties' obligations due to unforeseen circumstances., through the Contract for the Purchase of Sars-Cov-2 Vaccine (Vero Cells), Inactivity or Covid-19 Vaccine (Vero Cells), Until now, the force majeure benchmark in the applicable legal provisions in Indonesia is regulated in a limited manner in Articles 1244-1245 of the Civil Code. The research method used was juridical normative by analyzing the force majeure clause in the Sars-CoV-2 Vaccine Purchase Contract (Vero Cell), Inactive or Covid-19 Vaccine (Vero Cell), Inactive between PT. Kimia Farma Tbk and Sinopharm China. The results of the study show that Article 10 Paragraph (4) of the Sars-CoV-2 Vaccine Purchase Contract (Vero Cell), Inactivation or Covid-19 Vaccine (Vero Cell), Deactivated between PT. Kimia Farma Tbk and Sinopharm China did not comply with one of the provisions in Articles 1244-1245 of the Civil Code, namely: elements that were not anticipated beforehand. Based on the results of the analysis, this study is expected to provide legal recommendations for the preparation of force majeure clauses in international business contracts in the future to be more in line with the principles of Indonesian civil law.

Keywords: Force Majeure, Business Contracts, Covid-19 Pandemic.

I. Introduction

In business practice, it is very important to realize an agreement regarding a transaction by including it in the formulation of the contract. There are many benefits that can be obtained from including the content of the agreement in the contract. This is intended to avoid problems that arise both before the contract is made, during the contract, and after the performance of the contract ends. So that the making of the contract is intended to provide legal certainty and clarity of rights and obligations for both parties. In the performance of the contract, sometimes problems arise where one of the parties does not fulfill its obligations as agreed in the contract, or also called a breach of contract. The aggrieved party can ask for compensation as stated in Article 1243 of the Civil Code, namely: "reimbursement of costs, losses and interest due to non-fulfillment of an obligation, only begins to be requested, if the debtor, after being declared negligent in fulfilling his obligations, continues to ignore them, or if something that must be given or made, can only be given or made

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within the time limit that has passed." General information about the importance of contracts in business practice and the relevance of force majeure clauses in providing legal protection to parties, especially in the context of the COVID-19 pandemic. The explanation includes the legal conditions in Indonesia that do not have special arrangements related to force majeure, as well as how it is applied in the contract between PT. Kimia Farma Tbk and Sinopharm China.

In business practice, it is very important to realize an agreement regarding a transaction by including it in the formulation of a written contract. The inclusion of the agreement's content in the contract provides many benefits, particularly in preventing disputes that may arise before, during, or after the performance of the contract. Essentially, contracts serve as a foundation of legal certainty, ensuring clarity of rights and obligations for both parties involved in a business transaction. However, in the implementation of a contract, problems sometimes occur when one of the parties fails to fulfill its obligations as agreed, known as a breach of contract. In such cases, the aggrieved party is entitled to claim compensation as stipulated in Article 1243 of the Indonesian Civil Code, which provides that reimbursement for losses, costs, and interest due to non-fulfillment of obligations may only be requested after the debtor has been declared negligent and continues to ignore the obligation. To further understand these issues, it is essential to discuss the concept and legal basis of *force majeure*. Under Articles 1244 and 1245 of the Civil Code, *force majeure* refers to an event that prevents a party from fulfilling contractual obligations due to circumstances beyond their control. This concept has its roots in the Napoleonic Code and has evolved in modern civil law and international business practice as an important principle to balance fairness between contracting parties.

The inclusion of *force majeure* clauses in business contracts thus becomes highly urgent, especially in countries like Indonesia that are prone to natural disasters and other unpredictable crises. Such clauses help distinguish between negligence that can be legally accounted for and circumstances that genuinely occur beyond human control. Nevertheless, in Indonesia, the absence of specific legal provisions regulating *force majeure* has led to diverse interpretations in practice. This condition creates uncertainty in both the drafting and implementation of business contracts. The relevance of this issue became even more pronounced during the COVID-19 pandemic, where many contractual disputes arose, including in the vaccine purchase contract between Kimia Farma Tbk and Sinopharm China. This study, therefore, examines how *force majeure* clauses function as legal protection mechanisms in such contexts. However, not all breaches of contract can be sued for damages. If the breach of contract committed by either party is not due to negligence, that party may be exempt from the payment of damages. This is also regulated in Articles 1244 and 1245 of the Civil Code. Article 1244 of the Civil Code states:

"If there is any reason for it, the debtor shall be punished by paying costs, losses, and interest if he cannot prove that the failure or failure to perform the obligations promptly was caused by an unforeseen event for which he cannot be accountable, all of which, if there is no bad faith on his part." And Article 1245 of the Civil Code states: "No costs of loss and interest shall be reimbursed if, due to force majeure or unforeseen events, the debtor is prevented from providing or doing anything necessary, or for the same, has committed an unlawful act." The circumstances mentioned above are also called force majeure. The concept of force majeure comes from the Napoleonic Code. In general law, this concept evolves from physical impossibility to goal frustration. The main principles that have been recognized by the courts are that to constitute force majeure, the event (to use the neutral term) must be (a) irresistible, (b) unforeseeable, (c) external, and must (d) make performance completely impossible and not merely more burdensome or difficult.

The inclusion of force majeure clauses in business contracts is a fairly common practice in many business contracts. Contracting parties who are in areas prone to natural disasters or other acts of God are often less likely to withstand the test. In contract negotiations, people rarely consider issues such as "God's Actions" that can lead to the termination of the relationship. Especially in Indonesia, which is also prone to disasters, the force majeure clause is very important so that the parties understand the difference between negligence caused by the parties themselves and negligence arising from force majeure. Indonesia adheres to an open system in the rules of contract law; this open system makes everyone free to enter into contracts, whether regulated or not regulated by law. Freedom in this case does not mean freedom without limits. But

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unfortunately, the inclusion of a clause regarding force majeure in this business contract is often not well understood regarding the provisions of the validity of the use of the clause. The research in this scientific paper analyzes Article 10 Paragraph (4) of the force majeure clause in the contract for the purchase of SARS-CoV-2 (Vero Cells), Inactivated or COVID-19 Vaccine (Vero Cells), Inactivated between PT Kimia Farma Tbk and Sinopharm based on the provisions of force majeure as stipulated in Articles 1244-1245 of the Civil Code.

Based on the description above, there is a formulation of the problem to be discussed, namely: Is the force majeure clause in Article 10 Paragraph (4) of the Contract for the Purchase of SARS-CoV-2 Vaccines (Vero Cells), Inactivated or COVID-19 Vaccines (Vero Cells), Deactivated between PT Kimia Farma Tbk and Sinopharm during the pandemic, in accordance with the provisions of Articles 1244-1245 of the Civil Code?. In accordance with the problems studied, this research is legal. The approach method used in the study is normative juridical or literature that aims to describe, explain, and analyze force majeure clauses in the contract for the purchase of the Sars-CoV-2 (Vero Cell), Inactivated or Covid-19 Vaccine (Vero Cell), Inactivated vaccine between PT Kimia Farma Tbk and Sinopharm, based on the applicable legal provisions in Indonesia. The approach used includes a legal approach by examining related regulations, a conceptual approach that explores relevant legal doctrines and concepts. This study relies on secondary data, which includes primary, secondary, and tertiary legal materials, and is analyzed using qualitative normative methods.

II. Research Method

The legal research method in this study is normative juridical, which is research that focuses on the study of laws and regulations and legal doctrines that apply to answer legal problems theoretically. This method does not examine the facts on the ground, but examines how the law should be applied to a legal case or event. In this study, the approach used includes a legal approach and a conceptual approach. The legal approach is carried out by tracing and interpreting relevant laws and regulations, such as Articles 1243, 1244, and 1245 of the Civil Code, which regulate default and force majeure. Through this approach, the researcher interprets the intent and scope of these articles to see whether the force majeure clause in the vaccine purchase contract between PT Kimia Farma Tbk and Sinopharm is in accordance with the applicable legal provisions. Meanwhile, a conceptual approach is used to understand the ideas, theories, and legal doctrines put forward by experts, especially those related to the concepts of force majeure, contractual responsibility, and principles in contract law. This approach helps to provide a theoretical framework for the analysis of contract clauses to be based not only on the legal text, but also on a deeper conceptual understanding.

This research uses secondary data, namely existing legal materials, such as laws and regulations (primary legal materials), legal textbooks and journals (secondary legal materials), as well as legal dictionaries and encyclopedias (tertiary legal materials). All of these materials are analyzed using a qualitative normative method, namely by describing the legal content logically, systematically, and argumentatively without using numbers or statistics. Through this method, the researcher interprets the relevant legal provisions, relates them to applicable legal theories, and then draws normative conclusions about how force majeure should be understood and applied in business contracts, particularly in the case of vaccine purchases between PT Kimia Farma Tbk and Sinopharm.

III. Results and Discussion

Understanding force majeureFrom several legal perspectives, there is currently no unity or consensus. Some argue that coercive force is justification, while others argue that force majeureIt is a reason for forgiveness. In addition, there is also a third opinion, which says that force majeure may be a justification, and there may also be a reason. The concept described in this scientific paper is limited to force majeure in the field of civil law. The views derived from the judge's opinion on force majeure in various decisions of the Supreme Court of the Republic of Indonesia are not the same from one decision to another, and the legal considerations that become the standard (measure) for judges in issuing decisions regarding force majeure

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(Suhandi Cahaya, 2012). In principle, it can be understood that in general there are 3 (three) conditions for an event or situation to be said to be force majeure based on Articles 1244-1245 of the Civil Code, namely the event that causes the occurrence of force majeure is not anticipated by the contractor, apart from the fault of the contract drafter and the parties are not in a state of prior bad faith by the parties in drafting the contract. If the three force majeure conditions have been met, then in principle the debtor cannot be considered a default because he failed to perform his contract (Muhammad Riffqi Hidayat and Parman Komarudin, 2017).

The matters mentioned above determine that force majeure can eliminate the element of default in a contract, as long as force majeure actually occurs and prevents either party from performing its obligations. There is no provision that force majeure must be regulated in the contract to be legally binding in the event of a force majeure event. Therefore, the inclusion of a force majeure clause in the contract is only intended to strengthen the contract, but it does not mean that force majeure should be agreed upon as a reason not to have to pay compensation. This is certainly contrary to the principle of good faith in contracts (Betsy Habeahan and SenaRussiana Siallagan, 2021). In addition to explaining the conditions of force majeure above, Werner Melis argues that the elements that can be said to be force majeure are generally similar in every legal regulation and court decision. Melis explains its elements as follows: Werner Melis, 1984): an event that occurs as a result of a natural event, unpredictable, will occur, indicating an inability to perform obligations under a contract either in its entirety or only for a certain period of time.

If viewed from the perspective of the duration of a situation that can be said to be force majeure, then force majeure can be divided into 2 two, namely: a. Force majeure is permanent, meaning that at any time an execution or legal obligation is completely impossible or even impossible to do (for example, destruction of goods), b. Force majeure is temporary, which is a condition in which the fulfillment of performance is temporarily impossible (Annisa Dian Arini, 2019). According to Rahayu Ningsih Hoed, contracts in Indonesia contain two types of force majeure clauses. The types of clauses are: Non-exclusive clauses/conditions that are considered force majeure are not specific, so the debtor can claim force majeure as long as there are agreed conditions to apply for force majeure. Meanwhile, the exclusive clause is that force majeure is only limited to the conditions that have been stated in the mutually agreed contract. In this type of clause, force majeure is limited to the conditions listed in the contract. Or, in the usual description, it is explained that if the contract expressly states that an outbreak of disease or pandemic is a force majeure event.

The basis of PT Kimia Farma Tbk's authority to cooperate in the purchase of the SARS-CoV-2 vaccine (vero cell), deactivated or the covid-19 vaccine (vero cell), deactivated with Sinopharm agreed and signed on April 20, 2021, is based on the Presidential Regulation of the Republic of Indonesia Number 99 of 2020 concerning the Procurement of Vaccines and the Implementation of Vaccination in the Context of Countering the COVID-19 Pandemic in conjunction with the Regulation of the President of the World State of the Republic of Indonesia Number 14 2021 concerning Amendments to the Presidential Regulation of the Republic of Indonesia Number 99 of 2020 concerning the Procurement of Vaccines and the Implementation of Vaccination in the Context of Countering the COVID-19 Pandemic (Presidential Regulation of the Republic of Indonesia, 2021) in conjunction with the Decree of the Minister of Health of the Republic of Indonesia Number HK.01.07/MENKES/12758/2020 concerning the Determination of the Type of Corona Vaccine for Viral Disease (COVID-19) Vaccination Services in connection with the Letter of the President Director of PT Bio Farma (Persero) Number SD-057.01/DIR/III/2021 dated 1 March 2021 concerning Support for Cooperation in the Import and Distribution of Sinopharm COVID-19 Vaccine in conjunction with the Letter of the Minister of State-Owned Enterprises of the Republic of Indonesia Number S-164/MBU/03/2021 dated March 5, 2021 concerning Support for the Import and Distribution of COVID-19 Vaccine Products with Sinopharm (Minister of SOEs of the Republic of Indonesia, 2021).

Based on the above authority, PT Kimia Farma Tbk as a subsidiary of PT Bio Farma (Persero) and as a company that has received support from the Ministry of State-Owned Enterprises and PT Bio Farma (Persero), can hereby cooperate in purchasing COVID-19 vaccines with Sinopharm, as a provider of COVID-19 vaccines while still applying the principles of Good Corporate Governance and in accordance with applicable laws and regulations. The contract that has been made contains 11 articles and 49 paragraphs with general details

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about the content of the contract, namely Article 1 regulates the Definition, Article 2 Product Delivery, Article 3 Product Quality, Article 4 Product Acceptance, Article 5 Handling of Post-Immunization Side Effects, Article 6 Implementation and Purchase Guarantee, Article 7 Term and Termination, Article 8 Confidential Information, Article 9 of the Law Governing and Dispute Resolution, Article 10 of the Disclaimer Clause and Article 11 of Miscellaneous. In a contract written and agreed in three languages: Indonesian, Chinese, and English, the force majeure clause is regulated in Article 10, Paragraph 4, which reads as follows:

10.4 Force Majeure: The Supplier and the Seller shall not assume any liabilities or in breach of any provision of this Contract for any failure or delay on its part to perform any obligation hereof because of force majeure (including, but without limitation, strikes, unforeseeable lockouts, shortage of raw materials or energy, any governmental regulations, government act, changes in national laws and policies, pandemic diseases or Acts of God) provided that the Supplier and the Seller shall promptly give notice to the other Party of such occurrence and shall do all things reasonable to eliminate the effect thereof to the extent possible.	10.4 不可抗力：如果由于不可抗力导致供应商和卖方未能或延迟履行义务（包括但不限于罢工、不可预见停工、原材料或能源短缺、政府监管、政府行为、国家法律政策变化、大疾病流行、天灾等），供应商和卖方不承担责任或不被视为违反本合同规定。但是，供应商和卖方应在发生不可抗力事件后立即通知其他方，并采取一切合理措施尽量消除影响。	10.4 Keadaan Kahar: Pemasok dan Penjual tidak akan menanggung kewajiban apa pun atau melanggar ketentuan apa pun dari Kontrak ini atas kegagalan atau penundaan di pihaknya untuk melakukan kewajiban apa pun karena keadaan kahar (termasuk, namun tidak terbatas pada, pemogokan, larangan bekerja yang tidak terduga, kekurangan bahan mentah atau energi, peraturan pemerintah, tindakan pemerintah, perubahan dalam hukum dan kebijakan nasional, penyakit pandemi atau Bencana Alam) dengan ketentuan bahwa Pemasok dan Penjual harus segera memberi tahu Pihak lain tentang kejadian tersebut dan akan melakukan semua hal yang wajar untuk menghilangkan efeknya sejauh

Figure 1. Article 10 Paragraph 4 (Gunawan Widjaja and Kartini Muljadi, 2003)

The drawing explains that the contract force majeure clause is regulated in Article 10 Paragraph (4), which reads about the provisions of compelling circumstances that can exempt the parties from liability in the event of an event beyond human control that causes contractual obligations to be unenforceable. This clause is the legal basis for the parties in determining whether an event can be classified as force majeure or not. Through this arrangement, the contract between PT Kimia Farma Tbk and Sinopharm China seeks to provide legal certainty in dealing with extraordinary conditions such as the Covid-19 pandemic, natural disasters, or government policies that hinder the implementation of contract obligations. Thus, the inclusion of Article 10 Paragraph (4) shows the efforts of the parties to protect each other's interests while avoiding the occurrence of legal disputes in the event of compelling circumstances during the execution period of the contract.

In the formulation of Article 1244 of the Civil Code and Article 1245 of the Civil Code, it can be seen that the elements of force majeure are as follows: 1. Unexpected events, 2. It cannot be blamed on him or cannot be held accountable by him, 3. There is no bad faith on him. The elements of force majeure above, regarding the unforeseen event in Article 1244, can be understood that the event or event never crossed his mind that such a thing would happen, therefore it cannot be blamed on him or cannot be held accountable by him, meaning that the event is beyond the responsibility of the debtor, so that the burden of proof is on the debtor (Gunawan Widjaja and Kartini Muljadi, 2003). Furthermore, there is no bad faith in it, which essentially means that the default occurred not due to the intention or negligence of one of the parties, for example, an earthquake, or so on. Several things can be done in the event of force majeure to show good faith, namely (Budiono Kusumohamidjojo, 2004): a. the existence of common sense, which essentially means that the party who cannot do it has made the initial efforts to overcome force majeure, second, the existence of the condition must be notified as soon as possible to the other party. In the wrong position.

The definition of force majeure in various laws and regulations is explained. There is a general opinion that the elements of force majeure include (Rahmat SS Soemadipradja, 2010): a. the occurrence of circumstances/events beyond the will, ability, or control of the parties; b. cause loss to the parties or one of the parties; c. the occurrence of such events causes delays, obstacles, obstacles, or failures in carrying out the achievements of the parties; d. the parties have tried to avoid such events; e. The event has a significant effect

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on the performance of the contract. As long as the element of force majeure is not met, then an event or events that cause the implementation of the contract to be hampered cannot be declared as force majeure, so that the party that is unable to perform the contract can be punished for paying losses due to the occurrence of events/events that are not included as force majeure. In close connection with the SARS-CoV-2 Vaccine Purchase Contract (Vero Cells), the Inactivated or Inactivated Covid-19 Vaccine (Vero Cells) between PT. Kimia Farma Tbk and Sinopharm China. The author divides the force majeure clause into 2 two paragraphs of circumstance, so that later it will answer the question whether the editorial of the clause has met the terms and conditions of force majeure based on the above explanation of laws and regulations, and is in accordance with the doctrine and concept of force majeure.

The explanation is based on Figure 1. The above types of force majeure are included in the category of exclusive force majeure, meaning that they are limited to the conditions that have been listed in the mutually agreed contract. In this type of clause, force majeure is limited to the conditions listed in the contract, namely: strikes, unexpected work stoppages, shortages of raw materials or energy, government regulations, government actions, changes in national laws and policies, pandemic diseases, or natural disasters. In this clause, the element of unforeseen circumstances, which categorizes force majeure as a pandemic and the debtor requests to be released from liability, does not meet the element of "unforeseeable", since the agreement on the categorization of the pandemic is already known to the contracting parties. This is reinforced by the fact that the contract was made during the pandemic and the urgent need for vaccine procurement. The urgency of the force majeure provision in the clause is not based on the concept and doctrine of force majeure as it should be, in fact force majeure is used by suppliers and sellers as a form of exemption clause, which is a clause that contains conditions that limit or even eliminate the responsibility that should be borne by the seller (Nizla Rohaya and others, 2018).

Force majeure provisions provided exclusively for in the contract must not provide for excessive restrictions and/or the debtor's release of liability. The force majeure assessment must be seen in actual conditions where the debtor is unable to fulfill his obligations due to constraints, not solely because of the provisions contained in the contract (Arie Exchell Prayogo Dewangker, 2020). Usually, exclusive rules only provide a general perception of the definition and definition of force majeure, the obligation to provide written notice from the occurrence of a force majeure event, an agreement due to failure to comply with the notice of force majeure events resulting in legal consequences for damages and other matters that result in the debtor being released from the obligation to indemnify not a statement of release from legal liability. Therefore, the authors argue that the clause in Figure 1 above does not meet the unforeseen requirements at all. In fact, there is a tendency that in this case, the supplier and seller (Sinopharm) try to protect themselves from liability for violations that occur, whether violations that cannot be anticipated or those that can be anticipated.

Regarding the element beyond the fault of the parties, this element is fulfilled considering that the pandemic that occurred was beyond the control of both parties. Based on the analysis of the force majeure clause in the contract between PT. Kimia Farma Tbk and Sinopharm, it can be concluded that the formulation of the clause does not fully meet the terms and conditions of force majeure doctrinally. The clause that is exclusive and limits force majeure to only a certain list of events, including the pandemic, actually obscures the element of non-exclusivity that is the essence of force majeure, considering that this contract was made in the midst of the pandemic situation itself, so that the pandemic has actually become a condition that is known and can be anticipated by the parties. Although the element of "beyond the control of the parties" is met, and there is a formal notification clause reflecting good faith, the fact of such good faith becomes relative. This clause tends to serve as a tool for unilateral release of liability for Sinopharm, which unfairly deprives PT. Kimia Farma is to obtain compensation, even for violations that may occur after the pandemic period ends, as a temporary force majeure. To strengthen the credibility of these findings, the research requires a clearer methodological explanation, including the method of selection and analysis of legal sources, as well as a discussion of the limitations of the analysis, such as the absence of interviews with the parties that could provide a more in-depth negotiation context.

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Then, about the element not in bad faith, this element is met, as there is a clause regarding the notification of force majeure as soon as possible, and reasonable mitigation efforts are made to eliminate the effect as far as possible. According to the author, this element of bad faith became relevant when, from the beginning, the supplier and seller requested to be exempt from all liability for force majeure, which was logically unfair to PT Kimia Farma Tbk, which was supposed to receive possible compensation for losses, but became completely impossible to receive compensation for losses. Even though we know that in terms of the duration of force majeure, it can be said that the pandemic is a temporary force majeure, meaning that after the pandemic ends, efforts to recover losses must still be made if the debtor, in this case, experiences force majeure.

IV. Conclusion

Based on the discussion described above, Article 10 Paragraph (4) of the Sars-CoV-2 Vaccine Purchase Contract (Vero Cell), Inactivation or Covid-19 Vaccine (Vero Cell), Deactivated between PT. Kimia Farma Tbk and Sinopharm China did not comply with one of the provisions in Articles 1244-1245 of the Civil Code, namely: the element of unforeseen circumstances, because the pandemic categorization agreement was already known by the parties who drafted the previous contract. This is reinforced by the conditions when contracts were made during the pandemic, and there was an urgent need for vaccine procurement.

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