

APPLICATION OF HARDSHIP RULE UNDER THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS IN INDONESIA

Fikri Farokhi. Skd, Sanusi

Faculty of Law, Syiah Kuala University, Indonesia
Jl. Putroe Phang, No. 1, Darussalam, Banda Aceh – 23111
Tel./Fax: +62-651-7552295 e-mail: fikri.skd@mhs.unsyiah.ac.id.

ABSTRACT

This article examines the concept of hardship rule based on the UNIDROIT Principles of International Commercial Contracts (hereinafter called UPICC) and how it compares with force majeure regulated by the Indonesian Civil Code (hereinafter called ICC), as well as to analyze how it is applied in the Indonesian court decisions. This study uses a normative legal research method. The study shows that the meaning of the hardship rule under the UPICC is an event that has fundamentally changed the balance of a contract, resulting in a very high implementation value for the party performing, or the value of the implementation of the agreement is drastically reduced for the receiving party. Hardship and force majeure both occur in circumstances that preclude the obligation to perform that cannot be anticipated in advance, and the fault of either party does not cause the situation. The hardship rule emphasizes changes in circumstances by one of the parties to the contract caused by the contract value that changes significantly, causing significant losses for one of the parties, and hardship offers renegotiation for the parties. Meanwhile, force majeure is emphasized when the parties are unable to carry out all or part of the agreed performance which is generally caused by natural and social events, and force majeure offers contract suspension and termination of the contract. Indonesia has implicitly implemented this hardship in the legal system by referring to the principle of justice.

Keywords: Application, Hardship Rule, the UNIDROIT Principles, Indonesia, International Commercial Contracts

INTRODUCTION

In the realm of international contract law, there is the formation of the “*new lex mercatoria*” which has the aim of unifying international private law known as UNIDROIT, which contains the principles of contract law compiled from various major legal systems in the world, known as The UNIDROIT Principles of International on Commercial Contracts (UPICC). The UPICC was created as a general rule, which intends to provide a balance of rules that can be used throughout the world regardless of a country's political, economic system, and traditions that will enforce it in the realm of commercial contract law.¹

¹ R. Priyanto, “The Principles of International Commercial Contracts (UNIDROIT) As Material Reference for Modern Indonesian Contract Law,” *INKRACHT* 2.1, 2021, p. 141.

Of the various principles embodied in UPICC, the *force majeure* principle is also regulated in the non-performance article 7.1.7 of the UPICC, which recognizes the *force majeure* as an exception clause for giving responsibility to parties who cannot perform their obligations (default). The delay was caused by an obstacle that occurred unexpectedly and could not be controlled, avoided, or could not be predicted when the parties drafted the contract.² The application of *force majeure* can only be made when an unforeseen situation occurs at the time the contract is made. This unexpected situation also has implications for another principle in the UPICC called hardship.

Force majeure and hardship, if seen in particular, have many differences. Hardship emphasizes a situation that can be fundamentally balanced between the parties, while *force majeure* provides a more general meaning that refers to unexpected events that occur beyond the control of the parties. This difference certainly has different legal consequences for a contract. Based on the doctrines of various jurists, the legal consequences arising from *force majeure* are distinguished into absolute *force majeure* and relative *force majeure*. In absolute *force majeure*, the fulfillment of performance can no longer be carried out, and the contract is terminated immediately. On the other hand, relative *force majeure* causes the fulfillment of performance to be postponed, and the contract is not terminated. Meanwhile, the legal consequences of hardship on the contract provide an opportunity for the aggrieved party to apply for renegotiation. It is possible because it places a fundamental position for the parties. The UPICC's comments clearly distinguish between *force majeure* and hardship, where *force majeure* occurs after a default while hardship has not yet occurred.³

Indonesia has not recognized and regulated this hardship rule in the legal system in solving problems that arise as a result of an event that cannot be expected to affect the implementation of the contract. In most cases, Indonesia will invoke the doctrine of *force majeure* as a last alternative for the parties to find a solution. For instance, the issuance of Presidential Decree No. 12 of 2020 concerning the determination of non-natural disasters for the spread of Corona Virus Disease 2019 (Covid-19) as National Disasters, which states that Covid-19 is a *force majeure* event, even with Mahfud MD's debate that the establishment of *force majeure* status is inaccurate and cannot be

² Pritayanti and Budiarta, "A Comprehensive *Force Majeure* Model Clause in Corporate Transactions in Indonesia," *Sociological Jurisprudence Journal* 3.2, 2020: 138-144, p.140.

³ Govi Tri Saputra, "Formulation of *Force majeure* Clauses in International Trade Contracts," *Jurist-Diction* 3.3, 2020: 991-1014, p. 1006.

used as an excuse to cancel the contract because a court should decide *force majeure* by examining the entire contract because various regulations and contracts have not included Covid-19 as a *force majeure* event.⁴ In general, while analyzing various contract problems in Indonesia, legal experts primarily examine each occurrence through *force majeure* perspective, with little endeavor made to look at an event through the perspective of hardship because the ICC primarily regulates the principle of *force majeure*.⁵

In the absence of specific regulation on the hardship rule in Indonesian contract law, it is possible to implicitly apply it, and judges had applied the hardship rule in various decisions that referred to the use of the term *force majeure* and the principle of justice.

RESEARCH METHOD

The research used normative legal research, which study of legal documents, using sources of legal authorities in the form of statutory regulations, court decisions, contracts and agreements, legal theory, and the opinions of scholars.⁶ This research method will describe the setting of the hardship rule under international contract law and the related rule under Indonesian contract law. Specifically, the UPICC and the ICC as the primary reference of Indonesian contract law.

FINDING AND ANALYSIS

1) Definition of International Commercial Contracts

The contract comes from the English “*contract*,” and in Dutch, it is known as “*overenkomst*”, whereas in Black's Law Dictionary, a contract can be interpreted as “*an agreement between two or more persons which creates an obligation to do or not to do a particular thing.*” If generally translated, a contract is an agreement between two or more people who agree to do something or not to do something.⁷

A contract is an agreement between two or more people and is enforceable by law. The binding power of the contract lies in its clauses and descriptions. In general, there are two forms of

⁴ Andi Risma and Zainuddin. “The Interpretation of the Covid-19 Pandemic as the Reason for *Force majeure* Resulting in Cancellation of the Agreement,” *Jurnal Wawasan Yuridika* 5.1, 2021: 100-112, p. 106.

⁵ Pritayanti, *Op. Cit.*, p. 142.

⁶ Muhaimin, *Metode Penelitian Hukum*, Mataram: Mataram University Press, 2020, p. 45.

⁷ Sarah Selfina Kuahaty, “The Influence of International Law on Contract Law Developments in Indonesia,” *Sasi* 20.2, 2014: 64-70, p. 65.

contact. First is a contract in oral form; an oral contract is a contract whose terms have been agreed upon through verbal communication. The second is a written contract; a written contract is an agreement stated in a written document and has been signed by each party who agreed to the contract. In principle, a contract arises from a situation where a party offers to perform one or more certain actions under certain conditions, and the other party accepts the offer on mutually agreed terms.⁸

Contract law is a part of private law that focuses on obligations or performance in executing an obligation (self-imposed obligation) because when in the event of an unlawful act or default on the obligations specified in the contract, it is purely the business of the parties to the contract. Classically, the contract is seen as an expression or act of human freedom to perform contract activities. Free will in a contract and freedom of choice are manifestations of the contract itself.⁹

When it comes to commercial contracts can be interpreted simply as an agreement made by two or more parties to conduct business transactions.¹⁰ Whereas in the international law provision, it is stated Under Article 1 (1) of the Hague Principles, an approach that identifies a contract as “*commercial*” where it allows “*each party is acting in the exercise of its trade or profession.*” Meanwhile, in other approaches it can be found in Article 2 (a) CISG, which restricts its application to commercial matters by excluding consumer contracts, such as contracts for “*goods bought for personal, family or household use.*”¹¹

On the other hand, the UPICC explains that the “*commercial*” contractual limitation is not intended to override the distinctions traditionally made in some legal systems between “*civil*” and “*commercial*” parties and/or transactions, i.e., to make the application of the principles contingent on whether the parties have legal status formal “*trader*” and/or the transaction is commercial. The idea is to exclude from the scope of the Principles so-called “*consumer transactions,*” which in

⁸ Bing Yusuf and Liliana Tedjosaputro, “Dispute Resolution for International Contract to Achieve Legal Certainty,” *International Journal of Business, Economics and Law*, Vol. 14, Issue 5, 2017, p. 170.

⁹ Nury Khoiril Jamil, “Implications of the *Pacta sunt Servanda* Principle on *Force Majeure* in Indonesian Treaty Law”, *Jurnal Kertha Semaya Vol. 8 No. 7*, 2020: 1044-1054, p. 1047.

¹⁰ Merry Paulina Happy (*et. al*), “Legal Principles in International Contracts” *Privat Law* 2.4, p.5.

¹¹ Cyril Emery, “International Commercial Contracts,” *GlobaLex*, 2016, p. 1.

various legal systems are increasingly subject to special rules, mostly mandatory, aimed at protecting consumers who enter into contracts other than in their trade or profession.¹²

If it is viewed from the nature and scope of the law that binds it, the contract can be divided into national and international contracts. A national contract is made by two individuals (legal subjects) in a state territory that does not have a foreign element. Meanwhile, an international contract is a contract in which there is or is a foreign element. The foreign element is the relationship between the legal systems of more than one country, which affects the contract and leads to the choice of law. This choice of law is then agreed upon by the parties agreeing.¹³ Foreign elements can be theoretically indicated as follows:¹⁴

1. Different nationality between parties;
2. Different legal domicile;
3. The selected legal standard is foreign law, including regulations and even the principles of international contract;
4. International contract dispute settlement is conducted overseas;
5. The contract signing is done overseas
6. The material object of the contract is located oversea.
7. The language used in the contract is a foreign language or internationally well-known language
8. Foreign currency is used as a standard of transaction for the contract

International Conventions that form the basis of International Contracts are sourced from CISG and The UPICC. International instruments identify a contract as “*international*” when the parties to the agreement are from two or more different States (the CISG article 1 (1); Principles on Choice of Law in International Commercial Contracts).¹⁵ The UPICC defines a contract as “*international*” when it adopts national and international laws ranging from references to the parties’ places of business or regular residence in various countries to the application of more

¹² The UNIDROIT Principles of International Commercial Contracts 2016, P. 2.

¹³ Merry, *Loc. Cit.*

¹⁴ Bing Yusuf, *Op. Cit.*, P. 171.

¹⁵ Cyril Emery, *Loc. Cit.*

general criteria such as contracts that have a “*significant relationship with more than one States,*” “*involving a choice between the laws of different States,*” or “*affecting the interests of international trade.*”¹⁶

2) The *Force Majeure* Rule under the Indonesian Civil Code

In the Civil Code, there is no explicit mention of *force majeure*. However, the term *force majeure* is closely related to compensation and risk for unilateral contracts in coercive circumstances or related to compensation and risks in the particular contract section and is undoubtedly taken from various existing legal theories about *force majeure*, doctrine, and jurisprudence.¹⁷

The formula of *force majeure* in the ICC can be detailed. First, the event that caused the *force majeure* must be “*unexpected*” by the parties or not included in the basic assumption when the parties make the contract (Article 1244). Second, the event cannot be held responsible to the party that has to perform the work (the debtor) (Article 1244). Third, the event that caused the *force majeure* was beyond the debtor's fault (Article 1244). Fourth, the event that caused the *force majeure* was “*beyond the mistakes of the parties*” (Article 1545). Fifth, the parties are not in bad faith (Article 1244). Sixth, if a *force majeure* occurs, the contract will be null and void, and as far as possible, the parties are returned as if the agreement was never conducted (Article 1545). Seventh, if a *force majeure* occurs, the parties may not claim compensation (1245 and 1553). However, because the contract concerned was terminated due to *force majeure*, the party who had performed his obligation may claim for the object he had delivered in the exchange (Article 1545).¹⁸

The provisions in the article stipulate that forced circumstances are “*unexpected*”, “*debtors are hindered from giving or doing something that is required*”, and “*cannot be accounted for*”.¹⁹ *Force majeure* can also be interpreted as “*the state of the debtor being hindered from giving something or doing something or doing an act prohibited in the agreement*”. Therefore, the

¹⁶ The UNIDROID Principles of International Commercial Contracts 2016, p. 1.

¹⁷ Rizkyana Diah Pitaloka, “Policy of Delaying Business Contract Fulfillment during the COVID-19 Pandemic,” *National Conference on Law Studies (NCOLS)*. Vol. 2. No. 1, 2020, p. 438.

¹⁸ Seng Hansen. “Does the COVID-19 outbreak constitute a *force majeure* event? A pandemic impact on construction contracts.” *Journal of the Civil Engineering Forum*. Vol. 6. No. 1. 2020. p. 204

¹⁹ Rizkyana, *Loc. Cit*

terminology used is *forced majeure*. Forced circumstances are interpreted as “*events beyond the control of one party*.”²⁰

Although it is not explicitly mentioned the definition of *force majeure*, through the mentioned articles can be identified the elements of a state can be said to be *force majeure*; 1) Unexpected event; 2) Cannot be accounted for to the debtor; 3) There is no bad faith from the debtor; 4) The presence of accidental circumstances by the debtor; 5) The situation prevents the debtor from performing; 6) If the performance is executed, it will be banned; 7) Circumstances beyond the debtor's fault; 8) The debtor does not fail to perform (deliver goods); 9) The incident cannot be avoided by anyone (both debtors and other parties); 10) The debtor is not proven guilty or negligent.²¹

Through its elements, the *force majeure* gives birth to inevitable legal consequences. Two things are the result of *force majeure*, according to Yahya Harahap, namely; 1) To exempt the debtor from payment of compensation (*schadevergoeding*). This situation resulted in the creditor's right to sue will be lost for good. Due to coercive circumstances, the exemption of indemnity on the previous agreement is absolute; 2) Exemption from debtor's obligation to fulfill performance (*nakoming*). Exemption from the fulfillment of relative obligations is generally only a postponement of obligations for the debtor until the situation or condition improves. The *force majeure* situation still hinders the debtor from carrying out the performance of obligations in the agreement. If the *force majeure* is lost or completed, the creditor can again sue the debtor to fulfill the performance. The obligation to implement performances does not expire forever and is only delayed, while compelling circumstances exist.²²

Now it can be understood that the *force majeure* is one of the causes of the default. However, it should also be remembered that a default in a *Force majeure* condition does not have a negative connotation for the debtor not to perform according to the agreement that binds the parties. The *force majeure* condition becomes forgiving to debtors for not implementing performances.²³

3) The Meaning of *Hardship* Rule

²⁰ *Ibid.*

²¹ Niru Anita Sinaga, “The Perspective of *Force Majeure* and *Rebus sic Stantibus* in the Indonesian Legal System,” *Jurnal Ilmiah Hukum Dirgantara* 11.1, 2021, p. 12.

²² Nury Khoiril, *Op.Cit.*, p. 1050.

²³ *Ibid.*

Hardship rule, in general, is a contractual method that regulates fundamental alters in events so that it affects the balance of the agreement that the parties have made. Hardship is a principle derived from Roman philosophy, namely the term *rebus sic stantibus*, which response to the principle of *pacta sunt servanda*.²⁴

The hardship rule in some countries has long been known, but using different terminology. *Hardship* is the terminology or other term of the *rebus sic stantibus* principle used in the UPICC, and each country has its terms. For example, in the UK, hardship is better known as *Frustration of Purpose*, Germany uses the term *Wegfall der Geschäftsgrundlage*, and French uses the term *Imprevision*.²⁵ In Bulgarian legal tradition, the principle of dealing with these obstacles is known as “*economic onerosity*.”²⁶ In this discussion, the term hardship is preferred because the term is more general and acceptable to various circles.²⁷

The basis for the hardship rule arrangement is regulated in Article 6.2.2 of the UPICC. The elements are:²⁸

1. There is an event that fundamentally changes the balance. It can be in the form of increasing implementation cost or a decreasing execution value of the contract received by one party.
2. The events occurred or were only known by the aggrieved party after the agreed agreement.
3. The events were rationally not predicted when the agreement was agreed upon.
4. The event is beyond the control of the aggrieved party.
5. The aggrieved party does not suspect the risk of events occurring.

The UPICC stipulates that “*there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract.*” while the requirements for “*fundamental alteration*” are set out in the UPICC to bear the risk of not being misused. However, UPICC commentators suggest that

²⁴ Taufik Armandhanto, (*et.al*), “Paradigm of *Hardship* Principles in Treaty Law Post the New Normal Era in Indonesia,” *Jurnal Hukum Bisnis Bonum Commune*, 2021, 4.1: 50-60, p. 4.

²⁵ *Ibid*.

²⁶ Radosveta Vassileva, “Harmonisation Impossible? on the Evolution of the English, French, and Bulgarian Approach to hardship in Commercial Contracts.” *On the Evolution of the English, French, and Bulgarian Approach to Hardship in Commercial Contracts (February 12, 2019)*. *Amicus Curiae: Journal of the Society for Advanced Legal Studies* 112 (2019). p. 3

²⁷ Taufik, *Loc. Cit*.

²⁸ Niru Anita, *Op. Cit*, p. 21.

“*excessively onerous*” performance is implicitly included in the requirement of “*fundamental alteration*.”²⁹

In his hypothesis about the numerical standard regarding the determination of the hardship criteria, Daniel Girsberger explains section 6.2.1 of the UPICC, which states, “*Since the general principle is that a change in circumstances does not affect the obligation to perform,*” then hardship cannot be imposed unless the change in the balance of the contract is fundamental. Whether a change is “*fundamental*” in a particular case will depend on the circumstances. However, if the performance can be measured accurately in monetary terms, a change of 50% or more of the cost or value of the performance will most likely be a “*fundamental*” change.³⁰

After a situation is declared as hardship, the legal consequences arise as effects According to Article 6.2.3. of the UPICC are:³¹

1. The aggrieved party has the right to request renegotiation of the contract to the other party immediately (without undue delay) by showing the basics.
2. A request for renegotiation does not entitle the aggrieved party to terminate the execution of the contract.
3. The aggrieved party must also indicate the reasons for submitting the request for renegotiation and allow the opposing party to study whether the request for renegotiation can be justified.
4. If the parties fail to reach a consensus within a reasonable period, each party can apply to the court.
5. If the court proves that there are hardship, the court can decide to terminate the contract at a fixed date and time or amend the contract to restore the balance.

Considering the legal consequences of hardship above, it is recognized that the aggrieved party may submit a request for renegotiation in such circumstances. The renegotiation purpose is to obtain a fair exchange of rights and obligations in the execution of the contract due to events that fundamentally affect the balance of the contract.

²⁹ Daniel Girsberger and Paulius Zapolskis, “Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption,” *Jurisprudence*. 2012, 19(1): 121–141, p. 123.

³⁰ *Ibid*, p.127.

³¹ Niru Anita, *Op. Cit*, p. 22.

4) The Comparison between *Hardship Rule* under UPICC and *Force Majeure* under Indonesian Contract Law

Agus Yudha Hernoko, in his book, also develops a *force majeure* theory called hardship, which according to the author, is more inclined towards relative/temporary *force majeure*. *Hardship* has the consequence that the aggrieved party may submit a request for renegotiation. It is a new teaching that previous doctrines have not explicitly discussed.³² However, if we examine the old teachings, even though there are similarities between hardship and *force majeure*, if we look at the condition of the cause when viewed from the resulting legal consequences, we can see the difference between the two.

Before looking at the difference between *force majeure* and hardship, we can look at the similarities they have first as follows:³³

1. There are circumstances that prevent the obligation to do performances against one of the parties.
2. This situation cannot be anticipated by the parties and occurs after the agreement has been closed.
3. The fault of either party does not cause this situation.

The most obvious remaining comparison between *force majeure* and hardship concerns their applicability, both of which can only be applied to the extent of events, not within the control of the aggrieved party. Therefore, it is natural that the party may not carry out its performances. No judge will punish someone for something impossible to perform. Both *force majeure* and hardship can only be applied to unforeseen circumstances when the contract was made. In other words, before the contract is concluded, the parties have no idea that something will happen.³⁴

There are several vital differences between *force majeure* and hardship. In a *force majeure* event, it can occur: 1) The contract will be considered terminated (except for partial *force majeure*, there is an obligation to continue the remaining portion) because if referring to Article 1381 of the ICC, then *force majeure* is one of the reasons for the termination of the engagement; 2) The debtor is no longer responsible for the risk. In hardship, events that hinder performance are prioritized on

³² *Ibid*, p. 17.

³³ Setyawati Fitri A, “*Force Majeure* and *Hardship*: A Comparison of Tips on Designing a *Force Majeure* Clause in a *Force Majeure* Contract”, *ACTIO Journal Issue no. 13th June 2020*, p. 11.

³⁴ Govi Tri, *Op. Cit*, p. 1007.

events that fundamentally change the balance of the contract, either because of an increase in performance costs or because the value of the performance to be received changes: 1) Resulting in significant changes that will cause unfair losses to other parties; 2) If proven, the contract does not expire but can be renegotiated by the parties for its continuation; 3) If renegotiation fails, the dispute can be submitted to the court to be decided; 4) Judges can terminate the contract or revise the contract to restore the balance in proportion.³⁵

Based on the doctrine of legal experts, absolute *force majeure* causes the fulfillment of performances can no longer be carried out, and immediately, the contract is terminated. On the other hand, in temporary *force majeure*, the fulfillment of performances is delayed, and the contract is not terminated. The legal consequences of hardship on the contract mainly concern the opportunity for the aggrieved party to apply for renegotiation. It is possible because hardship makes the position of the parties fundamentally. At UPICC, explicitly in his comments, distinguish hardship and *force majeure*. In hardship, there has not been a default, but there has been a default at the time of *force majeure*.³⁶

To more easily understand the difference between hardship and *force majeure*, let us look at the following table:

the Difference between *Hardship* and *Force Majeure*

Hardship	<i>Force Majeure</i>
It is emphasized on the occurrence of changes in circumstances by one of the parties in the agreement, basically due to a particular condition.	It is Emphasized in situations where there are parties who cannot carry out all or part of the agreed performances due to circumstances beyond their control and cannot be predicted when the agreement is closed.
<i>The value of the contract</i> has changed significantly, causing a severe losses to one of the parties	If certain parties can prove the existence of <i>force majeure</i> , the agreement immediately ends, except for matters classified as temporary <i>force majeure</i> , there is still an obligation to continue to carry out performances following the circumstances.

³⁵ Setyawati, *Loc. Cit.*

³⁶ Govi Tri, *Loc. Cit.*

If one of the parties can prove the existence of hardship, then the agreement has not ended and can be renegotiated by the parties themselves.	The party concerned is no longer responsible for the risks that arise as a result of <i>force majeure</i>
If renegotiation fails, then the parties can apply to the court so that the judge can decide whether to restore the balance in the agreement or terminate the agreement	It is Recognized and regulated in the Indonesian legal system, namely Articles 1244, 1245, 1444, and 1445 of the ICC.
Not recognized and regulated in the Indonesian legal system	
Emphasizing on the context, performances must still be made. Although there are obstacles, they are still performed by adhering to the balance of the agreement.	

Source: Adapted from Taufik Armandhanto's Presentation in Paragraph Form.³⁷

5) The Application of *Hardship* Rule in Indonesian Court Decisions

To see how the hardship rule is applied in Indonesia. We will try to examine two examples of cases that have been decided by the Indonesian courts. Both cases are related to the events of the economic crisis. The court decision used is the Indonesian Supreme Court Decision Number 285PK/Pdt/2010 and Number 1787 K/Pdt/2005.

a) Supreme Court Decision Number 1787 K/Pdt/2005

President Director of PT PERTAMINA (PERSERO), as the Petitioner for Cassation/plaintiff, filed a petition for cassation against PT WAHANA SENO UTAMA, as Respondent of Cassation/Defendant, had signed a Cooperation Agreement for the Construction, Operation, and Management of the Gas Tower Building with a total cost of US\$ 95,614,070.00, with all operating facilities. Under the agreement dated February 17, 1997, the plaintiff had submitted the land intended for constructing the Gas Tower building and raised the necessary planning drawings. Initially, the defendant had carried out his duties under the contract, but since May 1, 1998, the defendant had stopped work on the gas tower construction project because changes in economic conditions have caused material prices to soar and become uncertain.

³⁷ Taufik, *Op. Cit.*, p. 8.

Even though the plaintiff had given the defendant sufficient opportunity or time to settle his obligations to the plaintiff (approximately 4.5 years), the defendant still failed to fulfill his duties. Project progress based on the agreement only reaches 5% (five percent). So the plaintiff had suffered losses in the form of a building that stood at 12,144 m². It could no longer utilize the buildings previously leased to third parties, which the defendant had demolished. So the plaintiff felt aggrieved because they could no longer use the large area of land that had been previously handed over.

The plaintiff stated that the defendant had defaulted, and Plaintiff was entitled to seek compensation in the form of interest payments of 3% per annum and returned the land belonging to the plaintiff with a 12,144 m² area in empty condition. Defendant, through the filed counterclaim, stated that he could not continue the construction due to economic changes in the form of a world economic recession which could be classified as a force majeure event so that these conditions affected the country's economy, especially the Plaintiff with the increase in the price of building materials.

Before the court, the defendant expressed his ability to proceed with the construction of the project. The defendant and plaintiff had planned to review the economy of the project following the current market conditions and they agreed to make changes to the articles of the agreement. However, all these plans were not implemented and the plaintiff terminated the agreement unilaterally and filed a lawsuit with the court.

PT PERTAMINA filed a lawsuit against PT WAHANA SENO UTAMA to the Central Jakarta District Court. However, the panel of judges of the Central Jakarta District Court through Court Decision No. 237/Pdt.G/2003/PN.Jkt.Pst rejected the plaintiff's lawsuit entirely. This decision also granted the counterclaim by punishing the defendant (convention plaintiff) back to review the economy of the project, complete changes to the articles of the mutually agreed agreement, and return the security deposit issued to the plaintiff's bank guarantee.

The judge of the Central Jakarta District Court stated that the defendant could not be declared a default, because there had been a monetary crisis the occurred monetary crisis, even though it was not a force majeure as stipulated in the law, which could be the reason for the delay in development in general and the PERTAMINA gas tower building

construction project in particular. It is proven that the monetary crisis has caused banks and funders to collapse so that the defendant is unable to complete the construction of the gas tower building.³⁸

The decision of the Central Jakarta District Court is the result of the judge's consideration based on the principles of contract interpretation, legal facts revealed in the trial, the lawsuit posita, and especially the petitum ex aequo et bono. According to Yahya Harahap, a *judex facti* decision based on a subsidiary petitum in the form of *ex aequo et bono* can be justified as long as it is within a framework that is compatible with the essence of the lawsuit. In essence, the *ex aequo et bono* decision is based on the subsidiary petition of the plaintiff who asks to be given a fair decision. Then the decision was given as a form of fulfillment of a sense of justice for both parties.³⁹

Furthermore, PT PERTAMINA filed an appeal to the DKI Jakarta High Court. However, the panel of judges of the Jakarta High Court also rejected the appeal filed by PT PERTAMINA stated in Court Decision No. 267/PDT/2004/PT.DKI. Not quite there, PT PERTAMINA again took other legal efforts. Through oral PT PERTAMINA submitted a cassation to the clerk of the Central Jakarta District Court.

The panel of judges of the court of cassation through Supreme Court Decision No. 1787 K/PDT/2005 stated that it rejected the application for cassation submitted by PT PERTAMINA. The Cassation judge (hereinafter called *Judex Juris*) stated that the district court judge (hereinafter called *Judex Facti*) was not wrong and did not wrongly apply the law, and all evidence had been examined and considered sufficiently and well. The assessment of the evidence results cannot be considered in the examination at the cassation level because the examination at the cassation level only deals with errors in applying the law. Based on previous considerations, it stated that the *Judex Facti* decision did not conflict with the law and/or legislation.⁴⁰

The panel of judges at the cassation level rejected the cassation application submitted by the president director of PT PERTAMINA, at the same time, strengthened the

³⁸ Mohammad Zamroni, *Judges' Interpretation in Contract Disputes: A Study of Court Theory and Practice*, Scopindo Media Pustaka, 2020, p. 132.

³⁹ *Ibid*, p. 135

⁴⁰ *Ibid*.p. 132.

previous court's decision, arguing that the *Judex Facti* was not wrong and was not wrong in applying the law used and the examination of all evidence had been examined carefully and adequately.

If we examine this event based on the point of view of Article 6.2.2 of the UPICC, the termination of work on the gas tower construction project carried out by PT WAHANA SENO UTAMA on the grounds of increasing raw material prices become high due to the economic crisis that occurred in Indonesia. It can be said to have obtained qualifications in a hardship situation. In addition, in terms of the value of workmanship received by PT PERTAMINA only reaching 5% (five percent) in a certain tempo can be said to have been a reduction in the performance value received. With the facts above, it can be said that there has been a situation that becomes onerous for the parties to the contract so it is appropriate to be able to follow the provisions of the hardship rule as stated in Article 6.2.1 of the UPICC.

Judex Facti has previously stated that it punishes the plaintiff (the defendant of the covenant) to be able to "review the economy of the project and to be able to complete changes to the articles of the mutually agreed agreement". If we compare with the statement of Article 6.2.3 (4) of the UPICC, it is very clear that the decision given by *Judex Facti* is in line with the provision hardship rule, namely re-fixing the terms of the contract to restore its balance.

b) Supreme Court Decision Number 285PK/Pdt/2010

The plaintiffs were PT SUMUR LADANG ANDALAN, PT ANTAR MUSTIKASEGARA, PT BANGUN MAYA INDAH, and PT DUTA SUMBER NABATI. They are companies engaged in oil palm plantation projects with the PIR-TRANS pattern (Perkebunan Inti Rakyat - Transmigrasi) in West Kalimantan. The plaintiffs have entered into a credit agreement with PT Bank Pembangunan Indonesia (Bapindo) and had changed to PT Mandiri Bank (Persero). Tbk (defendant) to finance the implementation of oil palm plantation projects under the PIR-TRANS pattern.

Based on the made agreement, each plaintiff was determined in the agreement Interest: 16% per annum, Fine: 23% per annum, Term of 12 years. In performing the PIR-TRANS Oil Palm Plantation Project, the Plaintiffs faced obstacles conditions outside the company, one of the clauses mentioned was a monetary crisis, which resulted in project costs being high

to exceed the cost ceiling set by the defendant in the agreement so that the palm kernel oil mill was experiencing difficulties infunding to support operational activities.

During the monetary crisis, the government had established a special agency, namely *Badan Penyehatan Perbankan Nasional* (BPPN), one of whose authorities is to take legal action on assets under restructuring and/or Liabilities under restructuring. At that time, the plaintiffs had conveyed the obstacles they were experiencing and requested that they be able to restructure their debts in the hope that the investments would not be in vain. However, Defendant did not take the plan for Settlement of Liability (restructuring) for the Plaintiffs' debts seriously but tended to require the sale of the Plaintiffs' assets.

PT SUMUR LADANG ANDALAN et al sued PT MANDIRI BANK to court. It starts with filing a lawsuit at the South Jakarta District Court level. However, the request was not granted at all. PT SUMUR LADANG ANDALAN et al then appealed to the DKI Jakarta High Court. At the court of appeal, their suit was also rejected, the rejection of their suit also occurred at the cassation court level. Until finally PT SUMUR LADANG ANDALAN et al applied for a judicial review of the Court Decision No.1848 K/Pdt/2009.

In his lawsuit, the plaintiff stated that he had experienced problems due to *force majeure* conditions which resulted in the plaintiffs being unable to fully carry out their obligations to the defendants. One of the most influential conditions is the occurrence of a monetary crisis that causes the cost of building a core palm oil mill to far exceed the cost ceiling set in the contract so that the core palm oil mill has difficulty funding to support operational activities. In addition, during the economic/monetary crisis, interest rates and fines were imposed so high that they were no longer relevant to the PIR-TRANS plantation business. The plaintiffs asked the judge to be able to punish the defendants to provide for the elimination of interest obligations, fines, and fees. As well as the write-off of a recovery rate of 15% of the principal debt amount of each plaintiff.

On Court Decision No. 285PK/Pdt/2010, The Judicial Review Judge in his deliberations stated that *Judex Juris* had made a mistake in applying the law in this case by rejecting the plaintiff's lawsuit, which essentially requested that PT Bank Mandiri relieve interest on loan money charged to the Applicant for Cassation / Plaintiff, but not fulfilled. The *Judex Juris* made an obvious mistake by not considering that the credit agreement/debt

agreement occurred during the economic crisis that hit the world, which affected the Indonesian economy.

The judicial review judge stated that *Judex Juris* had made a mistake in applying the law by rejecting the claim from the applicant, and *Judex Juris* was also found guilty for not granting the request for debt relief submitted by the applicant. Whereas based on the provisions of article 6 paragraph (1) letter b Presidential Decree Number 56 of 2002 which states: “*In the event that the debtor is unable to pay cash, the debtor may be given an agreement on the repayment period with the waiver of interest and fines.*”

The *Judex Juris* is stated to have committed a real oversight. *Judex Juris* should consider the condition of the world economic crisis, which also impacts Indonesia’s economic condition, as the reason the applicant does not fulfill his obligations. The obstacles started from technical problems, and security problems and the company’s cash flow was disrupted due to the global crisis. The four companies finally succeeded in the judicial review.⁴¹

The judicial review judge also stated that *Judex Facti* did not apply the law as it should, correctly, fairly, and absorbs the sense of justice of the people. Based on these considerations, the Supreme Court held that there were sufficient grounds to grant the petitioners' application for judicial review and would retrial the case. For the sake of a sense of fairness and propriety, the Judge sentenced the plaintiffs to pay their principal debt to the defendants in the amount of the initial debt, and sentenced the plaintiffs to pay interest of 6% per annum from the start of the registration of the application for review. Restructuring of debt interest which was originally 16% per annum to 6% per annum required by the Supreme Court. It can be interpreted that review judges make changes to the contract terms by adjusting the current conditions following national monetary conditions to keep the contract balanced. This decision is certainly the same as the decision of the judge on the Supreme Court Decision Number 1787 K/PDT/2005. However, the difference is that the judge in this case directly sets the size of the contract balance that must be accepted by the parties. And again, whether they realize it or not, the actions taken by the judicial review are

⁴¹ Muhammad Fajar Hidayat and Desi Sommaliagustina, “Juridical Implications for Determining Covid-19 as a National Disaster in Contract Implementation”, *Jurnal Selat Vol. 8 No. 1*, 2020: 2354-8649, p. 81

in line with the hardship rule under article 6.2.3 UPICC. The increase in ceiling costs as a result of the monetary crisis experienced by PT SUMUR LADANG ANDALAN et.al can be qualified as a hardship event as stated under Article 6.3.2 UPICC. Then they took the initiative to submit a loan restructuring application to PT MANDIRI BANK as a creditor. And they still try to implement the performance as much as possible even though it becomes more difficult. However, negotiations to readjust the debt structure did not find a way to resolve it and finally, this case went to court. The attitude taken by PT SUMUR LADANG ANDALAN et.al is in line with the provisions of Article 6.2.3 UPICC. Consciously or not, the actions they do as if based on the hardship rule under UPICC.

Previously, through the Supreme Court Decision Number 2914 K/Pdt/2001, the Supreme Court Judge determined that the termination of the implementation of performances under the pretext of *force majeure* over the conditions of the monetary crisis could not be justified.⁴² However, in addition to *force majeure*, courts in Indonesia in deciding cases related to hardship also use the sense of justice.

Written law is often left behind in the development of society so that it is less up to date on new problems that arise in society. To overcome these shortcomings, judges must be able to explore the values of justice in society, so it is hoped that if laws and regulations are not able to meet the sense of justice in society, the role of judges is to restore that sense of justice. It is following the mandate of Article 5 of Law Number 48 of 2009 concerning Judicial Power which states that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that lives in society.⁴³

In this case, a sense of justice can be the basis for cases related to the hardship rule because if one of the parties refuses to restore the balance of the contract due to a change in the fundamental circumstances, the refusal can be said to be contrary to justice. It is in line with the *lex mercatoria* doctrine, based on the *pacta sunt servanda* principle, it locks the

⁴² Muhammad Irfan Hilmy and Muhammad Fadhali Yusuf, "Practices and Disparities in Judges' Decisions in Establishing *Force Majeure* in Indonesia", *Zaiken: Journal of Civil and Business Law Vol. 1 No. 2, 2020: 182-201*, p. 191

⁴³ Wigati Pujiningrum, "Development of Civil Law through Jurisprudence," *Mahkamah Agung Republik Indonesia's Article*, <<https://www.mahkamahagung.go.id/id/artikel/4206/pembangunan-hukum-perdata-melalui-yurisprudensi>> [Accessed 2022-06-07]

parties to as much as possible to maintain the agreed contract, so termination of the contract is the last step allowed to be taken.

So far, the ICC has not provided hardship adjustment. However, by looking at the developments that occurred, it is very likely that we have implicitly adopted the doctrine and applied it in various cases in court. It is just that maybe we have not formally admitted it yet.

CONCLUSION

The meaning of hardship rule under the UPICC is an event that has fundamentally changed the balance of a contract, resulting in a very high implementation value for the party performing, or the value of the implementation of the agreement is drastically reduced for the receiving party. The event appears or is known to the aggrieved party after the contract is agreed, the event cannot be predicted rationally for the injured party after the contract is concluded, the event occurs beyond the control of the injured party, and the injured party cannot estimate the risk of the event. Moreover, the aggrieved party is given the right to request for renegotiation.

Hardship and force majeure both occur in circumstances that prevent the obligation to perform against one of the parties. The parties cannot anticipate the situation and occur after the agreement has been closed, and the fault of either party does not cause the situation. However, the two have some differences as well. The hardship rule emphasizes a change in circumstances faced by one of the parties to the agreement due to unavoidable circumstances. Generally, it is caused by the value of the contract changes significantly, causing severe losses to one of the parties. Meanwhile, force majeure is emphasized when parties cannot carry out all or part of the agreed performances due to circumstances beyond their control—usually caused by natural and social events, such as earthquakes, floods, hurricanes, and civil wars. In the case of hardship, if one of the parties can prove the existence of hardship, then the agreement has not ended and can be renegotiated by the parties themselves. If the renegotiation fails, then the parties can apply to the court so that the judge can decide whether to restore the balance in the agreement or terminate the agreement. Meanwhile, for force majeure, if a particular party can prove the existence of force majeure, the agreement will immediately end. Except for matters classified as temporary force majeure, there is still an obligation to continue to carry out performance according to the circumstances, and the party concerned no longer has any responsibility

Through Indonesian Supreme Court Decision No. 1787 K/Pdt/2005 and No. 285PK/Pdt/2010, the competent panel of judges accepted the reasons for the change in economic conditions as a reason to restore the balance of the contract. These court decisions were given with consideration of the principle of justice. The court decisions grant the requests of the aggrieved parties due to changes in economic conditions. Therefore, Indonesia has implicitly implemented this hardship in the legal system, but refers to the principle of justice.

BIBLIOGRAPHY

- Armandhanto, Taufik, (*et.al*), “Paradigm of *Hardship* Principles in Treaty Law Post the New Normal Era in Indonesia,” *Jurnal Hukum Bisnis Bonum Commune*, 2021, 4.1.
- Emery, Cyril, “International Commercial Contracts,” *GlobaLex*, 2016.
- Fitri A, Setyawati “*Force Majeure* and *Hardship*: A Comparison of Tips on Designing a *Force Majeure* Clause in a *Force Majeure* Contract”, *ACTIO Journal Issue no. 13th June* June 13 2020.
- Girsberger, Daniel and Paulius Zapolskis, “Fundamental Alteration of the Contractual Equilibrium under *Hardship* Exemption,” *Jurisprudence*. 2012, 19(1).
- Gita Pritayanti, Ayu and Putu Budiarta, “A Comprehensive *Force Majeure* Model Clause in Corporate Transactions in Indonesia,” *Sociological Jurisprudence Journal* 3.2, 2020.
- Hansen, Seng, “Does the Covid-19 Outbreak Constitute a *Force Majeure* Event? A Pandemic Impact on Construction Contracts.” *Journal of the Civil Engineering Forum*. Vol. 6. No. 1. 2020.
- Happy, Merry Paulina, (*et. al*), “Legal Principles in International Contracts,” *Privat Law* 2.4.
- Hidayat, Muhammad Fajar and Desi Sommaliagustina, “Juridical Implications for Determining Covid-19 as a National Disaster in Contract Implementation”, *Jurnal Selat* Vol. 8 No. 1, 2020.
- Hilmy, Muhammad Irfan and Muhammad Fadhali Yusuf, “Practices and Disparities in Judges' Decisions in Establishing *Force Majeure* in Indonesia”, *Zaaken: Journal of Civil and Bussiness Law* Vol. 1 No. 2, 2020.
- Jamil, Nury Khoiril, “Implications of the *Pacta Sunt Servanda* Principle on *Force majeure* in Indonesian Treaty Law”, *Jurnal Kertha Semaya* Vol. 8 No. 7, 2020.
- Muhaimin, *Metode Penelitian Hukum*, Mataram: Mataram University Press, 2020.
- MYA Kadir, The World Trade Organisation (WTO): Free Trade within Fair Trade Challenges, *Mimbar Hukum*, Vol. 26 (1), 2014.

- Pitaloka, Rizkyana Diah, "Policy of Delaying Business Contract Fulfillment During the Covid-19 Pandemic," *National Conference on Law Studies (NCOLS)*. Vol. 2. No. 1, 2020.
- Priyanto, R, "The Principles of International Commercial Contracts (UNIDROIT) As Material Reference for Modern Indonesian Contract Law," *INKRACHT* 2. 1 2021.
- Pujiningrum, Wigati, "Development of Civil Law through Jurisprudence," *Mahkamah Agung Republik Indonesia's Article*, <<https://www.mahkamahagung.go.id/id/artikel/4206/pembangunan-hukum-perdata-melalui-yurisprudensi>>.
- Risma, Andi and Zainuddin, "The Interpretation of the Covid-19 Pandemic as the Reason for *Force Majeure* Resulting in Cancellation of the Agreement," *Jurnal Wawasan Yuridika* 5. 1, 2021.
- Saputra, Govi Tri, "Formulation of *Force majeure* Clauses in International Trade Contracts," *Jurisdiction* 3. 3, 2020.
- Selfina Kuahaty, Sarah, "The Influence of International Law on Contract Law Developments in Indonesia," *Sasi* 20. 2, 2014.
- Sinaga, Niru Anita, "The Perspective of *Force Majeure* and *Rebus sic Stantibus* in the Indonesian Legal System," *Jurnal Ilmiah Hukum Dirgantara* 11.1, 2021.
- Sulaiman, (2021) Anti-Corruption Ideology In Higher Education In Indonesia, *Student Journal Of International Law* 1 (1), 1-12.
- Vassileva, Radosveta, "Harmonisation Impossible? On the Evolution of the English, French, and Bulgarian approach to *Hardship* in Commercial Contracts." *On the Evolution of the English, French, and Bulgarian Approach to Hardship in Commercial Contracts (February 12, 2019)*. *Amicus Curiae: Journal of the Society for Advanced Legal Studies* 112 (2019).
- Yusuf, Bing and Liliana Tedjosaputro, "Dispute Resolution for International Contract to Achieve Legal Certainty," *International Journal of Business, Economics and Law*, Vol. 14, Issue 5, 2017.
- Zamroni, Mohammad, *Judges' Interpretation in Contract Disputes: A Study of Court Theory and Practice*, Scopindo Media Pustaka, 2020.