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THE IMPOSITION OF FINANCIAL CONSEQUENCES DUE TO FORCE MAJEURE IN CONSTRUCTION SERVICE AGREEMENTS

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Abstract: Force majeure events are likely in Indonesian construction projects due to the country's susceptibility to natural disasters. Contractors are particularly vulnerable to defaults like completion delays and financial losses due to damage. Legal protection through force majeure clauses is crucial. However, some Project Owners hesitate to define force majeure conditions due to a lack of understanding. Researchers aim to clarify force majeure concepts in agreements and construction contracts to ensure legal certainty for all parties involved. This study employs a qualitative descriptive approach utilizing library research methods for data collection. Research findings indicate that construction service contract standards in Indonesia, including those within the PUPR environment, the FIDIC Contract Form, and other project contracts, align with expert formulations and relevant regulations regarding the implementation of the Force Majeure concept. Typically, the allocation of cost consequences resulting from a Force Majeure event assigns responsibility to the Project Owner as the Creditor, rather than transferring it to the contractor. However, variations can occur based on the parties' agreement, which, if agreed upon, are legally binding under the *Pacta Sunt Servanda* principle which facilitates the shifting of Force Majeure liability to the contractor, prompting the contractor to consider it in their offer.

Keywords: Force Majeure; Agreement; Construction Contract; Construction Law

I. INTRODUCTION

Construction is a strategic sector in the achievement of national development. The contribution of the construction sector is quite significant in the economies of various countries in the world. It's reaching Gross Fixed Capital Formation (GFCF) of 70%-80% and achieving Gross Domestic Product (GDP) up to 5%-9% (Hillebrandt, 1984). The Indonesian Central Bureau of Statistics reported that the construction sector is the fifth contributor to Indonesian economy, as it has contributed 9.43 percent in Q2-2023 to Indonesia's GDP. The index of accomplished construction during Q2-2023 grew by 6.58 percent when contrasted with Q2-2022. The construction value index completed in Q2-2022 amounted to 144.04, rising to 153.51 in Q2-2023 (Biro Pusat Statistik, 2023). The achievement of the economic value index in construction sector activities in various countries including Indonesia indicates that the construction industry has become one of the vital sectors in the economic growth of a country.

In the implementation of construction projects, extraordinary circumstances beyond human capabilities happen quite common. Therefore, force majeure is something that might happen in construction projects in Indonesia. This is because the majority of Indonesia has a high risk of natural disasters as a consequence of its geological and geographical location. The potential for natural disasters in Indonesia is evenly distributed in almost all parts of its territory.

Indonesia is located geologically at the meeting point of four primary tectonic plates (Indo-Australia, Pacific, Eurasia and the Philippines) and has more than 127 volcanoes (Ginting, 2021). This makes Indonesia vulnerable to earthquakes, volcanic eruptions and even tsunamis. In addition, Indonesia's geographical condition, situated in the tropical zone where two oceans and two continents converge, also renders it very vulnerable to natural calamities such as extreme weather, extreme waves, abrasion, drought, floods, landslides, flash floods and forest and plantation fires (Tim Indonesiabaik.id, 2022). UNESCO ranked Indonesia as the seventh most vulnerable country to natural disaster risk based on geography, geology, climatology and demography perspectives. In 2021, BNPB's Disaster Information and Communication Data Center released the Indonesian Disaster Risk Index (IRBI) which indicates that 15 provinces in Indonesia have a high disaster risk. These provinces include West Sulawesi, Bangka Belitung Islands and Maluku; and 19 provinces are at moderate disaster risk including West Nusa Tenggara, Riau Islands and DKI Jakarta (Adi et al., 2022).

In general, during a force majeure event, the service provider contractor the most affected party. This happens due to Force Majeure conditions; and experiencing losses as a consequence of delays and damage and / or destruction of work, facilities and equipment. To overcome this, the contractor would ask the project owner establish force majeure conditions. It is intended to escape the responsibility of completing the project on time and avoid fines, as well as obtain claims for compensation for losses suffered due to force majeure.

In reality however, most of the time, the project owner is hesitant to declare force majeure conditions. It is due to unfamiliarity with the force majeure provisions in the existing contract and consideration of receiving claims for losses suffered by the implementing contractor. Moreover, this would add submission of "forgiveness" for the contractor's default due to force majeure conditions, causing a dispute in decision making by the Project Owner to declare force majeure.

Previous studies on the implementation of force majeure in contracts typically explores how force majeure events affect contractors, particularly regarding the flexibility of project completion timelines due to force majeure, which often absolves contractors from penalties for delayed completion that typically imposed in construction service contracts. However, previous studies have overlooked regulations pertaining to the losses contractors endure from force majeure, including damage to work outcomes, loss or damage of equipment, and disruptions to the workforce. Despite the substantial impact of force majeure on contractors, this aspect has not received adequate attention in prior research, frequently resulting in contractors being unable to proceed with the work. Regulating this matter is crucial for the welfare of all involved, given the unpredictable nature of force majeure occurrences and their unforeseeable consequences. It's essential to implement regulations that are suitable and equitable to safeguard the interests of both parties. This way, contractors can prevent substantial losses, while Project Owners can obtain the agreed-upon work results.

The case mentioned above underlies the researchers to conduct legal research on force majeure in construction service agreements, to know the legal implications of force majeure conditions. The researchers wish to provide insight for the parties on how to reach the agreement, when one or more parties experience default and suffer losses due to force majeure to provide certainty, justice, and legal benefits.

Based on the background, the researchers formulate the following: 1. How is the responsibility of the parties to the party in default and the risk of loss as the impact of force majeure

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conditions in the practice of construction services agreement? And 2) Is the imposition of the responsibility of the parties to the party in default and losses due to force majeure conditions within the construction contract in compliance with the concept of contract law?

II. RESEARCH METHOD

The research is conducted normatively or doctrinally, where the process of finding legal rules and principles is carried out to produce new arguments, theories, or concepts. These serve as guidelines in responding to legal problems that arise with a conceptual and legal approach to the object under laws, regulations, construction services contract templates applied nationally and internationally as well as related legal theories and doctrines. Legal materials will be collected using document studies and presented systematically by existing legal issues and research problems through qualitative juridical analysis and then deductive conclusions (Soekanto, 2015).

III. RESULTS AND DISCUSSION

In a binding agreement between one or more people based on Article 1313 of the Civil Code (Khoiril Jamil, Nury & Rumawi, 2020), in the legal relationship, each party has an obligation to the other party that must be fulfilled which is commonly called an achievement. It is in the form of providing something, undertaking an action, or refraining from an action (Article 1234 of the Civil Code). The consequences of violation of obligations or non-fulfilment of obligations will have legal consequences in the guise of compensation, refund, losses and interest, which are decided through the court (Article 1236 of the Civil Code, Article 1239 of the Civil Code and Article 1242 of the Civil Code)

In the theory of agreement law, if default is caused by circumstances that are unforeseeable and outside the jurisdiction of the party affected, the debtor can take refuge by invoking the doctrine of force majeure. Subekti revealed that debtors who are accused of negligence and threatened with punishment for their negligence, can defend themselves by submitting arguments to exonerate themselves, including by claiming the existence of force majeure (overmach or force majeure) (Subekti, 2005; Fitri, 2020).

3.1 Force Majeure in Covenant Law

In treaty law, non-performance where there has been negligence from the debtor in violation of the agreement in the engagement is known as *wanprestasi*, derived from the word *wanprestatie* (Dutch) meaning bad performance which is equivalent in Bahasa Indonesia to *cidera janji, lalai* or *alpa* (English: breach of contract). Default is caused by not performing the entire performance; completing it late; not in accordance with what was promised; and for doing what is not permitted under the agreement (Syahrini, 2010; Rasuh, 2016; Fitri, 2020).

Based on civil law in Indonesia, defaults on agreements can be subject to penalties or sanctions by paying the losses suffered by the creditor or providing compensation for losses (Article 1243 of the Civil Code), canceling the agreement (Article 1266 of the Civil Code); the risk is transferred to the debtor in an agreement that gives something (Article 1237 paragraph (2) of the Civil Code); and if it is brought before a judge, then pay court costs (Subekti, 2005). In addition, debtors who default can be asked to do five possibilities, namely fulfilling the agreement; or fulfilling the agreement with the obligation to provide compensation; or providing compensation; or terminating the agreement; or canceling the agreement with compensation (Article 1276 of the Civil Code) (Miru, 2016; Sutrawaty, 2016).

However, it is different when the default causes the force majeure. The unpredictable event happens outside the influence of the party impacted by the occurrence, so the party cannot fulfill its obligations that cause default. In the doctrine of force majeure related to compensation or sanctions on an agreement, force majeure entails legal repercussions resulting from the inability or hindrance to fulfill the debtor's obligations as stipulated in a contract to achieve its performance. It also contains legal consequences freeing the parties to sue each other and / or compensate for losses because of the failure to fulfill the contract obligations caused by the force majeure situation as specified in Articles 1244 and 1245 of the Civil Code (Khoiril Jamil, Nury & Rumawi, 2020; Rizka, Junaidi, Sudaryono, & Masithoh, 2021) (Utama & Sutrisno, 2023; Syahputra, Harahap, & Syah, 2023).

Subekti revealed that during force majeure conditions, the debtor can defend himself by submitting arguments to avoid sanctions for default. The phrase "self-defense" mentioned by Subekti means: a) submitting a claim that there has been a force majeure (overmacht or force majeure); b) submitting that the creditor itself has also been negligent (exceptio non adimpleti contractus); and c) submitting that the creditor has waived its right (*rechtsverwerking*) to request compensation (Subekti, 2005).

Various definitions of Force Majeure have been put forward by experts and there is no mention of strict limitations on the events that qualify the force majeure condition. However, from the definitions presented, the characteristics of the circumstances or events in question are illustrated: (Brahmana, 2015; Helw, 2018 ; Adji, 2022; Syahputra et al., 2023)

1. cannot be estimated or taken into account when the agreement is made;
2. occurs not due to the fault or negligence of the debtor; and
3. the debtor is unable to overcome these conditions.

Thus, obstacles in achieving achievements included in the qualification of force majeure are actually quite broad. They are not only limited to an event that causes permanent and massive damage, such as natural disasters, landslides, earthquakes, storms, typhoons, volcanic eruptions, disease outbreaks, but also to any events that hinder the debtor in fulfilling achievements as long as they meet the 3 characteristics of the situation above (R. Simanjuntak, 2018).

Force Majeure makes the engagement no longer running (working) although the engagement is still working without any power. Therefore, the creditor cannot require the debtor to fulfill the obligation, terminate the obligation and cannot accuse the debtor of default. In a reciprocal contract, the obligation to provide a counterparty is void. In the case of temporary force majeure, the obligation must still exist where the obligation resumes when the force majeure ends. It should be noted that with this force majeure, the debtor can submit this force majeure condition through an exception and the judge cannot reject a lawsuit based on force majeure, which proves the existence of this force majeure condition is the debtor (Badrulzaman, 2001; Rasuh, 2016; Sahruddin, Wagian, & Dilaga, 2020).

Still related to the regulation of Force Majeure in Indonesian positive law that in Article 1244 and Article 1245 of the Civil Code, the legal consequences of force majeure are regulated provisions on compensation determined by legal provisions, force majeure is a justification (*rechvaardigingsgrond*) to release a person from the duty to provide compensation. If the provisions in the Civil Code are examined further, Force Majeure will be categorized as an unexpected event and cannot be accounted for by a person while he has made every effort to fulfill

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his obligations. Therefore, only the debtor can declare force majeure if after the agreement is made an unexpected event occurs and the condition cannot be accounted for (Badrulzaman, 2001; Isradjuningtias, 2015; Fitri, 2020).

Meanwhile, Sri Soedewi Masjchun Sofwan stated that force majeure can be distinguished from its nature, temporarily or permanently. Temporary force majeure only has the power to suspend obligations. The debtor is expected to restore his performance again after the force majeure condition ends. However, if the debtor's performance is no longer relevant to the creditor, the debtor's indebtedness obligation can be abolished (Sofwan, 1980; Isradjuningtias, 2015).

In relation to construction or building contracting service agreements, Sri Soedewi Masjchun Sofwan suggests more specific risk consequences that are slightly different from the arrangements put forward by other experts. She argues that if the work is destroyed through no fault of the contractor, such as due to natural disasters, earthquakes, floods, fires, and others, and they have tried to overcome the situation, then contractor has the right to receive equivalent to the work they have produced and the costs they have incurred. The contractor is also free from liability for damages for inaccurate construction planning contained in the bestek made by the Project Owner so that the risk of loss is in the hands of the Project Owner (Sofwan, 1980; Soemadipradja, 2010; Brahmana, 2015) .

In summary, according to the above theories, doctrines as well as applicable regulations regarding force majeure generally govern the concept of "excusable" reasons granted to debtors who default due to Force Majeure events that were unforeseeable at the time the agreement was made that could exempt them from penalties that would otherwise be imposed due to a breach of contract (Simanjuntak, 2018; Ezeldin & Helw, 2018).

3.2 Force Majeure in Construction Services Regulations in Indonesia

Construction services have a very wide scope. Construction refers to the process of producing something from various required inputs with results in physical form. The majority of construction industry products are investment items that are important for producing certain goods, services or facilities, including: (1) facilities for further production such as factory or refinery buildings; (2) construction or improvement of economic infrastructure, such as roads, ports, or railways; and (3) investment in the social sector, such as hospitals or schools. Therefore, demand for construction industry products is greatly influenced by economic fluctuations. Investments can be postponed or accelerated, depending on economic conditions and government policies. Construction services serve as a convergence point between service providers and users, where both parties agree to form a work contract agreement to produce construction products. On the service provider side, the involvement of businesses, laborers, and supply chains determine the success of delivering construction services (Yasin, 2006).

In a construction contract agreement, a binding legal relationship is formed between parties. Within the context of a construction contract, this juridical relationship occurs between the service provider and the service user. This juridical relationship results in legal consequences in the form of rights and obligations arising between the parties since the signing of the construction contract in compliance with the Construction Services Law. The elements in the construction services agreement include: (J. O. Simanjuntak, Bartholomeus, Simanjuntak, Lumbangaol, & Agnes, 2021)

1. Subject: service users and service providers.
2. Object: physical manifestation of construction such as buildings, facilities and other physical manifestations; And
3. Agreements/Contracts and other related documents that govern the juridical relationship between service users and providers.

Within the framework of the juridical relationship established a contract, each party is entitled to request the enforcement and adherence to the mutually agreed-upon limitations by the other party voluntarily. However, this juridical relationship does not always run according to its intentions and objectives. Often, one party cannot fulfill its obligations due to various reasons such as coercion, error, fraudulent acts, and force majeure. These failures are caused by factors beyond human or business control. Failure to fulfill this obligation can often be forgiven by law if the failing party can prove that there were obstacles that could not be avoided or predicted in advance (Hardjowahono, 2013; Isradjuningtias, 2015; Ezeldin & Helw, 2018).

Under the pertinent laws and regulations in Indonesia, the Force Majeure concept is implemented in Law Number 2 of 2017 concerning Construction Services (UUJK). In Article 47 paragraph (1) letter (j) UUJK, Force Majeure which uses the term "force majeure" is required to be contained in a Construction Work Contract which includes provisions regarding events that arise beyond the wishes and capabilities of the parties which impact losses on one of the parties. In the Explanation to Article 47 paragraph (1) letter j stated that "force majeure" can be absolute / absolute where the parties is still impossible to fulfill their rights and obligations and relative / not absolute where the parties is not possible to carry out their rights and obligations anymore. Regarding the risk of this force majeure, the parties and insurance institutions can agree on this (Sodik, Rofiqi, & Jasuli, 2021; Ginting, 2021).

Then Presidential Decree 16/2018 concerning Government Procurement of Goods/Services also includes regulations regarding force majeure. As of this journal is written, this regulation is only applied in government environments such as ministries, institutions and regional apparatus that use budgets from the APBN/APBD. However, this regulation should be used as an object of comparison on how the Force Majeure concept is applied in outlining the obligations of the parties during a force majeure event. Article 1 Paragraph 52 of Presidential Decree 16/2018 states Force Majeure with the term Force Majeure with a meaning similar to that given in UUJK. Presidential Decree 16/2018 also regulates in Article 55 that Force Majeure regulates the options that can occur if a Force Majeure situation arises, namely that the contract can be terminated or continued by making changes to the contract and agreeing to extend it. Further steps after a force majeure event occurs are regulated in the contract with the agreement of the parties as well (Sahruddin et al., 2020).

In general, Force Majeure events identified and included in construction service contracts as examples of the event categorized as Force Majeure including natural calamities such as floods, earthquakes, heavy rainfall, tsunamis, cyclones, volcanic eruptions, fires, power failures, sabotage, insurgency, military takeover, warfare, invasion, civil unrest, revolution, terrorism, nationalization, blockade, embargo, labor strikes, industrial disputes, sanctions against a government and even disease epidemics and pandemics (Soemadipradja, 2010; Isradjuningtias, 2015).

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3.3 Application of Force Majeure in Construction Services Agreement Clauses

In implementing construction projects, the service provider contractor would be the party that is most likely affected by a Force Majeure event. They would experience at least in 2 things: (Sutrawaty, 2016; Timothyus, 2022)

1. Being sued for breach of contract by the service user (project owner) because the contractor is unable to carry out its obligations according to the contract due to delays in completing work due to these obstacles, so that the contractor will be subjected to fines/penalties which are generally applied to construction service contracts; and
2. Suffering losses as a result of:
   a. delays in completing work due to obstacles (force majeure) experienced as a consequence of increasingly long work implementation schedules which require indirect project costs, project staff, equipment and facilities that are idle because they cannot work and so on; And
   b. damage and/or destruction of part or even all work performed by the contractor, construction facilities and equipment belonging to the contractor, accident victims of staff and project workers, so that the contractor must bear quite a lot of extra costs for repair, restoration and even replacement.

The conditions mentioned above will certainly put the service provider (contractor) in a difficult position. However, it is a situation they never expected to occur and of course this risk was never taken into account by the service provider/contractor when submitting their bid.

The assumption of responsibility for risks in construction service agreements is based on their origin before the contract, where all risks for the work covered in the contract, including risks resulting from Force Majeure circumstances, are in the hands of the Project Owner. Then, with the existence of an agreement/contract with the agreements made by the parties, all risks agreed upon in the agreement are transferred to the Contractor. However, considering Force Majeure cannot be predicted or anticipated by the parties, the risk of Force Majeure should not be transferred to the Contractor because it is not taken into account in the offer or contract as it cannot be predicted. However, responsibility for the risk of the impact of Force Majeure can be transferred in whole or in part by contract which has binding force based on *Pacta Sunt Servanda* principle (Prodjodikoro, 2000; Khoiril Jamil, Nury & Rumawi, 2020; Timothyus, 2022).

In order to be able to provide an answer as to whether the imposition of responsibility of the parties towards parties who experience default and losses due to force majeure conditions in construction contract is in accordance with the concept or doctrine according to the legal expert, the researchers will first explain how Force Majeure is applied in several forms of construction service agreement contracts. This service agreement are commonly used in construction service contract formats in the PUPR, FIDIC and BUMN environments, regarding how to formulate the imposition of responsibility of the parties towards parties who experience default and losses due to force majeure conditions in the contract clauses. Then the author carries out an analysis of the suitability of the clauses applied to construction service agreements with concepts or doctrines according to the teachings of contract law.

PUPR Contract Proforma

In the proforma of construction service contracts applied to government infrastructure construction projects under the Ministry of Public Works and Public Housing (PUPR), the provisions for Force Majeure are regulated in line with Presidential Decree 16/2018. Force

Majeure provisions which are termed "Force Majeure" in the General Conditions of Contract (SSUK) number R in Attachment III to PUPR Ministerial Decree 1/2020, are regulated as follows (Kementerian PUPR, 2020):

1. Force Majeure refers to a circumstance beyond the control of the contracting parties to the Contract and this event was never foreseen, resulting in failure to fulfill obligations according to the Contract even though maximum efforts have been made.
2. It is stated that several Force Majeure events are not limited to natural or non-natural calamities, civil unrest, labor strikes, fires, severe weather events, and other industrial disturbances.
3. Force Majeure does not arise from occurrences attributable to the actions or negligence of the involved parties.
4. It is required that within a period of 14 days the affected party must provide notification to the other party with the evidence.
5. If a Force Majeure occurs, the work can be temporarily stopped if it is still possible to continue / complete after the Force Majeure Condition ends; or permanently stopped (by termination of the contract) if due to Force Majeure the work is not possible to continue / complete; or partially terminated if the Force Majeure Event only affects part of the Work; and/or stopped completely if the Force Majeure Event impacts the entire Work.
6. If the parties agree to continue implementing the Contract, then contract changes can be made and the work implementation period can be extended.
7. If the parties agree to permanently stop implementing the Contract, then the contract is terminated by resolving the responsibilities and duties in compliance with the Contract.

FIDIC Contract Form

FIDIC Contract Form is a standard contract template published by FIDIC (Federation Internationale Des Ingenieurs-Conseils) which is the global representative of international associations/associations of consulting engineers (Consulting Engineers) of various engineering professions from 40,000 companies in more than 100 countries throughout the world. FIDIC has published several forms of standard templates / contract provisions tailored to the type of work, including: White Book for Consultant work; Red Book for Construction work, Yellow Book for Plant and Design-Build work, Silver Book for EPC / Turnkey Project work. FIDIC has also published the Multilateral Development Bank Harmonized Edition standard contract documents adopted by Indonesia, especially for construction projects funded by the World Bank, ADB and JICA (Turner & Townsend, 2007).

In the FIDIC Contract Proforma (Condition of Contract) in the standard Silver Book (FIDIC, 2017b), *Yellow Book* (FIDIC, 2017c) and Red Book (FIDIC, 2017a) contract templates which are most commonly used in international construction services, basically the Force Majeure clause The contract standards are the same, where the provisions for force majeure are known as "Exceptional Events" in Clause 18 (in the MDB Harmonized Edition included in Article 19 (FIDIC, 2006; The World Bank, 1999)) which regulates provisions regarding:

1. Exceptional Event is defined as an event or circumstance which is characterized by: (i) being beyond the control of a Party; (ii) the Party could not have reasonably implemented the conflicting provisions prior to entering the Contract; (iii) if it arises, the Party cannot

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reasonably avoid or overcome it; and (iv) cannot be substantially assigned to any other Party.

2. It is required that the party experiencing an Exceptional Event be notified to other parties that they have experienced an Exceptional Event within a period of 14 days accompanied by proof.
3. Several conditions are indicated which include Exceptional Events but are not limited to: (a) war, acts of war (whether declared or not), invasion, attack by a foreign enemy; (b) insurgency, military intervention or coup, or civil conflict; (c) riots, disturbances, or disturbances by persons other than Contractor Personnel and other employees of the Contractor and Subcontractors; (d) strikes or lockouts that do not solely involve Contractor Personnel and other employees of the Contractor and Subcontractors; (e) encounter war munitions, explosives, ionizing radiation, or contamination by radioactivity, except as may be assigned to the user of the munitions, explosives, radiation, or radioactivity by the Contractor; or (f) natural calamities such as earthquakes, tsunamis, volcanic activity, hurricanes, or typhoons.
4. Parties affected by the Exceptional Event are entitled to a time extension for carrying out the work including reimbursement of costs for the extended time due to the Exceptional Event.
5. If the parties agree to permanently stop implementing the Contract, then the contract is terminated by settling the rights and obligations as per the term of the Contract.

Other Construction Project Contracts

In the proforma of construction service contracts applied within state-owned enterprises or other private companies, the provisions for Force Majeure are generally referred to as Force Majeure which are regulated as follows: (Zubir, 2023)

1. A Force Majeure Event is defined as an event or circumstance/condition that is beyond the parties' ability to directly or indirectly affect the party's schedule and despite maximum possible efforts.
2. Several Force Majeure events indicated are not limited to natural or non-natural disasters, civil unrest, labor strikes, severe weather events, fires, and other industrial disruptions, including: a) acts of God such as disease outbreaks, tidal waves/tsunami, typhoons/hurricanes , explosions, fires, floods, earthquakes and other devastating natural disasters; b) war whether declared or not (civil war); c) civil and military unrest, riots, rebellion, and sabotage; d) decisions of the Indonesian Government or agencies or authorities that directly affect the implementation of the Project; and Government actions, and changes to the law.
3. The Force Majeure circumstance is not a situation resulting from the actions or negligence of the involved parties.
4. It is required to notify the party experiencing Force Majeure within a period of 14 days accompanied by evidence.
5. The affected party is entitled for a time extension but the costs resulting from this Force Majeure will be borne by each party.
6. Financial consequences due to Force Majeure event are borne by each party, the Contractor is not entitled to price adjustments.

7. If the parties agree to permanently stop implementing the Contract, then the contract is terminated by settling the rights and obligations as per the term of the Contract.

In the proforma of the contracts above, it can be seen that the consequences of Force Majeure costs are borne by each party. This means that in this case the Project Owner (Owner) wishes some of the Force Majeure risk to be transferred to the Contractor so the Contractor should take this into account in his bid.

Regarding the cost risk experienced by the Contractor who experiences a Force Majeure event, the author is more inclined to the opinion that it is reasonable. In the good faith of the parties, this risk remains in the hands of the Project Owner (Owner) or is not transferred to the Contractor, considering the unpredictable nature of Force Majeure, so the Contractor certainly nor anyone can predict when it will occur, what impact it will have on the work and the costs to be able to include it in the bid price. Even if this risk is transferred according to the agreement, the Contractor will still have difficulty estimating it so the Contractor takes a high-risk factor which causes project costs to increase. Likewise, if the risk is transferred, construction insurance will also have difficulty setting a premium for the guarantee so the insurance company will set a high premium cost.

Based on the review of the provisions related to Force Majeure or Exceptional Events formulated in the clauses of the construction service contracts described above, the following conclusions can be drawn:

1. The construction service contracts define Force Majeure as an event/circumstance experienced by a party to the contract containing:
   a. cannot be foreseen at the time of the agreement;
   b. is beyond the ability of the party experiencing the event to overcome it;
   c. occurs not due to the fault or negligence of the party experiencing it;
   d. the party experiencing the event has tried to overcome it as much as possible.
2. There are examples of events that qualify as Force Majeure such as natural and non-natural disasters, war, rebellion, sabotage, riots, earthquakes, storms, large waves, flash floods, fires, disease pandemics, and others.
3. Requirement for the affected party to inform the other party within a specified timeframe of the occurrence of a Force Majeure event with the evidence.
4. By declaring Force Majeure, the party affected is entitled to the extension of time and to avoid default penalties for delays due to Force Majeure.
5. There are 2 (two) options for applying the consequent costs suffered by the party affected by Force Majeure, namely:
   a. borne by the Project Owner (Owner) as specified in the PUPR and FIDIC Proforma contracts; or
   b. borne by each party, as applied in other construction project contract proformas.

The allocation of the financial consequences of Force Majeure to each party in the second option above is a risk transfer agreement in the agreement. It is technically referring to Force Majeure, that is, the creditor's side owns the risk. With an agreement to transfer the risk to the service provider, the provider must include the cost in the bid.

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IV. CONCLUSION

Force Majeure is a legal agreement concept that provides legal protection in the form of provisions, as a basis for "forgiveness" to a party affected by an event or condition. This event would make the contractor unable to fulfil his obligations pursuant to the agreement (default) and bears the risk because of force majeure impact, as long as it fulfils the elements in the doctrine of the Force Majeure. In implementation of PUPR standard construction service contracts, FIDIC Contract Form and contracts for other construction service projects adhere to the Force Majeure doctrine as conceptualized by experts and applicable regulations whereas the contractor is entitled for the extension of the contract allowing contractor to perform its responsibilities in compliance to the contract without delayed penalty as normally imposed in construction services contracts. Furthermore, the risk of losses resulting from force majeure is under the responsibility of the Project Owner as Creditor. However, the application of the burden of cost consequences resulting from a Force Majeure event can vary according to the agreement between the parties by agreeing to transfer the Force Majeure risk to the Contractor so that the Contractor must take this risk into account in their offer. By applying the force majeure concept more clearly in this construction service contract, the Project Owner will be more confident in declaring force majeure, which will ensure legal certainty for all involved parties including avoiding disputes.

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REFERENCES

Adi, A. W., Shalih, O., Shabrina, F. Z., Rizqi, A., Putra, A. S., Karimah, R., … Seniarwan. (2022). *Indeks Risiko Bencana Indonesia Tahun 2021*. *Pusat Data, Informasi dan Komunikasi Kebencanaan BNPB.*

Adji, H. S. (2022). Kontrak Kerja Konstruksi Yang Terdampak Pandemic Dalam Kaitan Dengan Kondisi Force Majure. *Dikmas: Jurnal Pendidikan Masyarakat Dan …*, *02*(4), 1161–1168. Retrieved from https://ejurnal.pps.ung.ac.id/index.php/dikmas/article/view/1601%0Ahttps://ejurnal.pps.ung.ac.id/index.php/dikmas/article/download/1601/1157

Badrulzaman, M. D. (2001). *Kompilasi Hukum Perikatan*. Bandung: Penerbit PT. Citra Aditya Bakti.

Biro Pusat Statistik. (2023). *Indikator Konstruksi, Triwulan II-2023* (Vol. 17).

Brahmana, H. (2015). Eskalasi dan Force Majeure Dalam Perundang-undangan Jasa Konstruksi. *USU Law Journal*, *3*(2), 78–86.

Ezeldin, A. S., & Helw, A. M. A. (2018). Proposed Force Majeure Clause for Construction Contracts under Civil and Common Laws. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, *10*(3). Retrieved from https://doi.org/10.1061/(ASCE)LA.1943-4170.0000255

FIDIC. (2006). *Persyaratan Kontrak Untuk Pelaksanaan Konstruksi Bagi Bagungan dan Pekerjaan Engineering Dengan Desain oleh Pengguna Jasa (MDB Harmonised Edition)*. FIDIC.

FIDIC. (2017a). *FIDIC® Form - Condition of Contract for Construction, For Building and*

Engineering Works Designed by The Employer (Red Book).

FIDIC. (2017b). *FIDIC® Form - Condition of Contract for EPC/Turnkey Project (Silver Book)* (2nd ed.). FIDIC.

FIDIC. (2017c). *FIDIC® Form - Condition of Contract for Plant and Design-Build, For Electrical & Mechanical Plant, And for Building and Engineering Works, Designed By The Contractor (Yellow Book),* (2nd ed.). FIDIC.

Fitri, W. (2020). Implikasi Yuridis Penetapan Status Bencana Nasional Pandemi Corona Virus Disease 2019 (COVID-19) Terhadap Perbuatan Hukum Keperdataan, *9*(1), 76–93.

Ginting, Y. R. (2021). *Perlindungan Hukum Bagi Para Pihak Dalam Kontrak Kerja Konstruksi Akibat Terjadinya Keadaan Kahar (Skripsi)*. Universitas Atmajaya Yogyakarta,.

Hardjowahono, S. B. (2013). *Rancangan Undang Undang Hukum Kontrak. Jurnal Akademik* (Vol. 2).

Helw, A. M. A. (2018). *Proposed force majeure clause for construction contracts under Proposed force majeure clause for construction contracts under prevailing laws prevailing laws*. *AUC Klowledge Fountai*. The American University in Cairo. Retrieved from https://fount.aucegypt.edu/etds/424

Hillebrandt, P. M. (1984). Analysis of the British Construction Industry. *Analysis of the British Construction Industry*. doi:10.1007/978-1-349-06660-5

Isradjuningtias, A. C. (2015). Force Majeure (Overmacht) Dalam Kontrak (Perjanjian) Indonesia. *Jurnal Ilmu Hukum Veritas Et Justitia*, *1*(1), 136–158.

Kementerian PUPR. (2020). *Syarat-Syarat Umum Kontrak, Kontrak Pekerjaan Konstruksi Terintegrasi (Design and Build) - Lampiran III, Peraturan Menteri PUPR No. 1 Tahun 2020 tentang Standar dan Pedoman Pengadaan Pekerjaan Konstruksi Rancang dan Bangun Terintegrasi Melalui Penyedia*. Kementerian Pekerjaan Umum dan Perumahan Rakyat (PUPR).

Khoiril Jamil, Nury & Rumawi, R. (2020). Implikasi Asas *Pacta Sunt Servanda* Pada Keadaan Memaksa (Force Majeure) Dalam Hukum Perjanjian Indonesia. *Jurnal Kertha Semaya*, *8*(7), 1044–1054.

Miru, A. (2016). *Hukum Kontrak dan Perancangan Kontrak*. Jakarta: Rajawali Pers Raja Grafindo Persada.

Prodjodikoro, W. (2000). *Azas-Azas Hukum Perjanjian*. Bandung: Mandar Maju.

Rasuh, D. J. (2016). Kajian Hukum Keadaan Memaksa Pasal 1244 dan Pasal 1245 Kitab Undang-Undang Hukum Perdata. *Lex Privatum*, *IV*(2), 173–180.

Rizka, R., Junaidi, M., Sudaryono, S., & Masithoh, M. (2021). Pandangan Islam Terhadap Force Majeur Dalam Relaksasi Kredit Di Masa Pandemi Covid-19. *Profetika: Jurnal Studi Islam*, *23*(1), 127–140. doi:10.23917/profetika.v23i1.16800

Sahruddin, S., Wagian, D., & Dilaga, Z. A. (2020). Tanggung Jawab Atas Risiko Musnahnya Objek Pengadaan Barang/Jasa Sebelum Serah Terima Pekerjaan Sebagai Akibat Dari Terjadinya Force Majeure. *Jurnal Risalah Kenotariatan*, *1*(2). doi:10.29303/risalahkenotariatan.v1i2.7

Simanjuntak, J. O., Bartholomeus, Simanjuntak, S., Lumbangaol, P., & Agnes, A. (2021). Analisa Kontrak Proyek Konstruksi Di Indonesia. *Jurnal Visi Eksakta*, *2*(2), 205–214. doi:10.51622/eksakta.v2i2.394

Simanjuntak, R. (2018). *Hukum Perjanjian: Teknik Perancangan Kontrak Bisnis* (3rd ed.).

E-ISSN : 2723-2476
ISSN : 2723-1968
ACLJ, Vol. 5, Issue 2, 2024

Jakarta: Kontan Publishing.

Sodik, M. F., Rofiqi, I., & Jasuli, D. (2021). Hukum Penyelenggaraan dan Perjanjian Jasa Konstruksi. *Jurnal 'MITSU' Media Informasi Teknik Sipil*, *9*(1), 1–8.

Soekanto, S. (2015). *Pengantar Penelitian Hukum*. Jakarta: UI-Press.

Soemadipradja, R. S. S. (2010). *Penjelasan Hukum tentang Keadaan Memaksa: Syarat-syarat pembatalan perjanjian yang disebabkan keadaan memaksa / force majeure*. Jakarta: PT Gramedia.

Sofwan, S. S. M. (1980). *Hukum Perdata, Hukum Perutangan, Bagian A*. Jogjakarta: Seksi Hukum Perdata Fakultas Hukum Universitas Gadjah Mada.

Subekti, R. (2005). *Hukum Perjanjian*. Jakarta: Penerbit Intermasa.

Sutrawaty, L. (2016). Force Majeure Sebagai Alasan Tidak Dilaksanakan Suatu Kontrak Ditinjau Dari Perspektif Hukum Perdata. *Legal Opinion*, *4*(3).

Syahputra, A. E., Harahap, N., & Syah, D. (2023). Tinjauan Yuridis Penerapan Keadaan Memaksa (Force Majeur) Pada Perjanjian Konstruksi Peningkatan Jalan (Studi Putusan Mahkamah Agung RI Nomor 2241 K/Pdt/2020). *Jurnal Hukum Dan Kemasyarakatan Al-Hikmah Vol. 4, No. 4, Desember 2023*, *4*(2), 336–364.

Syahrini, R. (2010). *Seluk Beluk dan Asas-Asas Hukum Perdata*. Bandung: PT. Alumni.

The World Bank. (1999). *Guidelines Procurement under IBRD Loans and IDA Credits: Condition of Contract for Construction Services* (5th ed., Vol. 2).

Tim Indonesiabaik.id. (2022). Indonesia Negeri Indah Rawan Bencana. *Direktorat Jenderal Informasi Dan Komunikasi Publik Kementerian Komunikasi Dan Informatika*, 1–55. Retrieved from https://indonesiabaik.id/public/uploads/post/6083/Indonesia-Negeri-Indah-Rawan-Bencana.pdf

Timothyus, B. O. (2022). *Kajian Klausul Eksonerasi Dan Force Majeure Dalam Standar Kontrak Konstruksi 'FIDIC' Terhadap Hukum Nasional (Skripsi)*. Univeristas Diponegoro Semarang.

Turner & Townsend. (2007). The FIDIC Suite of Contracts. Retrieved from https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf

Utama, N. A., & Sutrisno, B. (2023). Tanggung Jawab Pelaksana Konstruksi Atas Keterlambatan Pembangunan Karena Bencana Alam. *Jurnal Commerce Law*, *3*(1). Retrieved from www.google.com/amp/s/fakpi.org/2018/07/02/denda-keterlambatan-pekerjaan-berdasarkan-perpres-nomor-16-ta-

Yasin, N. (2006). *Mengenal Kontrak Konstruksi di Indonesia,* (2nd ed.). Jakarta: Penerbit Gramedia Pustaka Utama.

Zubir, A. (2023). *Analisis Yuridis Normatif Terhadap Pandemi Covid-19 Sebagai Force Majeure Dalam Kontrak Jasa Konstruksi Pekerjaan Pembangunan Jetty Sulfur Balikpapan (Skripsi)*. Universitas Al-Azhar Indonesia.