THE APPLICATION OF FORCE MAJEURE IN THE RESOLUTION OF UNPAID DEBTS AT BANKING INSTITUTIONS RESULTING FROM NATURAL DISASTERS

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Abstract *– The objective of this study was to examine how non-performing credit agreements resulting from natural disasters associated with force majeure are settled, and the measures taken by banks to resolve bad loans. The research employed both juridical normative and descriptive analytic methods, analyzing primary and secondary data and evaluating them qualitatively with the help of legal provisions. Qualitative descriptions were used to reinforce the previous description and answer the fundamental questions, thus leading to valuable conclusions and suggestions. The findings of the study disclosed that credit contracts did not have any regulations regarding force majeure, making it challenging for banks to execute them. This resulted in debtors, mainly being farmers, encountering issues in paying off their loans. The strategy to tackle non-performing loans was to clear any credit owed by individuals who had been relocated. This approach provided legal protection by granting certainty for people affected by natural disasters.*

Keywords*: Commercial agreement, Force Majeure, Natural Disaster, Legal Risk, Legal Protection;*

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INTRODUCTION

Banks are institutions that engage in the collection and flow of public funds, and they must abide by regulations set forth by governing bodies to conduct their business. In accordance with the Law Number 7 of 1992 regarding Banking, credit refers to the provision of funds or comparable claims based on an agreement between the bank and another party that obliges the borrower to repay their debt with added interest, rewards, or profit sharing after a specific period (Hadad et al., 2011). Consequently, loans represent the primary undertaking of banks, carrying risks that have an impact on the growth and long-term viability of the business.

Humans engage in various activities to pursue their interests, one of which involves entering into a contract or agreement. Such agreements typically involve competent parties, an agreed-upon subject matter, legal considerations, reciprocal agreements, and mutual rights and responsibilities (Governatori et al., 2018; Craven, 2000). An example is the agreement between a creditor and a debtor, which is known as a credit agreement. As this type of agreement is not subject to specific regulation in the Civil Code, it is designated as an innominate or unspecified agreement (Hudiarini, 2019). Although not directly

governed by the Civil Code, innominate agreements emerge and evolve within society. This is due to Article 1338 paragraph 1 of the Civil Code, which states that a legally binding agreement serves as a law for its participants. Article 1320 of the Civil Code also outlines the four necessary conditions for an agreement to be considered valid: the agreement of the parties involved, their ability to make promises, a specific item, and a lawful reason.

Following the release of Law Number 21 of 2011 regarding the Financial Services Authority (OJK), the OJK was granted the responsibility and power to regulate and oversee the financial service activities of the banking sector (Atikah, 2020). However, the OJK must still collaborate with Bank Indonesia while executing its duties. The OJK's banking regulation and supervision measures are currently governed by the regulations detailed in the existing Bank Indonesia Regulations. Occasionally, agreements may not go as planned and one party may breach the contract, leading to disputes between parties. In such cases, there is a risk that the loan given may not be repaid and could become non-performing loans, or even bad loans.

In order to settle dispute regarding agreements, legal action or alternative methods of resolving conflict can be utilized (Suadi, 2018). Parties involved in a contractual arrangement, such as a bank acting as a creditor and a customer acting as a debtor, can determine the format of the agreement. Both internal and external issues can arise from these agreements, resulting in problems. For instance, natural disasters can lead to bad loans and eventual losses for banks (Siahaan, 2014). In situations like these, banks must consider multiple perspectives, as they need to sustain their company as a financial institution. This side refers to the regulations and requirements that a bank must adhere to in order to operate within a country. Meanwhile, banks are also responsible for considering the well-being of their customers in times of natural disasters, providing assistance and support when necessary. Such disasters are unpredictable and considered a force majeure, which poses risks and consequences for all parties involved. These parties are interconnected and have legal rights and responsibilities within the situation. This research was executed to examine how non-functioning credit agreements caused by force majeure related to natural calamities are resolved and the measures taken by the bank to settle bad loans caused by natural disasters.

1. Research Methods

In this study, normative legal research was employed to examine the doctrines and principles of the science of law. Normative legal research is a type of legal research that is concerned with analyzing and evaluating legal rules and principles, and with providing recommendations for their improvement. This method was descriptive in nature, meaning that it aimed to gather accurate information about legal subjects, rights and obligations, legal events, legal relations, and legal objects. The aim was to identify these notions and principles through systematic analysis of certain laws or registered laws. The research was also descriptive analytical, meaning that it sought to describe and analyze any problems that arose in order to find solutions that were compatible with established or new theories. The main purpose of this research was to reinforce hypotheses and advance theoretical frameworks.

2. Results

2.1. Force Majeure and its Arrangements in Business Law

Overmacht, another term for force majeure, has its roots in Dutch language (Leenen & Ciesielski-Carlucci, 1993). Force majeure pertains to situations that are beyond human control and cannot be anticipated at the time of a commercial agreement (Kiraz & Üstün, 2020). It can be considered as an event that occurs unexpectedly and impedes the execution of a contract, without the debtor's fault, or it is not considered in the agreement. It includes uncontrollable circumstances caused by natural disasters such as earthquakes, floods, and landslides (Januarita & Sumiyati, 2021).

The Indonesian Civil Code includes articles 1244 and 1245 which address the concept of force majeure. Generally, force majeure refers to a situation that prevents the debtor from fulfilling their obligations and absolves them from any responsibility for the creditor's losses. These articles serve as a framework for interpreting force majeure in a broader sense. According to Article 1244 of the Civil Code, a debtor must be held responsible for compensating costs, losses, and interest if they fail to fulfill a contract without a valid reason or explanation. However, if the debtor can prove that something unexpected

occurred outside of their control, and they acted in good faith, they may not be penalized. Article 1245 of the Civil Code specifies that a debtor will not be reimbursed for costs, losses, and interest if they are prevented from fulfilling their obligations due to external factors such as coercive circumstances or accidents. Additionally, if the debtor commits an illegal act, they will not be able to receive compensation.

The Civil Code oversees various types of force majeure and their regulations. In situations where unforeseen circumstances lead to force majeure, article 1244 of the Civil Code dictates that if the debtor can prove that unexpected events prevented them from fulfilling their contract, they will not be considered to have defaulted on the agreement. Instead, this falls under the category of force majeure, which has its own set of legal provisions. However, if the debtor acted in bad faith, they may still be held accountable. The following pertains to force majeure situations. If a debtor is unable to fulfill their contract due to a force majeure event, they may not be held responsible for non-performance. This is also the case when the non-fulfillment is caused by a prohibited action, as stated in article 1245 of the Civil Code. These articles focus on compensation for losses and interest resulting from contractual breaches. Article 1244 refers to force majeure as a legal cause, while article 1245 calls it a force majeure event.

2.2. Force Majeure and Risks in Commercial Agreements

Essentially, force majeure can be categorized as either absolute or relative coercion (Brietzke, 1990). Absolute force majeure refers to a situation where the debtor is completely incapable of fulfilling their debt or agreement to the creditor, whereas relative coercion describes a scenario where the debtor is still able to complete the task, but only by making significant and imbalanced sacrifices. The concept of absolute coercion versus relative coercion stems from the force majeure theory. Throughout the history of coercion ideology, there have been teachings on two distinct ideas.

The first was the doctrines of impartiality or unambiguousity (*de objectieve overmachtsieer*). A circumstance in which an individual is deemed incapable of executing or accomplishing their responsibilities due to an incident that is out of the debtor's control. This is typically linked by professionals with the presence of a calamity or mishap that renders the debtor powerless to complete their obligations. The second was the doctrines of subjectivity or relativity (*de subjectieve overmachtsieer*). This doctrine is open to interpretation or dependent on personal perspective. For instance, if an individual is capable of accomplishing their tasks even under challenging circumstances that demand significant sacrifices, although the debtor is deemed competent, the lender cannot compel the borrower to execute their tasks under such conditions.

Force majeure is a term used to describe justifiable reasons for not fulfilling contractual obligations, such as when a debtor is unable to complete their duties as agreed upon in the original contract. This can include events that result in the debtor being released from the obligation to pay for any damages, losses, or accrued interest. Objective reasons, which relate to the debtor's inability to fully participate in the contract, and subjective reasons, which relate to other factors that can prevent a debtor from participating in the agreement, qualify as justification and excuses, respectively. Absolute force majeure can be used as justification reasons while relative force majeure can be used as forgiveness reasons. For a debtor to prove a coercive situation exists, three conditions must be met: they must prove their innocence, their inability to meet their obligations with or without payment, and that they are taking no risks. Force majeure and risk are closely linked. In contract law, the definition of risk varies from its everyday usage. In the context of contractual obligations, risk refers to who should be responsible for any losses incurred should a debtor fail to perform in the event of an uncontrollable situation. If the debtor is at fault, they will be liable for the losses. However, if the failure to perform is due to unforeseeable circumstances, the risk doctrine determines how losses will be settled in cases of force majeure.

2.3. Force Majeure as a Standard Clause in Credit Agreements

The credit agreement from the bank includes a number of clauses or provisions aimed at safeguarding the creditor while allowing the debtor to fulfill their obligations as agreed. In cases where the debtor cannot fulfill their obligations due to reasons beyond their control, there is usually a force majeure clause. However, there may be cases where this clause is not included in the credit agreement, in which case a deed of agreement may be required. The presence of these clauses in the credit agreement shows that the bank is implementing a precautionary approach towards granting credit. As per Article 1339 of the Civil Code, an agreement is not limited to what is explicitly stated, but includes everything that is required by law, decency, or custom.

The credit agreement of Bank Rakyat Indonesia includes a clause on force majeure, which covers events beyond human control such as natural disasters, riots, wars, fires, floods, and explosions, among others. This clause considers such events as force majeure incidents that may hinder a party's obligation to comply with the agreement. If such events occur and impede the implementation of the agreement, the affected party must inform the other party in writing within 7 working days of the incident, and provide evidence that the obstacle is a force majeure event. If one or more unexpected incidents occur or force majeure events take place, both parties will work together in good faith to reduce the impact and duration of the incident or event as much as possible. Once the force majeure event is over, the party responsible for fulfilling its obligation must inform the other party in writing within 7 working days after the event's conclusion. After that, both parties will resume the execution of the agreement.

2.4. Settlement of Bad Credit as a Force Majeure Due to Natural Disasters

Force majeure refers to a situation that is beyond the control of the party responsible for fulfilling the contract and is not caused by any fault or mistake on their part. Examples of such situations may include natural phenomena, such as earthquakes, floods, and volcanic eruptions, as well as environmental factors like weather and climate conditions. Additionally, changes in government policies, labor disputes, or protests may also result in the failure to meet contractual obligations on time, either temporarily or permanently (Karyadi & Rizki, 2018). Based on the standards for force majeure, it can be categorized into two types: permanent force majeure situations where it is impossible to carry out the obligations at any time, such as when the subject matter of the contract is entirely destroyed; and temporary force majeure situations where the fulfillment of the obligations can only be temporarily postponed due to certain events, such as a new government policy that forbids something which was previously legal. If this prohibition is lifted later on, the debtor can once again fulfill their obligations.

A disaster is an occurrence that has the ability to cause harm, loss, suffering, as well as fatalities to both humans and the environment. Such disasters can be of two types: those caused by natural occurrences and those caused by human error. At present, the provisions pertaining to credit determination only cover restructuring initiated by banks for customers affected by natural disasters. Consequently, customers who have become debtors due to the aftermath of natural disasters are still faced with the burden of paying off their debts. Some debtors who have passed on also continue to be pursued by banks for loan remuneration. Many natural disaster victims have become debtor customers, and they feel overwhelmed and constrained by the bank's inflexible approach.

When dealing with bad credit debtors affected by natural disasters, it is important to observe the principles of justice, benefit, propriety, equality, and legal certainty. This involves providing impartial and fair treatment to these debtors, in accordance with the mandate set forth in the Constitution. Specifically, Article 28 letter D paragraph 1 of the amended 1945 Constitution guarantees everyone the right to recognition, guarantees, protection, fair legal certainty, and equal treatment before the law. Article 28 D paragraph 1 suggests that the state should offer lawful approval and defense to every citizen in Indonesia, with a particular focus on those who may be vulnerable or disadvantaged. These actions must adhere to the principles of legal certainty, justice, and equality, ensuring that everyone is treated fairly before the law. The state has control over legal certainty, with the power to decide when justice can be served due to its strength and authority.

Banking institutions rely on public trust, and to maintain that trust, it is necessary to support debtors whose businesses have been destroyed by the eruption and flash floods, and who may not be able to do business in the near future. The determination of a national disaster status will impact the issuance of a special policy for loans given to debtors located in disaster areas caused by natural disasters. Specific policies relating to credit and natural disasters, such as PBI Number 8/15/PBI2006 dated October 5th, 2006, provide special treatment for bank credit in certain areas of Indonesia affected by natural disasters. This policy covers issues such as:

The determination of credit quality for loans that do not exceed IDR 5,000,000,000,000 (five billion rupiah) is based on payment provision only. However, for loans exceeding that amount, assessment of fixed asset quality is done in accordance with PBI Number 14/15/PBI/2013. The quality of restructured credit is assessed for three years after the natural disaster that caused the restructuring. When granting new credit to the public, the government must protect them from irresponsible bank employees and institutions that could damage public trust. If people lose confidence in the banking system, it would be harmful to the economy. In the event of natural disasters, banks can offer fresh credit to debtors affected by the situation. The assessment of credit quality for new credit is carried out separately from existing credit evaluations. Financing options based on sharia principles, such as *mudaraba, musharaka, murabaha, salam, istishna, ijara, qardh*, and other funds, also receive special treatment in disaster-stricken regions (Suadi, 2020). To this end, the OJK has introduced two measures following natural disasters. This action reflects the government's concern for its citizens.

There is a pressing need to determine the national disaster status, specifically in relation to the decisions made by the Board of Commissioners on the Mount Sinabung natural disaster and the Manado City flash floods. The Board's decrees, namely the Decree Number 2/KDK.03/2014 and the Decree Number 3/KDK.03/2014, which designate certain areas as requiring special treatment for bank credit, must be removed from consideration.

The Board of Commissioners of OJK have passed a decree (No. 2/KDK.03/2014) stating that certain districts in Karo Regency require special treatment for bank credit. The first dictum designates Payung District, Nawantran District, Simpang Ampat District and Tiganderket District in Karo Regency as areas affected by disaster. The second dictum refers to the procedure for special bank credit treatment as stated in PBI Number 8/15/PBI2006, which is applicable to areas in Indonesia affected by natural disasters. Lastly, the decree will be valid for three years from the date of approval. During a visit to disaster-affected areas, several Commission IX- parliament members requested the government to cancel loans for victims of natural disasters in Karo Regency and Manado City. These requests were made through the DPR by debtor customers. The request was made by customers who owe money because they have suffered severe losses due to natural disasters, such as empty warehouses, depleted businesses, and houses destroyed. This illustrates that the regulations set by the Financial Services Authority (OJK) do not sufficiently address credit issues resulting from natural disasters for debtors who are struggling to pay back their loans to the bank. However, the bank has not implemented a policy to forgive or write-off debts for affected debtors until the disaster is declared a national disaster. The bank's credit policy is ultimately governed by the central authority.

2.5. Legal Protection and Certainty for Debtors in the Context of Force Majeure Due to Natural Disasters

Generally, there are various factors that contribute to non-performing loans at banks. These reasons can be divided into three categories. The first factor is internal, which includes the Bank's inadequate ability to analyze credit worthiness, poor credit information and supervisory systems, interference from shareholders in decision-making, and insufficient credit guarantees. The second factor is debtor ineligibility caused by issues such as rejection, personal problems (such as accidents, illness, death, or divorce), a lack of knowledge and experience, corporate mismanagement or fraudulent activities. The third factor is external and includes economic progress, natural calamities, and government regulations (Zghama et al., 2021). The issue of banks having a high number of defaulted loans resulting from natural calamities is often the reason for the banks to suffer financial losses. In such situations, banks need to

consider two perspectives. Firstly, they function as financial institutions and therefore have a responsibility to sustain and uphold their business operations. As a result, they are bound to abide by the rules and regulations laid down by the government and related organizations. Secondly, banks must empathize with their customers, especially those who face adverse situations due to natural disasters. As a part of their social responsibility, banks are obligated to offer relief and assistance to their customers in distress.

Due to the negative impact of substantial problem loans on the bank's income and profits, any indications of problem loans must be promptly addressed. This article will discuss various strategies for managing problem loans, beginning with credit reconstruction. Credit reconstruction may be implemented for clients who have potential and are willing to fulfill their obligations in good faith. Referring to Article 1 Paragraph 9 of Bank Indonesia Regulation Number 8/19/PBI/2006 relating to Asset Quality and Allowance for Earning Assets Establishment for Rural Banks, credit restructuring refers to the actions taken by Rural Banks to improve lending to debtors who are experiencing difficulties in meeting their obligations (BI, No. 8/19/PBI/2006) (Israhadi, 2014).

The second option is to reschedule, in which case the debtor's payment schedule or time period is altered. Return requirements refer to modifications made to some or all of the credit terms, which may or may not include changes to the payment schedule, time period or other prerequisites, while keeping the maximum credit limit intact. The third option is realignment, which entails revising credit requisites by adding credit facilities and replacing all or some of the interest installment arrears with a new credit principal. This may be accompanied by rescheduling and/or re-conditioning. Rescheduling specifically pertains to alterations in credit terms related to payment schedules and time periods, including any changes in the installment amounts and grace periods (Setiawan et al., 2022; Hasan & Mustafa, 2022). Reconditioning encompasses alterations to some or all of the credit conditions, such as payment schedules and other criteria, as long as they don't affect the highest credit limit or change converting a portion or the entire loan to bank participation. Another option is restructuring, which involves introducing bank funds, converting arrears interest into a new credit balance, or changing part or all of the credit into equity in the business.

CONCLUSION

According to the research results, laws and regulations governing problem loan settlements specify two distinct pathways: execution and non-execution. The execution pathway entails private sales and credit guarantee auctions, while the non-execution pathway involves credit restructuring, write-off, and foreclosed collateral. The credit agreement must explicitly mention the resolution of non-performing credit arrangements caused by natural disasters deemed force majeure under the Civil Code, in order to provide legal protection and certainty to debtors directly impacted by the disaster. The Civil Code governs these provisions in Articles 1244 and 1245, which describe debt relief as a legal action that involves the creditor relinquishing their right to collect the debt. In instances where the debtor is unable to fulfill the terms of the credit due to force majeure, such as a natural disaster, their obligation to compensate the creditor for losses and interest is nullified through the settlement of the credit. In handling credit settlements, it is guided by the provisions of Bank Indonesia Regulation Number: 8/15/PBI/2006 dated 5 October 2005 concerning Special Treatment of Bank Credit for Certain Areas in Indonesia Affected by Disasters, Bank Indonesia in a Decree will determine the determination of certain areas which are hit by a natural disaster. When dealing with credit settlements, Bank Indonesia follows the guidelines provided in Regulation Number 8/15/PBI/2006 dated 5 October 2005. This regulation outlines a special treatment for bank credit in areas of Indonesia affected by disasters. Bank Indonesia will issue a decree to identify the specific areas impacted by natural disasters.

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