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Application of Unidroit Hardsip Principles to Renegotiate International Contracts Due to COVID-19

Deddy Effendy[1], Chicha Chairunnisa[2], Cucu Yanti[3]

Fakultas Hukum, Universitas Islam Bandung, Indonesia

Author Email: deddyeffendy60@gmail.com[1], chichachairunnisa@unisba.ac.id[2], zainun.mumtaz@gmail.com[3]

Abstract. The Covid 19 pandemic is a tough challenge for human life, including in the implementation of international contracts. What is of concern is UNIDROIT's role in arranging international contracts during the COVID-19 pandemic and UNIDROIT's arduous principle in international contracts during the COVID-19 pandemic. This study uses normative juridical research with secondary legal data. UNIDROIT as a harmonization of international contract law plays an important role in providing legal certainty for the parties, so UNIDROIT is actively trying to provide a way out of the problems caused by the pandemic. The principle of hardship which forms the general foundation in international contracts is the best solution to survive this pandemic by renegotiating.

Keywords: COVID-19, International Contracts, Pandemic, UNIDROIT

1 Introduction

In general, a contract can be based on the wishes of the parties who make it, although the contract has differences from the agreement, the systematics of making it is still based on freedom of contract as stipulated in Article 1338 of the Criminal Code. So that in the act, the parties can pour an agreement on the clauses that they think are needed in the contract. The clause not only contains the subject and object of the contract, how to fulfil the achievement and settlement of disputes in the future, but the parties can plan the risks that will arise after the contract is made or signed by the parties. The principle of hardship can be used as the basis for making a contract where in this case there is something that hinders the course of achievement, the parties can seek renegotiation rather than termination or termination of the contract.

A contract begins with a difference or dissimilarity of interests between the parties. Therefore, after the parties have reached an agreement on the will to enter into a contract, they usually draw up a "Memorandum of Understanding" (MoU), which contains the wishes of each party and sets a period for achieving the goals of the contract. Because the MoU or memorandum of understanding is still in the pre-contractual stage, making each party in some cases is uncertain. Thus, rights and obligations have arisen that must be fulfilled by each of the parties. It is an application of ethical principles. The existence of a contract is necessary to create legal certainty. The structure or building of the contract drawn up by the parties as a process also determines the success of the business.

The COVID pandemic is a major disaster for World life which of course occurs suddenly beyond human power, as a result of which almost all areas of human life are disrupted. Internationally as well as nationally, COVID-19 has had a major impact on many sectors around the world. Even other sectors such as business, tourism, and others were negatively affected by the incident. Many business sector contracts are experiencing obstacles when COVID-19 spreads around the world, especially in Indonesia. It appears that the COVID-19 pandemic is an unexpected and inevitable circumstance so assuming COVID-19 can be classified as a force majeure/overnight event. Force majeure is the occurrence of an event that is caused by nature, and cannot be predicted to occur, the occurrence of which is due to the inability to carry out obligations under an agreement in whole or in part. [1]

In a legal context, force majeure can be defined as a clause that provides a forgiving basis for one of the parties to an agreement to bear consequences that cannot be foreseen in advance, resulting in that party not being able to fulfil its obligations by the contract that has been agreed. Therefore, the rules of international law, especially the principles of international contract law, are needed to cover the legal gaps in international contracts that cannot be touched by the rules of law in the contract itself or national laws between the parties.

Principles of International Commercial Contracts, hereinafter referred to as UNIDROIT, is a private law-related organization consisting of approximately 63 member countries drawn from five continents that have

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ratified the principles of international contracts in UNIDROIT, dated September 2nd, 2008 Indonesia has delegated the UNIDROIT statute by issuing Presidential Regulation (Perpres) number 59 of 2008 concerning the ratification of the Statute of the International Institute for the Unification of Private Law. Therefore, Indonesia is also subject to the substance in UNIDROIT, one of which is the hardship principle in international contracts. The principle is expected to provide convenience and solutions to the parties if they experience a difficult obstacle in fulfilling or completing achievements in international contracts.

2 Research Method

The research method in this paper uses normative legal research, which is the process of finding the rule of law, legal principles, and legal doctrines as the goal of answering legal issues faced [2]. This research approach uses the approach of the law and the old concept approach. The approach through legislation is done by analyzing all regulations related to this research problem. Meanwhile, the conceptual approach uses the doctrine or views of Jurists in the development of legal science as a benchmark for the mind to build legal arguments as an answer to problems. The legal materials used in the research are sourced from secondary legal data consisting of primary legal materials, and secondary legal materials. Research Data were analyzed by legal interpretation and deductive conclusions were drawn by concluding general things to be specific and individual.

3 Discussion

3.1 International Contract

Contracts are often equated with agreements, although indeed both have a binding effect on the parties who make them so that they cause legal consequences, but in essence the two are different. International contracts contain business transaction activities that are included in private law so that the parties concerned have the freedom to determine the content of the agreement that becomes the result of the agreement. However, international law still applies to business transactions carried out in international contracts both related to business transactions and trade practices that are internationally recognized, in addition to this, the parties to making international contracts must pay attention to the rules of their respective national laws [3].

The definition of an international contract is a contract in which there are foreign elements [4]. Although contracts can be made in writing or unwritten, international contracts should be made in writing because of the great risk of the presence of foreign elements in them. The most dominant foreign element in international contracts is the difference in the legal systems of the parties, which requires the choice of law and the choice of forum in the contract. It is synonymous with procedural and non-substantive civil international law, which is the rule used to identify national laws that apply internationally to a particular act. Thus, civil international law can provide solutions to problems by determining which laws apply across national borders and which courts have the right to resolve disputes between parties to international contracts.

The selection of law and selection forums in international contracts will examine in more detail the various foreign elements, and how to determine the characteristics of the strongest connection of these foreign elements to the contract with which the adjustment will provide maximum benefit in the implementation of international contracts [5].

As for the principles of international contract law that must be considered in making contracts, the author summarizes according to Huala Adolf in his book, there are several sources of international contract law, including the following:

a. The National Law of the parties relating to the election of the law and the rule of law of the national force.
b. A contract document that is closely related to the content of the contract as a rule of law that binds the parties who make it.
c. International trade practices relating to contracts are of course universally recognized and enforced. International institutions such as the International Chamber of Commerce (ICC) created these rules. The United Nations commission on international trade law (UNCITRAL). For example, uniform custom for documentary credits.
d. General principles of international commercial contract law, as set out in the UNIDROIT principles of international business contracts.
e. Decisions of international courts, affecting international contracts.
f. Doctrine is the views of jurists who provide answers to the problems of international contract law issues.
g. International agreements on contracts, which are universal and binding for countries that have ratified the agreement, such as the convention on international sales of a goof (1980), UNIDROIT and other agreements.

The sources of International Contract Law mentioned above become a limitation of the principle of freedom of contract in making international contracts. In practice, any contract concluded with a foreign party will cause

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several problems. If a business transaction takes place between two different subjects of law it must be regulated under the international law concerning the transaction, but a business transaction between two different subjects of law must be regulated by international law as well as the National Law of each country concerned. To be able to carry out such business activities, both parties must understand and understand the rules of law in the counterparty's country. This will greatly affect the implementation of the agreement [6].

3.2 UNIDROIT's Hardship Principle

UNIDROIT is an international instrument that regulates the principles used in international contract law which aims to harmonize foreign elements in international contracts if an act is not regulated in the contract and is not also regulated in national law, the UNIDROIT principle can be used to cover the legal vacuum. There are many arrangements regarding the principles of international contracts, one of which is hardship or often known as difficult circumstances. In Article 6.2.2 UNIDROIT provides a definition of hardship, which is as follows:

> *"There is hardship where the occurrence of events fundamentally altersthe equilibriumof the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;*
>
> *(b) the events could not reasonably have been taken into account by thedisadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the controlof the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."* [7].

In the article mentioned above that hardship is a fundamental event which may affect the balance of the contract. Hardship is often equated with force majeure because it is often an event that not only complicates but also enters into a force majeure event, so that the settlement is given back to the parties to have which settlement should be used, if it is considered a force majeure then the situation cannot be repaired resulting in termination of the contract or suspended, while the difficulty can still be renegotiated or renegotiated the terms of the contract so that the contract can still run as the original purpose of the contract.

Renegotiation must be based on good faith, as we know that the principle of good faith and honest transactions is the main foundation in making contracts or other agreements. If the renegotiation by the parties does not settle, then the settlement can be delegated to the court. The court will decide what method is used as a solution to the problem of hardship, the court can terminate the contract if the court believes that it is the best way.

3.3 COVID-19

In 2020, the world was compared to a new variant of the flu virus, the coronavirus (SARS-CoV-2) and its spread to coronavirus disease 2019 (COVID-19). The spread of the virus originated in Wuhan, China as an area reported by the World Health Organization (WHO) and has reportedly spread to 65 countries that have been confirmed infected with the virus. Coronavirus is a positive single-stranded RNA virus, encapsulated in unsegmented DNA. The Virus belongs to the group of the order Nidovirales, the family Coronaviridae. The Virus is sensitive to heat and can be effectively controlled by disinfectants against chlorine, fat solvents with a temperature of 56 C for 30 (thirty) minutes, ether, alcohol, acetic acid, non-ionic detergents, formalin, oxidizers and chloroform [8].

In general, coronaviruses infect animals and circulate in animals, the virus can be called a zoonotic virus which is a virus that is transmitted from animals to humans. Because many wild animals can carry pathogens and act as vectors for certain infectious diseases. COVID-19 infection can cause mild, moderate to severe symptoms. As a result of the virus mentioned above, which is very contagious, it has resulted in the cessation of all areas of life, especially those who have been confirmed to have contracted the coronavirus.

The COVID-19 pandemic has had a major impact on all aspects of human life. The COVID-19 pandemic has caused various problems that are not only related to health and humanitarian issues but also cause economic activity to decline [9]. The COVID-19 pandemic has hampered the implementation of national and international business contracts. Which ultimately affects the economic system throughout the country in the world.

3.4 UNIDROIT's Role in International Contract Arrangements During The COVID-19 Pandemic

Through its official website, UNIDROIT provides instruments to solve problems that interfere with the implementation of contracts and can even contribute to rebuilding the economy in the post-COVID-19 period. The instrument is expected to be useful to address problems in several areas related to law and development

such as the administration of justice, economics and how to protect highly vulnerable populations, including the following: [10].

a. UNIDROIT Principles of International Commercial Contracts (UPICC) which was created in 1994 and has undergone changes in 2016 has also been translated into more than 20 languages. In addressing the problems arising from the COVID-19 pandemic and the public health and economic crisis, the principles in UPICC can overcome contract disruptions to provide settlement measures that can be used by the parties. The principles of hardship (Article 6.2.2) and force majeure (Article 7.1.7) are the best way for contracting parties to determine the circumstances of the contract, as well as assisting the courts and other arbitral or judicial bodies in deciding disputes arising therefrom and providing the legislator with the tools to adjust the rule of law, especially about the contract, if necessary in the circumstances.
b. UNIDROIT's Legal Guide on Contract Farming, created in 2015 and now the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) are working together to prepare a joint document that guides the legal implications of contract farming operations during the COVID-19 pandemic.
c. The Convention on International Interests in Mobile Equipment, associated with efficient financing facilities and leasing of equipment to reduce the cost of capital and even reduce the cost of debt of countries that have ratified the agreement.
d. The Future Legal Guide on Agricultural Land Investment Contracts, which is a rule that is being created by UNIDROID for private law and agricultural development. COVID-19 will be a new challenge and worsen the old situation related to agricultural investment that gives farmers concerns over cases of new land grabs, forced evictions and other land conflicts.

The author can conclude that the role of UNIDROIT is very important and active in providing solutions to world problems, especially in private law contracts, UNIDROIT instruments are used to solve problems in certain fields under the rules set as described above. The author can also conclude that the COVID-19 pandemic provides serious problems that can cripple contracts that have been made. The most common settlement is with the provisions of hardship and force majeure, that is, the parties can adjust the settlement to the circumstances they experience or to the losses received by the parties.

3.5 Application of the UNIDROIT hardship principle in international contracting during the COVID-19 pandemic

The author agrees with the principles of hardship and force majeure as a solution to contract problems during the COVID-19 pandemic. However, the author further considers that the COVID-19 situation is more suitable for using the UNIDROIT hardship principle as previously described. This can be concluded from various factors that affect the sustainability of the contract, if we examine further the principle of hardship against COVID-19 events, the author can conclude that there are several important reasons, namely as follows:

a. Hardship is an event beyond the control of the parties that disrupts the continuity of the contract as further described in Article 6.2.2. UNIDROIT, the authors agree that if further studied the COVID-19 virus has not been confirmed to be controlled in a certain period but the virus can only be controlled with a vaccine at the end of 2020. It is also not certain that it can stop the COVID-19 pandemic. Thus, the author does not agree if the situation is considered as force majeure, because the situation is uncertain and cannot be left alone with an uncertain time anyway.
b. The outbreak can be studied and adapted to the circumstances of contract execution although in more difficult circumstances it can still be continued because the outbreak cannot be predicted when it ends.
c. In good faith, renegotiation can be the best way to continue contracts disrupted due to the COVID-19 pandemic. In good faith, the settlement by renegotiation will proceed with the initial purpose of making the deed, because the event is not experienced by a few people or countries but the whole world experiences it.
d. The hardship clause in making international contracts is needed to anticipate the risks of the COVID-19 pandemic in the future because the outbreak cannot be confirmed to disappear or even get worse. Then this clause is very useful to continue the course of execution of the contract, that is, by renegotiating the parties.

The UNIDROIT principle aims to restore balance when circumstances change and put one of the parties in a disadvantageous position. This is important for long-term contracts because it ensures that the interests of each party remain fulfilled even when things beyond human expectations occur. Therefore, the UNIDROIT Principle provides an opportunity for parties who are in a disadvantaged position to apply.

4 Conclusion

Based on the author's research, the author can conclude that:

a. The role of UNIDROIT is needed in the implementation and risk management of international and domestic contracts, such as COVID events that have a great influence on the implementation of contracts, UNIDROIT provides instruments that are expected to be useful for resolving disputes due to the virus outbreak.
b. The hardship principle has a great influence on international contracts during the COVID-19 pandemic because the outbreak cannot be ascertained when or even worse than now, so contracts must still be carried out so that the country and world economy can remain stable even with more difficult circumstances. Therefore, renegotiation is the best way during this pandemic.

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