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Disruption Of Legal Review During the Covid-19 Pandemic and The Role Of Mediation In An Agreement Settlement

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Abstract

Physical construction or construction is a field that continues and develops at all times. Construction is an activity that displays the splendor of a country's civilization. Every era leaves evidence of civilization through development. The construction of office and residential buildings, and even areas, is an activity performed by the private sector and the general public as consumers. Since the end of 2019, China has faced a new virus attacking humans, which has spread to become a global pandemic known as Coronavirus Disease-19 or (Covid-19). All countries are moving behind with the speed at which the virus is spreading and terminating, whereas health Protocol occupies a superior position compared to all other aspects. Covid-19 disrupted all aspects, including the construction sector. The construction agreement was taken, hostage. The developer company failed to build because the bank failed to provide credit due to the precautionary principles; the consumer became a vulnerable party in constructing this legal relationship. This research is normative-analytic by tracing legal theories to solve construction agreement failure due to Covid-19. The results of the study found that the force majeure theory was not fully applicable to this problem. The theory of impossibility is better able to enter into the completion of a construction agreement disrupted by Covid-19. Good faith is an essential asset for lead parties to solutions based on interests. The path of re-negotiation, mediation, or arbitration motivates the court to legitimize the construction agreement's completion

Keywords

construction; Agreement; Development Companies, Banks, Consumers; Covid-19

1. Regarding the COVID-19 Pandemic

At the end of 2019, the world was shocked by what happened in Wuhan, China, which is a disease that is transmitted rapidly between humans. This disease's typical symptoms include problems with breathing and/or difficulty breathing, fever, cough and severe pneumonia, acute and severe respiratory syndrome, kidney failure, and even death.¹ Health experts call it a syndrome that attacks the respiratory system that leads to death or what is known as Corona Virus Disease-19 (Covid-19). Covid-19 is a similar virus to Middle East Respiratory Syndrome (MERS-CoV) and Severe Acute Respiratory Syndrome (SARS-CoV). The number 19 refers to the year the virus was discovered.

The Chinese government immediately took drastic and swift action. The city of Wuhan is closed. The Chinese government prohibits residents of Wuhan from leaving the region. On the other hand, residents from other cities or regions are prohibited from entering Wuhan. Unfortunately, this did not prevent the spread of Covid-19 to other regions, even outside China. In a short time, Covid-19 developed into a global pandemic. This virus is like a financial sector affected by systemic risk. The risk has led to the failure of one financial institution and becomes problematic.² This virus has infected several countries and caused so many deaths. The outbreak of Novel Coronavirus ("Coronavirus") in China has engulfed as many as 24 countries worldwide with a medical emergency and has claimed more than 1000 lives.³

The World Health Organization and several countries, including the United States, have declared it a "Global Public Health Emergency."⁴ Status shows that aspects of health are superior to other aspects. Handling Covid-19 provides the Authority to apply any approach to stop the spread of Covid-19. All other aspects are subject to or subject to the handling of Covid-19. Terminating the spread of Covid-19 can only be done by isolating people, and areas called lockdown, mobility, and social activities should be temporarily stopped. Self-quarantine and in hospitals during the incubation period are ways or strategies to overcome this virus.⁵ Apart from self-quarantine and in hospitals, detection methods are the next way to break the chain of spreading this virus.⁶

¹ Bodhisattwa Majumder, Devashish Giri, "Coronavirus & Force Majeure: A Critical Study (Liability Of A Party Affected By The Coronavirus Outbreak In A Commercial Transaction)," *Journal of Maritime Law and Commerce*, January 2020, pg. 53.

² Lee Kovarsky, Pandemic, "Risks And Remedies," *Virginia Law Review* Vol. 106, July 2020, pg. 75.

³ Majumder, Giri, "Coronavirus & Force Majeure...," pg. 53.

⁴ *Ibid.*

⁵ Shilei Zhao, Hua Chen, "Modeling The Epidemic Dynamics And Control of Covid-19 Outbreak in China," *Quantitative Biology*, 2020, pg. 7. <https://doi.org/10.1007/s40484-020-0199-0>.

⁶ *Ibid.*

Of course, prioritizing health aspects in handling the Covid-19 pandemic has legal implications. Apart from those related to health services and vital sectors that cannot be stopped, all activities must be temporarily stopped until the Covid-19 pandemic can be controlled.

Covid-19 is not only related to health and socio-economic aspects but also with legal implications and consequences. All aspects and wheels of business life have stopped; development has been postponed and/or has been suspended for a while, the solution uncertain. Covid-19 interrupts all aspects of life, business, social activities, religious activities, education at all levels.⁷All stopped to save lives.

Another aspect that is affected by Covid-19 is the construction sector. As support for physical and infrastructure development, the construction sector, whether carried out by the private sector or the government, must be aligned with government decisions regarding health priority in handling the Covid-19 issues.

2. Literature Review

In the mid-1990s, Nicholas R. Weiskop wrote the concept of frustration to an agreement.⁸For him, the concept of frustration should not be trapped or used as a tool by certain parties regarding the implementation of an agreement's contents. Weiskop explained that the frustration agreement is the absence of a motivation to carry out the contents of the agreement when other things happen that impact it. Weiskop guides the frustration agreement to the impossibility doctrine by referring to several judges in the United States. Thus, a frustrating agreement is an agreement that cannot be implemented because of a situation that the parties cannot resolve. Weiskop describes frustration agreements in the activities of leasing, buying and selling goods, and so on. That is, Weiskop captures the concept of frustration in micro-activities. But Weiskop's contribution is the concept of frustration followed by the doctrine of impossibility that applies to aspects of business law. Second, Weiskop raises the possibility of applying an impossible situation as a waiver of default if the party concerned has made every effort to resolve the situation (Joffroy, 2020).

Melvin A. Eisenberg launched the bounded-risk test theory in response to Professor Goldberg's criticism of the shared-assumption test theory, which criticized the doctrine of impossibility.⁹The bounded-risk test is a particular test that points to a dramatic and unexpected cost, whereas the implementation of the agreement by the parties results in even higher costs. Both Eisenberg and Goldberg developed ways of testing importance in terms of the unlikely. An important note is that the test should be done in appropriate cases on both seller's aspect and

⁷Christopher C. French, "Covid-19 Business Interruption Insurance Losses: The Case For And Against The Coverage," *Connecticut Law Journal*, Vol. 27, July 2020, pg. 5.

⁸See Nicholas R. Weiskopf, "Frustration Of Contractual Purpose – Doctrine Or Myth?" *Saint John's Law Review* Spring 1996.

⁹Melvin A. Eisenberg, "Impossibility, Impracticability, And Frustration—Professor Goldberg Constructs An Imaginary Article, Attributes It To Me, And Then Criticizes It," *Journal of Legal Analysis* Vol. 2, Spring, 2010

interest and the increase in market costs. Eisenberg and Goldberg both went beyond this doctrine to get deeper into parties' interests as a touchstone for impossibility doctrine (Joffroy & Cuttler, 2021).

Covid-19 broke out at the end of 2019 and developed into a pandemic in 2020. This situation has triggered legal issues in handling the spread of Covid-19 by stopping all activities that gather people. Legal experts convey their views on Covid-19 about (business) agreements. Russel Lewis, Jonathan Havens, Cornelius Sweers, Charles H. Bannet IV raised the possibility of force majeure as a savior of legal relations affected by Covid-19. Lewis, Havens, Sweers, Bannet IV referred to cases of the Spanish Flu outbreak to compare the factors contained in Covid-19. It turns out that there are some different factors between the Spanish Flu and Covid-19, namely the role and position of the government taking action in response to the Covid-19 pandemic, lockdown, or Large-Scale Social Restrictions (PSBB) policies. The absence of control over humans, either as individuals or as governments, is a force majeure. But Lewis, Havens, Sweers, Bannet IV believe that Covid-19 can be categorized as a force majeure as long as the parties have done everything to overcome it.

Continuing the views of Lewis, Havens, Sweers, Bennett IV; Thedford Felton launched the importance of the frustration doctrine by testing or examining both parties' interests.¹⁰ Covid-19 can be accepted as a state of frustration that contains the inability to carry out the agreement's contents. In this short article, Felton, following Melvin A. Eisenberg, believes that the test of interests on both sides is a form of reasonableness to determine that both have the same situation: the impossibility of carrying out the contents of the agreement due to the Covid-19 outbreak. Two things measure in Felton's view; (1) events that cause frustrating situations that cannot be fully understood, and (2) the value of "interests of the parties" is almost entirely undermined by this situation (Metcalfe, Soboroff, & Kelley, 2020).

In line with Lewis, Havens, Sweers, Bannet IV; Felton, Robert L. Gegios, Lance Duroni,¹¹ Explains how strong the link between the agreement with Covid-19. The point of balance is in the concept of force majeure and impossibility. The spectrum of his discussion deals with included and excluded events in the doctrine and impossibility. This cannot be separated from good faith as a moral quality of the agreement to save the parties' interests. Covid-19 opens the door to impossibility and impracticability and a state of frustration that creates a standpoint for each party to defend their interests to save themselves. The court becomes a settlement forum, and the judge becomes the foundation for obtaining justice. In practical terms, insurance has become increasingly necessary in today's circumstances. Negotiating the parties in good faith to save all parties' interests can be used to resolve this.

¹⁰See Thadford A. Felton, "Covid-19 And The Commercial Frustration Doctrine," *Illinois Bar Journal Vol. 108, June 2020*.

¹¹See Robert L. Gegios, Lance Duroni, "The Legal Domino Effect: Covid-19 & Contracts," *Wisconsin Lawyer Vol. 93, May 2020*.

Richard Favata and Bret Salzer linked construction and financing to the Covid-19 Pandemic.¹²Favata and Salzer introduced the offense and defense doctrine in the construction sector during the Covid-19 Pandemic. The offense and defense doctrine refers to the way investors and managers find investment opportunities. On the contrary, in bad conditions, it refers to making every effort to protect the entire existing portfolio from being destroyed or at least reducing its potential damage. Some of the critical aspects of this twin doctrine are the loan collateral value, the loan condition, the health condition (deal hygiene), cash management, and the sponsor. In the doctrine of defense, Favata and Salzer mentioned the need for the parties to stabilize the construction state in the absolute sense. Favata and Salzer emphasized the need to seek capital funds in a new debt model; allocate risk in the agreement. Restructuring is a way to activate the agreement in its current state.

Finally, the doctrine of good faith can be the key to solve covenant problems. From his book, "Good Faith in English Law" determines that good faith is a fundamental principle that comes from the principle of *pacta sunt servanda*.¹³ Therefore, it is relevant to be applied in overcoming the failure of the agreement. Elements of reasonableness, honesty, and fairness make goodwill operational and functional to resolve default issues. It is interesting to examine the possibility of using good faith in construction law cases in the conditions of the Covid-19 pandemic.

3. Methodology

This research uses a normative-analytical approach to assess the state of the Covid-19 pandemic by implementing construction agreements. Normative research is directed to specific laws or favorable laws.¹⁴ The study of legal theories or doctrines related to a pandemic status is aimed at finding justification. Of course, this normative-analytic approach is used to obtain a picture of how deadlocks can be unraveled. The interests of all parties are the focus of the construction agreements' implementation during the Covid-19 pandemic. Health priorities subdue all aspects of life, except those related to fulfilling health priority interests in overcoming Covid-19.

This theoretical exploration opens up as wide a space as possible to photograph the pandemic's status and its relation to construction agreements. The conflict is between force majeure and the impossibility of filling the space for discussion of business law, in this case, the implementation of construction agreements. The law must be able to place the interests of the parties proportionally and appropriately. Disagreements regarding this matter are certainly not productive.

¹²See Richard Favata, Bret R. Salzer, "Commercial Real Estate Finance And Covid-19, *Practical Real Estate Lawyer Vol. 26, September 2020*.

¹³See J.F. O'Connor, *Good Faith in English Law*, London: Dartmouth Publishing, 1990.

¹⁴Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif*, Malang: Bayu Media, 2008, pg. 49.

4. Discussions

5. The Impact on Construction Services

Physical and infrastructure development is a necessity for humans. Civilization is built every time as a legacy of history and the power of leaders and society. To this day, physical construction continues everywhere in the world. Physical construction (construction) is generally enforced by the state or the private sector prerequisites for carrying out infrastructure or facilities to meet the needs for space and shelter. This is an urban phenomenon. Everywhere, development is a reflection of a city or country's splendor. Referring to this explanation, experts say that the construction law is comprehensive.¹⁵ Because it is related to various aspects, construction law requires contract law, banking law, consumer protection law, insurance law.

6. Regarding Construction

Its civilization judges the back and forth of a country. Philip Bruner explained how construction is evidence of human existence that stands firm because of its strength. Leaders tend to want to leave a legacy in development that reflects their personal and national values. It is no surprise that it is a king or emperor.¹⁶ Like competing to display the splendor of their country through development. The constructions are a testament to the advancement of human civilization, from primitive ones like Mesopotamian burnt-stone buildings and Egyptian cut-stones to extraordinary modern structures¹⁷ to very tall skyscrapers like the Burj Khalifa in Dubai, United Arab Emirates.

Since the 19th century, construction has referred to agreements to manage risks that arise in the development process.¹⁸ Moreover, development is not only monopolized by the government but also by the private sector. Of course, this is natural if the agreement law becomes the foundation of commitment in the implementation of development, considering that the private sector relies on funds originating from it. Everywhere in the world, development involves the government and the private sector. The development of new cities that have recently been rampant in Indonesia is proof of the private sector's role in development.

¹⁵Randy B. Birch, "Construction Law," *GP Solo Vol. 24 No. 1 January/February 2007*, pg. 64.

¹⁶ Philip L. Bruner, "Construction Law," *William Mitchell Law Review Vol. 1, 2007*, pg 2-3. *Since mankind first promulgated elementary law principles to regulate human rights and obligations arising out of societal interaction, there have existed principles of law governing the built environment and the construction process. As classical antiquity *2 gradually civilized the built environment, so too did it refine the law governing its built environment. By the reign of Rome's Caesar Augustus, construction risks inherent in building upon unsuitable soils or incompetent management and cost control were *3 widely recognized. Under Roman law, good construction practice favored careful contractual articulation of the scope of work and allocation of construction risks.*

¹⁷*Ibid.*, pg. 1

¹⁸Philip L. Bruner, "The Historical Emergence of Construction Law," *William, Mitchell Law Review, Vol. 34, 2007*, pg. 5.

Christopher Butler testified how the role of contract law and construction law had become the rules of the game that are obeyed by parties, both government and private. Construction law, which strictly adheres to agreements, is related to the relationship between the parties in a construction project. It would be complicated to practice construction (service) law without understanding how the parties are involved in making the project successful. Until someone has a construction background, there is no way to acquire this knowledge.¹⁹Civil engineers have the knowledge that is key in implementing agreements for the construction of office and residential buildings, even in regional development, such as the construction of a new city.

Also, a degree in civil engineering, legal experts are needed to implement construction agreements. Two things are considered necessary for experts to be involved and involve themselves in construction law. First, the private sector's involvement in government projects where several risks need to be considered and how to do business.²⁰There is a lot of expertise needed in implementing Government construction projects, in addition to substantial funds, of course. This situation is not comfortable to manage if there is no mutually agreed reference, namely an agreement.²¹The agreement's ideal life cycle is from the signing of the agreement by the parties to the completion of the implementation of the contents of the agreement.

As it befits life, agreements don't always run on an ideal reel. There are times when disputes arise between the parties. The agreement was used as a reference to see which interests were violated, but this was not enough, so the court's role was essential. Judges decide disputes over Government project development agreements.²²With their limited knowledge, Judges certainly need expert opinions to be heard relating to reports over Government project development agreements.

7. Failure to Build as an Impact of Covid-19 towards Construction Services

Apart from the loss of goodwill, the pandemic situation was able to stop the construction of office buildings or residential buildings. Regional closure (lockdown) is a method taken by the government in many countries to stop the spread and infection of Covid-19. Mino Han and Celia Guignet shared the South Korean experience, "*the direct impact of the pandemic on the South Korean construction industry appears to be limited compared with other countries because the government did not implement such drastic measures. However, modest repercussions occur because of the introduction of swift measures to curb the*

¹⁹ Christopher B. Butler, "Fundamentals Of Construction Law," Book Review *American Bar Association Construction Lawyer Vol. 22 Summer, 2002*, pg. 38.

²⁰ John W. Ralls, "Government Construction Projects," *Construction Lawyer Winter, 2011*, pg. 3.

²¹ Butler, "Fundamentals Of Constructions...," pg. 38.

²² *Ibid.*

spread of the virus to reduce the burden on construction projects".²³The result is evident because the development in South Korea is restricted. South Korea's approach takes a firm and drastic position in dealing with Covid-19 and overcoming its citizens' spread.

The state of the Covid-19 pandemic, which strictly limits all business and development activities, is the primary consideration or reference at this time. *Due to COVID-19, all businesses face a new reality of supply disruptions, decreased demand for products and services, governmental prohibitions, and strains on their ability to use or maintain workers. Contracts might not be performed or available as anticipated.*²⁴Like a surprise, Covid-19 gave birth to a complicated situation for development companies (developers), banks, and consumers who bought office or residential units.

In such a pandemic, there is an authoritative approach that goes beyond collaborative approaches,²⁵So it is impossible to find a point of motion unless development is a priority. The rest are subject to health priorities that are reported by the authorities. As a result, the implementation of construction projects for office and residential buildings or areas has stopped. This causes problems with the failure to build the developer, the risk of bad credit provided by the bank, and the failure to pay consumers. Who is to blame for this?

At the practical level, in anticipation of a very decisive event in the continuity of the construction of office and residential buildings, construction cannot be separated from financing.

*Commercial real estate loans typically allocate significant financial, business feasibility, and property condition risks to the borrower. Borrowers often seek to mitigate these risks by negotiating for "material adverse effect" (MAE) clauses, which provide an option to terminate the contract. Certain circumstances occur that result in a material or adverse change to the property's condition before closing. Sometimes the term "material adverse change" (MAC) is used interchangeably to refer to an MAE clause.*²⁶

This clause safeguards the interests of construction companies while at the same time preventing the bank from potential lousy credit.

The business disruption due to the Covid-19 pandemic has resulted in the agreement having no basis (considerations) to proceed.

*Due to these disruptions in business operations, many enterprises in China would not honor their contractual obligations. This could expose them to corporate litigations, which could impact both their resources and their reputations. In this scenario, it becomes essential for a corporation to escape its responsibility for contract performance due to the health emergency outbreak in China.*²⁷

²³Mino Han, Celia Guignet, "Impact of Covid-19 on South Korean Construction Projects," *Construction Law International*, Vol. 15 No. 3, September 2020, pg. 50.

²⁴Gegios, Duroi, "The Legal Domino ...," pg. 12.

²⁵David Mosley, "What Can Constructing Law Learn from Covid-19?" *Construction Law International*, September 2020, pg. 7.

²⁶Robin L. Nolan, Adam F. Aldrich, "Navigating Commercial Leases And Real Estate Loans During Covid-19," *Colorado Lawyer* Vol. 49, June 2020, pg. 37-38.

²⁷Majumder, Giri, "Corona Virus &...pg. 53.

The state of the Covid-19 pandemic is accepted as an excuse to leave the agreement. Of course, this is only with the agreement of both parties.

Theoretically and doctrinally, the Covid-19 pandemic is classified as a force majeure or force, but it must fulfill four things:

First, the impediment behind the non-performance of a contract must be beyond the party's control, and any steps that it could reasonably have been expected to be taken to prevent it. **Second**, in a temporary impediment, the invocation of force majeure shall only subsist as long as the impediment affects the performance. **Third**, a notice of the impediment and the resulting non-performance must be provided within a reasonable time after the party knows of the impediment; **Fourth**, this invocation of force majeure in no way restricts a party from exercising termination rights under the contractor withholding the performance.²⁸

Force majeure is not entirely accurate when it comes to the possibility of human intervention in the event. The change caused by something beyond human control is a force majeure state. This condition cannot be prevented or at least known to humans. Meanwhile, the Covid-19 pandemic is a situation beyond human control of its emergence and spread. However, the pandemic's prevention and duration are long, so that its destructive power is seen gradually.

It's difficult to conceive of the significant number of contracts that have been or will be breached because of the COVID-19 pandemic and its halting of economic activity. If a single corporation is a "nexus of contracts"--as some economists view it--then the nation's economy is a massive network of interdependent contracts. Even under normal economic circumstances, the breach of one contract can beget another breach, as in a domino effect of breaches in a supply chain. Now, much of the entire economic system is halted. ²⁹

The disruption due to the pandemic's status and circumstances resulted in a (temporary) failure to implement construction agreements.

8. The Impact of Covid-19 on Banks' Interest

9. The Role of Banks

The construction of office buildings, residential areas, or new urban areas always requires banks' role as a source of financing. Traditionally, banks are said to be the institutions for collecting and distributing funds. The definition shown in the bank is the role played in the economy by acting as an intermediary between depositors and borrowers.³⁰ With this role, banks are regulated in a conservative, strict, and closely monitored manner to safeguard depositors and borrowers'

²⁸*Ibid.*, pg 54.

²⁹ Brodie H. Smith, "Beyond Force Majeure And Frustration Of Purpose: How Else To Defend A Contract Claim Based On The Covid -19 Pandemic," *Orange County Lawyer* Vol. 62, June 2020, pg. 32.

³⁰Shellagh Heffernan, *Modern Banking In Theory and Practice*, New York: John Wiley And Sons, 1996, pg. 1.

interests. Therefore, banks are said to be financial institutions that manage liabilities. ³¹If the bank lives in managing its liabilities, then where will the bank's revenue come from? Theoretically and practically, banks have some rights, among others, the right to determine the imposition of fees for services in the form of interest for loans provided by banks to borrowers; receive repayment of invoices from customers; freed from fees and responsibilities for acting in the interest of the customer...³²Meanwhile, the bank's duty is to carry out the customer's mandate; respect customer checks; keep information about customers confidential; submit account information periodically or upon request; accept checks and other bank instruments; apply prudence and expertise in running the business.³³With their chain of networks and various services, banks are the dominant financial institutions providing payment systems, deposit services, and loan disbursement. It is not surprising then that the bank is a financial institution that controls Indonesia's most considerable financial assets.

The relationship between the bank and its customers is based on the creditor-debtor relationship, trust relationship, and the relationship of confidentiality. The relationship between the bank and its customers is a creditor-debtor relationship based on an agreement. Thus, the Covid-19 pandemic is an issue that refers to the agreement for the office and residential buildings (construction). *Due to COVID-19, all businesses face a new reality of supply disruptions, decreased demand for products and services, governmental prohibitions, and strains on their ability to use or maintain workers. Contracts might not be performed or available as anticipated.*³⁴The space for finding solutions is traced through the agreement. A binding agreement is based on the consensual principle, as stated in Article 1338 of the Civil Code. It can be concluded that the moral and legal basis of the agreement is binding on the parties. An agreement is used to determine the implementation of the agreement's contents regarding the conditions of the Covid-19 pandemic.

Consensual universalism can reconcile the interests of any party to any legal system. O'Connor states that the principle of agreement *pacta sunt servata* is always completed in good faith.³⁵Good faith is the intention of one party to agree not to harm the promised partner or harm the public interest.³⁶Such moral commitment directs the parties to a meeting point whose purpose is to save both parties' interests.

The elements of good faith are honesty, fairness, and reasonableness.³⁷The parties promote these three elements in discussing the superiority of the Covid-19 pandemic situation for all interests or aspects of life for a while to be determined

³¹*Ibid.*, pg. 1.

³²David Palfreman, *Law Relating to Banking Service*, London: Pitman Publishing, 1993, pg. 13.

³³*Ibid.*, pg. 14-15.

³⁴Gegios, Duroni, "The Legal Domino...", pg. 12.

³⁵O'Connor, *Good Faith in ...*, pg. 11.

³⁶Sjahdeini, *Kebebasan Berkontrak Dan...*, pg. 121.

³⁷O'Connor, *Good Faith in...*, pg. 10.

by the government. Good faith is a moral door to open up problems that arise in construction agreements. Development companies and banks are re-opening discussions to resolve issues that have arisen due to the Covid-19 pandemic.

10. Failed Fundings as an Impact of Covid-19 as a form of the Precautionary Principle's implementation

The bank is a business in the financial services sector, which is based on trust, which is secured by the principle of prudence (prudential banking). Banks are managed by referring to a set of provisions or regulations to maintain the survival of the bank and the ability to fulfill the interests of its depositing customers.

Banks are cautious in extending credit by referring to Law No. 7 of 1992 concerning Bank as Amended by Law No. 10 of 1998. According to these regulations, Banks are required to observe sound and prudent credit principles. The state of the Covid-19 pandemic is undoubtedly not considered a conducive condition for disbursing credit.

This provision is related to the provisions of the same Law Article 29, paragraph 2, which reads:

Banks are required to maintain the bank's soundness level following the provisions of capital adequacy, asset quality, management quality, liquidity, profitability, solvency, and other aspects related to the bank's business, and must conduct business activities following the precautionary principles.

If linked to history, banking is the sector most vulnerable and threatened with systemic impacts, even though internally, the bank is in good condition. This provision is further stipulated in the *Otoritas Jasa Keuangan* (OJK) or the Financial Services Authority Regulation No. 32/POJK.03/2018 concerning the Legal Lending Limit and Large Funds Provision for Commercial Banks.

In several crises, banking conditions reflect the strength of a country's economy. No country is immune to crisis. But a healthy banking sector can be the savior of the country in question. Financial trauma echoed with the tagline "too big to fail" and "too many to fail" to remind how vulnerable the banking sector is from the failure of one large bank or many failed banks.³⁸ The condition of the Covid-19 pandemic has this potential. The agreement clause above certainly secures the interests of construction service providers and contractors. But what about banks? Although it is not regulated regarding impossibility situations, such as the Covid-19 pandemic, banking principles and regulations require banks and banking authorities to withdraw temporarily to disburse construction credits.

If civil law puts forward the doctrine of force majeure,³⁹ On the other hand, common law introduces the doctrine of impossibility. The doctrine of impossibility becomes an actual issue with activating good faith to renegotiate construction

³⁸See Jeremy C. Kress, Matthew C. Turk, "Too Many to Fail: Against Community Bank Regulation," *Northwestern University Law Review* Vol. 115, 2020.

³⁹ Tomasz Darowski, Josef Hlavic'ka, Ralf Leinemann, "Covid-19 as a Force Majeure Event in Civil Law Jurisdictions," *Construction Law International* September 2020, pg. 38.

agreements related to the Covid-19 pandemic. Three elements of good faith, namely honesty, fairness, and reasonableness⁴⁰ It can be used to assess the temporary suspension of the implementation of the construction agreement's contents until the government declares the pandemic over.

If the government establishes a superiority of protocols and health management to overcome Covid-19, the bank will activate a caution alarm or even pull an emergency brake to avoid bank failure. However, there are guarantees given to banks to protect credit for building office or residential buildings. Banks must maintain the capital adequacy ratio, lousy credit ratio, and liquidity. The precautionary principle influences bank behavior and the risks it takes.⁴¹With these three blades, the bank will undoubtedly stop the disbursement of loan funds for the construction of office buildings and residences to protect its customers and depositors' interests. Banks' interests and the interests of depositing customers are superior to the implementation of construction loan agreements during the Covid-19 pandemic. In other words, the interests of the bank and depositing customers' interests are the public interest. Agreements that at one time are deemed to interfere with the interests of the community are prohibited.⁴²The implementation of construction agreements during the Covid-19 pandemic can plunge banks into bad credit, which will impact the bank's ability to serve withdrawals of depositing customer funds and harm bank shareholders. The failure of one bank can impact the banking system so that the principle of prudence becomes the foundation of banks and banking authorities to prevent banks from failing and the impact of the system.

The doctrine of impossibility does not violate the law of the agreement to stop the disbursement of loan funds for implementing the construction of office and/or residential buildings, even areas. Re-negotiation to determine changes in the substance of the construction agreement. Following Mariam Darus's opinion nearly 30 years ago, bad credit is judged by two conditions: lousy credit that can be resolved by both parties and bad credit that cannot be resolved after both parties' efforts.⁴³The construction credit agreement in the state of the Covid-19 pandemic is an agreement that does not have the same characteristics as expressed by Mariam Darus Badruzaman. Not yet included in bad credit, but if implemented, it can become lousy credit for construction agreements. There is no single court in the United States that qualifies the Covid-19 pandemic as a form of emergency.⁴⁴This means that the Covid-19 pandemic is a situation that develops gradually with a relatively short period with anticipations that can be done. People can avoid the danger of death from Covid-19. Business is temporarily suspended until the government declares things under control.

⁴⁰O'Connor, "Good Faith In...", pg. 11.

⁴¹Heffernan, *Modern Banking In...*, pg. 229.

⁴²Sjahdeini, *Kebebasan Berkontrak Dan...*, pg. 100-101.

⁴³Mariam Darus Badruzaman, *Perjanjian Kredit Bank*, Bandung: Citra Aditya Bakti, 1991, pg. 175.

⁴⁴Clifford Shapiro, "COVID-19 And The Construction Project – Key Contract Issues,"

11. The Impact of Covid-19 on Consumer's Interests

In the property business, third parties, which are related and perhaps most important to developers and banks, are consumers. The developer has a legal relationship with the bank as the creditor and consumer of office or residential units.

11.1.1. The Failure of Payment as an Impact of Covid-19

The state of the Covid-19 pandemic has stopped all activities, including the business sector, namely the construction of office or residential buildings.

*While the Covid-19 pandemic's impact has been sharp and dramatic for financial markets and residential real estate, commercial real estate tends to move more slowly during times of disruption. Nonetheless, the initial period of sheltering-in-place, nonessential business shutdowns, and other factors soon saw deals cancel due to concerns regarding the economy. It is now more challenging to get deals financed. The commercial deals that seem to be "sticking" are owner-occupant office and industrial products. Many investor deals seem frozen, with investors anxiously waiting to see how all of this shakes out and downward pressure in almost every asset class.*⁴⁵

The Indonesian economy makes it look as if the world is in free fall. The number of poor people has increased due to Covid-19. The economy was disrupted. Individual business activities disappeared. No exception, the same thing happened to the property market, such as buying office units and/or occupancy, which fell far from the time before the pandemic occurred.

The income of businesspeople has shrunk to its lowest point so that their purchasing power is also severely affected.

*Condominiums and cooperatives are dealing with additional Covid-19-related costs and the failure of some unit owners in paying their monthly standard charges/maintenance. Here the boards have to figure out how to respond to those owners who state that they do not have the funds to pay what is due. This is a much easier issue because there is a limited number of issues, but the current pandemic is different.*⁴⁶

Consequently, *borrowers need merely submit a request to their loan servicers, affirming that they are experiencing financial hardship during and caused by the Covid-19 emergency.*⁴⁷As a result of the Covid-19 pandemic, consumers of office and residential units cannot fulfill their obligation to pay.

The consumer stated that they were unable to continue the installment payment to purchase an office or residential unit.

As with all property transactions, there is no perfect time to buy, sell or

⁴⁵Beth Jo Zeitzer, "Commercial Real Estate Focus: Leasing and Buying in the Covid - 19 Era State," *Bar of Arizona June 2020*, pg. 42.

⁴⁶ Richard J. Sobelsohn, "Coops, Condos And Covid-19," *New York State Bar Journal Vol. 92, November 2020*, pg. 51.

⁴⁷ Dale A. Whitman, "Covid-19 And Real Estate," *Feature Probate and Property Vol. 34, July/August 2020*, pg 30.

*negotiate the terms on a commercial property--nor is there any single metric that can determine when it is right to make a move. While a rising market can make anyone look like a genius, a falling market brings to mind the famous Warren Buffett saying, "You only find out who is swimming naked when the tide goes out." Having a strategic plan in place--and enlisting the assistance of an expert in commercial real estate--can help guide your decision making in any type of market, and that is particularly true during tumultuous times like these. For all of the challenges, a disrupted market offers a unique opportunity to niche down and find the available phenomenal opportunities.*⁴⁸

The construction business (property market) was temporarily corrected. However, the property market still creates opportunities for parties. The consumer is the party most affected by the purchase agreement for an office or residential unit.

In a vice versa situation, a developer company experiences a failure to build an office building and/or a residence, so the consumer fails to obtain an office unit and/or occupancy at the time promised in the sale and purchase agreement. Development companies failed to build because banks failed to disburse credit. After all, the principles of prudence and regulations did not allow it. Such failure cannot be entirely blamed or attributed to the development company or the bank.

11.1.2. Finding Solutions for Consumers

The consumer is the end-user and the legal relationship of construction. A development company deals with banks as lenders and with consumers of office and/or residential units. This contractual relationship underlies the construction of an office building or a residence. The law of construction agreement deals with permissions, prohibitions, and orders that lead to two things, namely rights and obligations.

The Covid-19 pandemic has stopped construction work for office buildings or housing that is financed using banks. The theory of economic loss becomes a standpoint and a perspective regarding whom the law takes sides.

*The economic loss problem sometimes seems to trigger an irresistible tendency toward hyperbole. One court initially limited its bright-line economic loss pronouncement to a too narrow spectrum of cases: "The cases uniformly hold that a person who sustains economic loss only cannot recover in damages from persons whose negligent conduct damages bridges." That rule was fully adequate to resolve the case before the court. Business owners sued those allegedly responsible for defectively constructing a bridge that provided access to the business premises. But promptly after noting the consistent results of the cases involving those specific circumstances, the court offered as the controlling rationale the "well-established general rule" that "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable."*⁴⁹

⁴⁸Zeitzer, "Commercial Real Estate...", pg. 44.

⁴⁹Carl J. Circo, "Placing The Commercial And Economic Loss Problem In Construction Industry Context, " *John Marshall Law Review Vol. 41 Fall 2007*, pg. 61-62.

In the context of the Covid-19 pandemic and the force majeure theory, the theory of economic loss is applied to assess the injured party in a construction agreement.

In principle, the construction agreement deals with the rights and obligations of the contractor towards the consumer.

Therefore, contractors should be careful to preserve a contractual right of indemnity in the event they are found liable in tort to a third-party consumer. Although developers might be reluctant to indemnify a subcontractor in advance for defects in workmanship, some standard contract forms permit the parties to waive all claims between themselves if the developer obtains "all-risk" insurance, and this arrangement can effectively limit future litigation. ⁵⁰

The consumer is the final party in the construction of an office building and or a residence. In the Covid-19 pandemic conditions, the construction of office buildings and/or occupancy was hampered, even temporarily stopped. Health Protocol motivates the termination of seeking credit or loss of consumers' income so that they are unable to fulfill obligations for installments.

In this environment, construction lawyers representing clients who have suffered purely economic loss must first analyze liability about the available theories, knowing that some courts will be skeptical of tort claims. What the balance of this Part will show is that many cases recognize several viable alternative theories to recover the purely economic loss in construction cases and that a progressive level of sophistication (some might say sophistry) emerges as these theories move away from breach of contract to theories of tortious infliction of economic loss. As Subparts B, C, and D explain, the primary theories include breach of an implied warranty, ordinary negligence, professional negligence, negligent misrepresentation, and products liability. ⁵¹

These theories must be adapted to the conditions of the Covid-19 pandemic.

In the scenario, developer companies that fail to build, because banks fail to disburse credit due to compliance with the precautionary principles and banking regulations related to the Covid-19 pandemic conditions, consumers who have good intentions, have obeyed to pay installments, must be protected from agreement law and consumer protection law. In this situation, the consumer's economic loss lies, so the developer is obliged to accommodate the consumer's interest by finding a solution through negotiation (re-negotiation).

In case the consumer fails to fulfill the obligation to pay installments, the consumer needs to talk to the developer and find a solution to this. The principle of good faith, as conveyed by O'Connor, can be applied to find a meeting point for the interests of consumers affected by Covid-19 and companies developing office buildings and residential buildings. This is understandable because the status of the Covid-19 pandemic is more in line with the principle or doctrine of impossibility,

⁵⁰ Jesse Howard Witt, "The Spearin Doctrine And The Economic Loss Rule In Residential Construction," *Colorado Lawyer Vol. 35 July 2006*, pg. 57.

⁵¹ Circo, "Placing The Commercial..." pg. 62.

which results in a disruption in many aspects of life, including loss of income, cessation of construction of office buildings, and/or occupancy.

If the parties' re-negotiation fails, then alternative dispute resolution options are still available for the parties to rely on to resolve legal issues regarding construction agreements in the Covid-19 pandemic conditions. The parties can take the path of settlement utilizing an arbitration mechanism or through a court. The court or the mediation or arbitration mechanism becomes the institution to legitimize the settlement of disruption of construction agreements. Good faith becomes the capital for the parties to see and find straightforward solutions to the disruption of office building construction and/or housing due to the Covid-19 pandemic.

Conclusion

After exploring the legal theory related to the Covid-19 pandemic, three theories are discussed: force majeure, impossibility, and good faith. Force majeure cannot entirely be attributed to failure to carry out construction agreements. Even though the state of the Covid-19 pandemic is beyond the control of the parties, the theory of force majeure does not occur suddenly and briefly, but rather the pandemic process occurs gradually.

The theory of impossibility has more potential to be used to deal with construction agreements' failure during the Covid-19 pandemic. Development companies (developers), banks act as funders and consumers of office units. Banks, which are financial institutions that are closely monitored and regulated by the principle of prudence, are unlikely to distribute funds in a disrupted situation due to the Covid-19 pandemic because it will endanger the bank and the interests of depositing customers, as well as the banking system.

The state of the Covid-19 pandemic has disrupted all aspects of life, including the construction business. According to Health Protocols and Human Infection Management, the agreement is the binding of the interests of all parties, construction companies, banks, and consumers of office or residential units. The Authority determines the Health Protocol's superiority and permission to carry out activities; in this case, the construction of office and/or residential buildings.

Good faith is an asset to find solutions that save the interests of the parties. Reasonableness, honesty, and fairness are elements to realize good faith. Renegotiating between the parties can be done in good faith if you have to take alternative ways of resolving disputes such as mediation or arbitration; or take a lawsuit in court.

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