Force Majeure in Aircraft Lease Agreement and Covid-19: Indonesian and English Law Perspectives

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Abstract

The Covid-19 pandemic has resulted in the establishment of flight restrictions throughout the world. Airlines lose their main source of income. In fact, most aircraft operate from leasing schemes making them unable to fulfill their payment obligations under the aircraft lease agreement. Airlines argue that the Covid-19 pandemic is a force majeure event, is beyond its control, and causes the contractual obligations to be unenforceable. This study reveals Indonesian and British law perspectives on force majeure, related to the Covid-19 pandemic, and analyzes such implementation in the aircraft lease agreement. English law was chosen because most aircraft lease agreements are governed by English law, in accordance with the implementation of the autonomy of the parties of international civil law. This study shows that both Indonesian and English laws regulate force majeure events for the affected party to be released from contract obligations if the party is truly unable to carry out obligations due to force majeure. The event of force majeure must also be regulated specifically in the agreement. However, in the aircraft lease agreement, there is a hell or high-water clause that the obligation to pay rent is absolute regardless of any circumstances. Therefore, the legal provisions regarding force majeure do not apply to aircraft lease agreement unless it is mentioned.

Keywords: aircraft lease agreement, covid-19, force majeure.

A. Introduction

In November 2019, a mysterious case of pneumonia was first reported in Wuhan, China. After some time, the coronavirus spread all over the world. The World Health Organization categorizes the Covid-19 (coronavirus diseases 2019) as a global pandemic since March 11, 2020.[1] To prevent the spread of the Covid-19 virus, all preventive measures were taken, among others by policies for working and studying from home, limiting activities outside, and closing state borders to limit human activities.[2] The Covid-19 pandemic has an impact on almost all sectors of the world's economy, especially the tourism, hotel, and airline industries, due to

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1 Peni Jati Setyowati, "Akibat Hukum Pandemi Covid-19 sebagai Bencana Non-Alam Medis dalam Menetapkan *Force Majeure* di Indonesia", *Kosmik Hukum* 21, No. 1 (2021): 1-9.

2 S. Esra Kiraz dan Esra Yıldız Üstün, "Covid-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards", *Uniform Law Review* 25, No. 4 (December 2020): 437-465.

efforts to restrict individual movements.[3] The World Trade Organization even predicts a decrease in world trade volume at 9.2%.[4]

Airlines are one of the business lines that have been impacted significantly by the spread of the virus and the Covid-19 pandemic. It is experiencing decrease in passenger demand due to restrictions on individual activities. States of the world has applied restrictions and special rules for aviation transportation as well as closure of national borders. Consequently, airlines are being forced to limit their operational activities.[5] Surely, the condition brings an impact on the income, considering that the main source of income is passenger. The drastic decrease in revenue is inversely proportional to the airline's contractual obligations to third parties. The obligations continue to take place and must still be fulfilled, regardless of the Covid-19 pandemic.[6]

Most airlines in the world fulfill their operational needs by leasing aircraft from lessors under an operational leasing scheme. Due to Covid-19 pandemic, airlines experienced a significant decline in revenue. In the meantime, they have obligations to pay for aircraft rental costs. More than sixteen airlines have filed for bankruptcy or closed their businesses.[7] Many airlines previously tried to deal with the obligation by proposing force majeure arguments. Force majeure clause is generally contained in a contract. It allows party experiencing specific circumstances not to be held responsible for the non-performance of obligations.

International aircraft lease agreements mostly use English law as governing law on interpretation and disputes.[8] Aircraft lease agreement between Indonesian airlines and the leasing parties, which are generally foreign companies, are also the same.[9] Based on the principle of freedom of contract, parties can freely choose law

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3 Tri Budiyono, "Penundaan Kewajiban Pembayaran Utang (PKPU) dalam Masa Pandemi Covid-19: antara Solusi dan Jebakan", *Masalah-Masalah Hukum* 50, No. 3 (July 2021): 232-243.

4 Andre Janssen dan Christian Johannes Wahnschaffe, "Covid-19 and International Sale Contracts: Unprecedented Grounds for Exemption or Business as Usual?", *Uniform Law Review* 25, No. 4 (2020): 466-495.

5 Lucy Budd, Stephen Ison, Nena Adrienne, "European Airline Response to the COVID-19 Pandemic – Contraction, Consolidation and Future Considerations for Airline Business and Management", *Research in Transportation Business & Management* 37 (2020): 1-7.

6 Nindry Sulistya Widiastiani, "Pandemi Covid-19: Force Majeure dan Hardship pada Perjanjian Kerja", *Jurnal Hukum & Pembangun*an 51, No. 3 (2021): 689-719.

7 Kaitano Dube, Godwell Nhamo, dan David Chikodzi, "Covid-19 Pandemic and Prospects for Recovery of the Global Aviation Industry", *Journal of Air Transport Management* 92, No. 1 (2021): 1-12.

8 Donal Patrick Hanley, *Aircraft Operating Leasing: A Legal and Practical Analysis in the Context of Public and Private International Air Law*, (The Netherlands: Kluwer Law International B.V., 2017). See Donald H. Bunker, *International Aircraft Financing, Volume 2: Specific Documents* (Montreal: International Air Transport Association, 2005): 197-198. See also Thomas A. Zimmer and Neil Poland. "Aircraft Operating Leases – New York Law or English Law?". https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2017/07/gtdt-both-vp-chapters-2017.pdf (accessed on 07 April 2022). See more Debra Erni. "England and Wales: Law and Practice". Aviation Finance & Leasing. https://www.pillsburylaw.com/images/content/1/3/138561/2020-Chambers-Aviation-Finance-Leasing-Guide-England-Wales.pdf (accessed on April 7, 2022).

9 Sukarmi, M. Sudirman and Dwi Egawati, "Klaim Asuransi Pesawat Udara Sewa Guna Usaha (*Operating Lease*) Sebagai Objek Jaminan Fidusia," *Jurnal Hukum dan Pembangunan* 50, No. 3 (2020): 549-562.

used in the aircraft lease agreement. This is in accordance with Article 72 of the Law Number 1 of 2009 on Aviation (Law on Aviation).[10] It is also the implementation of the autonomy of parties of international civil law. If parties do not determine the law in the contract, the international civil law theory applies to disputes between the parties.[11] However, given the complex nature of the aircraft lease agreement, it is highly unlikely that governing law is not included in the aircraft lease agreement.

This study attempts to analyze and compare the Indonesian law and English law clauses on force majeure, especially in the case of the Covid-19 pandemic. It also analyzed the application of the provisions in aircraft lease agreement. The aircraft lease agreement discussed in this study are limited to operational leasing schemes. The study choose the English law as a comparison because most aircraft lease agreement choose it to govern their contracts.[12]

B. Implementation of The Force Majeure Clause During The Covid-19 Pandemic Based on The Indonesian Law

In principle, contracts made and agreed upon by parties are binding the parties, in accordance with the principle of *pacta sunt servanda* adopted in the Indonesian legal system. The principle of *pacta sunt servanda* is in Article 1338 of the Indonesian Civil Code. The Article states that all agreements legally apply as law to those who make them. In the Indonesian legal system, the failure of a party to carry out its obligations under a contract causes that party to be in default. Based on Article 1243 of the Civil Code, the party in default can be prosecuted because the actions harm the other party in contract.

However, the doctrine of *rebus sic stantibus* appeared later to introduce the possibility of deviations from the principle of *pacta sunt servanda*. One or the parties can be released from contract obligations, if the party has a difficulty to carry out the obligations due to circumstances.[13] The doctrine of *rebus sic stantibus* is implemented to contract through a force majeure clause. It regulates the release of one or the parties from liability for not carrying out the contract, in the event that there are unexpected events or circumstances that occur beyond the control

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10 Article 72 of Law Number 1 of 2009 on Aviation: "Agreements as referred to in Article 71 [among other things a lease agreement/*leasing*] may be made under the law chosen by the parties to the agreement."

11 Sitti Nurjannah, "Harmonisasi Prinsip-Prinsip Hukum Kontrak melalui *Choice of Law*", *Al-Daulah* 2, No. 2 (Desember 2013): 160-167.

12 Operational leasing scheme in this case is an aircraft lease scheme by the lessee from the lessor for a certain period of time with the payment of rent as compensation. During the lease term, the lessee has the right to possess and operate the aircraft, but the ownership remains with the lessor. At the end of the lease period, the lessee is obliged to return the aircraft to the lessor in accordance with the return conditions agreed by both parties. See Donald H. Bunker, *International Aircraft Financing* (Montreal: International Air Transport Association, 2005), 178.

13 Taufiq Adiyanto, "Dealing with Unexpected Circumstances: Judicial Modification of Contract under Indonesian and Dutch Law", *Hasanuddin Law Review* 5, No. 1 (April 2019): 102-119.

of the parties.[14] In the event that the non-performance of the obligation is not due to the fault, but due to an event beyond control (force majeure), the party cannot be blamed for the loss caused because the party did not carry out his obligations under the contract.[15]

Article 1244 and 1245 of the Civil Code regulate force majeure in Indonesia. Article 1244 stipulates that debtor must compensate creditor if the creditor does not carry out the engagement or does it in a timely manner. If the debtor is unable to prove it was caused by an unexpected thing, the debtor cannot be held accountable to him, even though there is no bad faith from the debtor. Furthermore, Article 1245 stipulates that debtor does not have to compensate if the debtor is prevented from carrying out obligations under the contract, due to compelling circumstances, or circumstances that occur by chance.

Subekti states that force majeure is a condition beyond the expectations of debtor, where the debtor cannot do anything, thus causing the agreed performance to not be carried out. It means that the failure to carry out obligation is not caused by the negligence of debtor, but it is because of the unexpected event.[16] Events that can be called force majeure were initially limited to acts of God or natural disasters and the loss or destruction of the object of the contract. However, in its development, the notion of force majeure has become broader.[17] Soemadipradja states that the scope of force majeure has now expanded, not only limited if the main object or purpose of the contract is lost/disappeared, but also includes other things or events that are beyond the control of a party, such as administrative actions from the government, as well as political conditions like war.[18]

Based on the Indonesian court decisions in determining whether a situation or event is considered force majeure, the main consideration of judges in general is to assess the influence of the situation or event on the fulfillment of achievements by the parties. In addition, judges also consider how the parties regulate force majeure provisions in contracts that bind the parties as a consideration to determine whether an event can be considered force majeure.[19]

Several Supreme Court decisions reflect Soemadipradja's opinion. The definition of force majeure in a broad sense includes (1) the Supreme Court Decision Number 3389K/Pdt/1984, which defined acts of God, administrative

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14 Taufiq Adiyanto, 102-119.

15 Suhandi Cahaya, "Pandangan Hakim terhadap Keadaan Memaksa", *Jurnal Hukum dan Pembangunan* 42, No. 4 (Oktober-Desember 2012): 320-549.

16 Ulim Tjiatawi, Sunarmi, and Dedi Harianto, "Analisa Yuridis Permohonan Pailit atas Ketidakmampuan Pemenuhan Prestasi Perusahaan yang Mengalami *Force Majeure*", *Jurnal Hukum Kaidah: Media Komunikasi dan Informasi Hukum dan Masyarakat* 21, No. 2 (2022): 343-375.

17 Nindry Sulistya Widiastiani, 689-719.

18 Suhandi Light, 320-549.

19 Muhammad Irfan Hilmy dan Muhammad Fadhali Yusuf, "Praktik dan Disparitas Putusan Hakim dalam Menetapkan *Force Majeure* di Indonesia", *Zaaken: Journal of Civil and Business Law* 1, No. 2 (Juni 2021): 182-201.

actions from the authorities, orders from the authorities, binding or decisive administrative decisions or actions, as well as sudden unavoidable events by the parties to the contract as force majeure conditions; (2) the Supreme Court Decision Number 24K/Sip/1968, which consider government regulations as force majeure; and (3) the Court Decision Number 21/Pailit/2004/PN.Niaga.Jkt.Pst, which defines force majeure as a situation or condition completely unpredictable and/or very compelling and beyond the control of the party affected by the force majeure.[20]

Based on the decision of the Supreme Court Number 409K/Sip/1983, an event can be said to be a force majeure if the event meets some conditions. First, the event is unexpected. Second, the event cannot be prevented by the party who is supposed to fulfill the obligation/perform the obligation under the contract. Third, the non-fulfillment of the obligation/implementation of the contract is not the fault of the party.[21] These three elements must be fulfilled to categorize an event as force majeure. Another Supreme Court jurisprudence can be found in the Supreme Court Decision Number 587/PK/Pdt/2010, which consider flood and collapsed bridge due to heavy rains as force majeure events. However, up to the present, there are still disparities in court decisions in the determination of whether an event can be categorized as force majeure.[22]

C. Implementation of The Force Majeure Clause During The Covid-19 Pandemic Based on English Law

Indonesian legal system recognized the principle of *pacta sunt servanda*; and the English law has almost similar principle. The implementation is also limited by the doctrine of *rebus sic stantibus*. The English law system recognizes the *doctrine of frustration* as a condition to determine whether an event is considered force majeure; and the party can be released from responsibility to carry out obligations under contract. In the doctrine of frustration, an event is force majeure if there is a change in circumstances that causes the obligations to be very different from the one at the beginning, when the parties agreed to the obligation.[23]

According to the doctrine of frustration the existence of an event that can be categorized as a frustrating event does not necessarily relieve the parties of their obligation to carry out the contract, without a court decision to release.[24] Therefore, the determination of whether an event belongs to force majeure must be examined by the judge on a case-by-case basis and decided in a court decision. In addition, the party who claims that it did not carry out obligations in the contract because of the force majeure event must be able to prove that due to the change

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20 Nindry Sulistya Widiastiani, 689-719.

21 Irma Lina Habibah, "Keabsahan Force Majeure dalam Perjanjian di Masa Era Pandemi Covid-19", *Recital Review* 3, No. 1 (2021): 64-73.

22 Muhammad Irfan Hilmy and Muhammad Fadhali Yusuf, 182-201.

23 Charles Allen-Jones, "Force Majeure", *International Financial Law Review* 7, No. 5 (Mei 1998): 36-39.

24 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

in circumstances or the occurrence of the force majeure, the implementation of current obligations is radically different and erratic, and unpredictable, compared to the beginning of contract. The proof is also called evidence related to the impossibility of carrying out obligations due to force majeure events.[25]

So far, English courts have been very careful to implement the doctrine of frustration, because it may result in the contract being void since the parties will face the impossibility of performance; and be released from their obligations under the contract.[26] It can be concluded that in deciding whether a party can be released from obligations under contract due to force majeure, the English courts will, in principle, refer to the interpretation of the parties' agreement on the force majeure clauses in their contract; and it goes through the doctrine of frustration and impossibility.[27] However, in principle, the common law legal system interprets the doctrine of frustration in a very narrow sense. Courts tend to decide that the performance of contractual obligations is absolute. Deviation or discharge of the obligation to perform the contract can only happen if it is regulated explicitly in the contract.[28]

D. Force Majeure Clause in Aircraft Lease Agreement

1. Aircraft Lease in General

Most airlines procure aircraft to meet their operational needs in one of two ways: purchasing or leasing. In Indonesia, the requirements for purchasing and possessing aircraft are regulated in the provisions on aircraft ownership based on the Government Regulation Number 32 of 2021 on the Implementation of the Aviation Sector. Article 65 paragraph (2) of the Regulation requires commercial air transportation to fulfill a minimum number, one unit of aircraft ownership and possess a minimum number of two aircraft of the type that supports the continuity of flight operations according to the route operated. Therefore, it requires airlines to control at least three aircrafts.[29] This provision is a relaxation from the Law on Aviation, which requires airlines to have a minimum of five aircrafts and possess five other aircrafts so that the total number of aircrafts is ten units.[30]

The forms of aircraft procurement mostly include finance-lease and operating lease because the purchase price of aircraft tends to be expensive. Due to the

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25 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

26 Tay & Partners. "Covid-19: Navigating the Terms of an Aircraft Lease Agreement Amidst the Covid-19 Pandemic". https://taypartners.com.my/wp-content/uploads/2021/05/Covid19-20200430.pdf (accessed on March 8, 2022).

27 Barry Nicholas, "Force Majeure and Frustration", *American Journal of Comparative Law* 27, No. 3 (May 1979): 231-246.

28 Roy Granville McElroy, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration*, (New York: Cambridge University Press, 2014), 107.

29 Article 65 paragraph (2) Government Regulation Number 32 of 2021 on the Implementation of the Aviation Sector.

30 Article 118 (2) letter a of Law Number 1 Year 2009 on Aviation.

price, airlines have difficulty to fund purchase. Purchasing aircraft is also considered economically unprofitable because it requires a large investment. Therefore, airlines do not have the flexibility to change their fleet structure according to the company's business needs.[31]

In most aircraft leasing transactions, there are three parties: (1) the lessor, as the party providing financing services to the lessee; (2) the lessee, as the party that lease the aircraft and operates the aircraft for its business needs; and (3) the manufacturer, as aircraft manufacturers who receive cash payments from aircraft purchases.[32] Aircraft leasing schemes are generally carried out in the form of leasing. Lease agreement is a contract between the lessor and the lessee for an object/asset needed by the lessee. The lessor will buy the object/asset and the lessee will lease the asset from the lessor for a certain period. Leasing can be divided into two forms, namely financial leasing, and operational leasing.[33]

Aircraft leasing generally uses an operational leasing structure, where the lessor leases aircraft for a certain period. During the lease term, the lessee is obliged to pay a certain amount of rent to the lessor. At the end of the lease term, generally the lessee will return the aircraft to the lessor, unless there is an option to purchase the aircraft at the end of the lease term (purchase option). If ownership of the aircraft is transferred from the lessor to the lessee at the end of the lease term, the aircraft leasing structure is not operational leasing, but financial leasing. Today, almost all airlines use operational leasing schemes as a component of their business capital.[34] In addition to differences regarding the option to purchase assets at the end of the lease term, financial leasing generally has a longer term than operational leasing, because the lease period in financial leasing generally covers almost the entire economic value of the aircraft.[35]

2. Aircraft Lease Agreement

As mentioned above, one of the components of the lessee's obligations in the aircraft lease agreement scheme is payment obligations, which generally consist of rent, security deposits, and maintenance reserves, which are often referred to as additional rent (supplemental rent).[36] The rent on aircraft leasing can be fixed, meaning that it is agreed upon by the parties at the time of drafting the aircraft lease agreement and is valid for the duration of the lease; floating and then fixed (float to fix), meaning that it can be agreed upon the factors that affect the

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31 Hanafiah Ponggawa & Partners, *Pembiayaan Pesawat Udara - Teori dan Praktek*, (Jakarta: Hanafiah Ponggawa & Partners, 2015), 67.

32 Hanafiah Ponggawa & Partners, 61.

33 Hanafiah Ponggawa & Partners, 55.

34 Qiong Zuo. "Aircraft Leasing with Contracts." (Order No. 1494110, Singapore Management University, Singapura, 2011). https://www.proquest.com/dissertations-theses/aircraft-leasing-with-contracts/docview/873818946/se-2 (accessed on March 6, 2022).

35 Hanafiah Ponggawa & Partners, 56.

36 Donald Patrick Hanley, 49.

fluctuation of the rent between the period from the time of signing the contract to the date of delivery of the aircraft, then the rent will be determined at the time of delivery and is fixed; or costs are not fixed or floating, meaning that there is a possibility of adjustment of interest on the lease, the amount of which varies during the lease term.[37]

In general, lessor requires lessee to pay a certain amount of money as a guarantee for the implementation of obligations. It is known as a security deposit to protect the rights of lessor from possible payment failures by lessee. Maintenance reserves are used as collateral to cover scheduled aircraft maintenance costs, to minimize the risk of failure to pay aircraft maintenance costs by lessee. The amount of security deposit and maintenance reserves can be negotiated depending on the bargaining position of each party, especially lessee. The obligation to pay security deposits and maintenance reserves can also be carried out in other forms, not cash payments, namely by providing a standby letter of credit or bank guarantee issued by a bank approved by the parties.[38]

3. *Force Majeure* in The Aircraft Lease Agreement

Based on the principle of freedom of contract, the parties are free to agree on the provisions in the contract governing the relationship between the parties.[39] They are, among others, related to risks, responsibilities, payment schemes, and arrangements on force majeure events and their consequences for the implementation of the contract. The agreed provisions must not conflict with (1) applicable law; (2) decency; (3) public order or interest; and (4) human rights.[40] If the parties do not stipulate certain provisions in the contract, then the applicable provisions are the provisions according to the law governing the contract, including regarding force majeure.[41]

Provisions and implementation of force majeure in each jurisdiction is very different. The same event does not necessarily have the same consequences in every legal system. Therefore, it is important to include a force majeure clause in an international contract to equalize understanding and expectations of parties on the implementation of the force majeure clause. In aircraft lease agreement, parties must surely agree on force majeure clauses and consequences for the implementation of contract obligations. Aircraft lease agreements are agreements that incidentally are international in nature. Lessee and lessor are from different countries with different applicable legal provisions.[42]

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37 Donald Patrick Hanley, 50.

38 Ronald Scheinberg, *The Commercial Aircraft Finance Handbook* (New York: Routledge, 2018), 12.

39 Rini Apriyani (et.al.), *Force Majeure in Law* (Yogyakarta: Zahir Publishing, 2021), 4-5.

40 A. Rahim, *Dasar-Dasar Hukum Perjanjian: Perspektif Teori dan Praktik* (Makassar: Humanities Genius, 2022), 107.

41 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

42 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

Generally, force majeure clause in most aircraft lease agreement only accommodates failure to fulfill obligations by lessor. If the lessee plans to use force majeure as an excuse not to fulfill the obligation to pay rent due to a certain event, then it depends on whether the particular event is explicitly stated as an event that triggers the force majeure clause to apply.[43]

In the case of Tandrin Aviation Holdings Ltd (Tandrin) v Aero Toy Store LLC (ATS), ATS, as the buyer, refused to accept the delivery of an executive jet worth 31.75 million Euros from Tandrin. They argued that the refusal to accept the jet was based on a force majeure incident caused by a cataclysmic downward spiral of the world's financial markets. Tandrin then sued ATS to compensate for the losses suffered by Tandrin because they were forced to sell the jet for 24 million Euros. The Court ruled that, under the English law, changes in the economic or market situation that affect the benefit or convenience of the parties to the contract, which the obligations of the parties remain in effect, cannot be categorized as a force majeure event. The Court held that ATS had failed to demonstrate a relationship between extreme changes in economic circumstances that could trigger the application of force majeure clauses in the contract.[44]

4. Hell or High Water Clause

In aircraft lease agreement, lessee's obligation to pay rent during lease period is absolute by default. This absolute payment obligation is known as the *hell or high-water* principle. This hell or high-water clause is a very important clause for lessor, because the clause provides certainty for lessor on the performance of rent payment obligations from lessee, regardless of any conditions. The hell or high-water clause is a fundamental clause in the aircraft lease agreement, which is very unlikely for the lessor to agree to not include this clause in the agreement.[45]

Under the hell or high-water clause, even under any circumstances, either hell or high conditions, lessee must ensure that lessor receives all payments of rent as stipulated in agreement.[46] The formulation of hell or high-water clause in each agreement can be different but in general it contains an affirmation that lessee must carry out all obligations in the lease absolutely and unconditionally, without considering any event, regardless of how fundamental or unpredictable the event is. It includes, among others, the right to set-off, file a claim, unavailability of aircraft for any reason, or lessee's failure to obtain the necessary approvals to

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43 Tay & Partners.

44 David Thomas, "Frustration and Force Majeure: A Hard Line in English Law", *Construction Law International* 5, No. 2 (June 2011): 21-23.

45 Tay & Partners.

46 Donald Patrick Hanley, 52.

operate the aircraft.[47] The following are examples of hell or high-water clauses commonly found in aircraft lease agreement: [48]

> *"Absolute"*
> *Lessee's obligations under this Agreement are absolute and unconditional irrespective of any contingency whatever including (but not limited to):*
> *(a) any right of offset, counterclaim, recoupment, reduction, defense or other right which either party to this Agreement may have against the other;*
> *(b) any unavailability of the Aircraft for any reason, including a requisition of the Aircraft or any prohibition or interruption of, interference with or other restriction against Lessee's use, operation or possession of the Aircraft;*
> *(c) any lack or invalidity of title or any other defect in title, airworthiness, merchantability, fitness for any purpose, condition, design or operation of any kind or nature of the Aircraft for any particular use or trade, or for registration or documentation under the laws of any relevant jurisdiction, or any Total Loss in respect of or any damage to the Aircraft;*
> *(d) any insolvency, bankruptcy, reorganization, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against Lessor or Lessee;*
> *(e) any invalidity, unenforceability or lack of due authorization of, or other defect in, this Agreement; or*
> *(f) any other cause which, but for this provision, would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement;*
> *provided always, however, that this Section shall be without prejudice to Lessee's right to claim damages and other relief from the courts in the event of any breach by Lessor of its obligations under this Agreement, or in the event that, as a result of any lack or invalidity of title to the Aircraft on the part of Lessor, Lessee is deprived of its possession of the Aircraft."*

A few exceptions to the hell or high-water clause, which are rare in nature, can be done if lessee has a very good track-record. However, the exceptions can only be made limited to conditions where lessor violates its obligations, which causes lessee unable to operate aircraft during lease term. Without this limitation, in principle, it is unlikely that hell or high-water clause will not apply for any reason.[49]

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47 Donald Patrick Hanley, 50.
48 Donald Patrick Hanley, 50.
49 Tay & Partners.

It should also be noted that it is rare in the practice of aircraft lease agreement to allow lessee not to fulfill the obligation to pay rent on the grounds that lessee cannot operate aircraft because of cancellation or aircraft grounded.[50]

In addition to the hell or high-water provisions above, most aircraft lease agreement also include a clause regarding release of lessee's rights to any set-off claims, so that if lessee's has a claim against lessor, it cannot relieve lessee from the obligation to pay rent.

5. Hell or High Water Clause Applicability

Bunker argues that the implementation of the hell or high water clause is unfair to lessee in the operating lease scheme because it is different from a financial lease where lessor expects full repayment of costs incurred to possess the aircraft, given the nature of financial leases which are similar to financing or loans.[51] Regardless of Bunker's opinion, English courts tend to uphold the contract among parties if a hell or high water clause has been included in the contract. For example, in the case of Celestial Aviation Trading 71 Limited v Paramount Airways Private Limited, Judge Teare argued that the lessee could not claim to set-off payment obligations with the lessor's obligations through a reduction in the value of the security deposit because the terms of the contract stated that the lessee's payment obligations were absolute, regardless of any 'defense, set-off, or any claim' from the lessee.[52] Hanley also views that if there are no conflicting legal considerations or legal policies, then the hell or high water clause that has been agreed upon by contracted parties should be enforced.[53]

A test of the hell or high-water clause was also found in the case of Wilmington Trust SP Services (Dublin) Ltd (Wilmington) v SpiceJet Ltd (SpiceJet). The English court granted Wilmington's claim as the lessor in connection with SpiceJet's late payment of rent and other payment obligations. As a background, SpiceJet leased three aircraft from Wilmington, one of which was a Boeing 737-Max 8. SpiceJet argued that its ability to operate aircraft was significantly limited by government policies related to the Covid-19 pandemic and the ban on the operation of Boeing 737-Max 8, caused by two fatal accidents involving the same type of aircraft. The limitation is unpredictable, and it cannot be predicted when the limitation will end. However, the court is of the opinion that by accepting the lease, SpiceJet has also accepted all risks of loss or damage, or other incidents related to the operation of aircraft because, in exchange, SpiceJet received a promise and statement from Wilmington not to interfere with SpiceJet's comfortable operation of aircraft (quite enjoyment). The court also referred to the hell or high-water clause in the lease

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50 Tay & Partners.
51 Donald Patrick Hanley, 50.
52 Donald Patrick Hanley, 51.
53 Donald Patrick Hanley, 178.

agreement between Wilmington and SpiceJet, which stated that the obligation to pay rent was absolute and unconditional, and without taking into account, among other things, the unavailability of the aircraft for any reason. Current conditions are not radically different from when SpiceJet signed the lease agreement, as the operating ban has so far only affected approximately 10% of the agreed lease term, so the effect is not so significant. Furthermore, there is no common purpose that SpiceJet should profit from operating the aircraft.[54]

In the case of Salam Air SAOC (Salam Air) v. Latham Airlines Group SA (Latham Airlines), Salam Air intends to disburse the standby letter of credit, in lieu of a security deposit of three months rent given by Latham Airlines. Latham Airlines as the lessee has been in arrears in rental payments. Latham Airlines tried to prevent the disbursement by taking Salam Air to court. They argued that the purpose of the aircraft lease agreement among the parties had been frustrated by the Omani government's policy of banning passenger flights to and from Oman during the Covid-19 pandemic.[55] Latham Airlines is of the opinion that the policy of the Omani government is a frustrating event, and therefore Salam Air has no right to demand that Latham Airlines fulfill its contractual obligations. The English court rejected Latham Airlines' claim on the grounds that it had not met the high threshold required by the Court to categorize an event as a frustrating event.[56] The court also argued that the aircraft lease agreement, which contains a hell or high-water clause, indicates a risk allocation agreed upon by the parties. By accepting an aircraft lease agreement containing a hell or high-water clause, lessee is deemed to have agreed to pay rent without considering the future operational conditions of the aircraft.[57]

Furthermore, in the case of Iris Helicopter Leasing Ltd. v Elitaliana Srl, Elitaliana Srl argued that the doctrine of frustration should be applied to the agreement between them and Helicopter Leasing Ltd. because the leased helicopter was detained by the Italian authorities for more than eighteen months. Elitaliana Srl was in arrears in paying taxes to the Italian authorities. Elitaliana Srl believes that the Italian authorities have acted in violation of legal provisions because there is no basis for imposing the tax arrears. However, the court still rejected Elitaliana Srl's argument by referring to the hell or high-water clause in the agreement and stated

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54 Clifford Chance. "Wilmington Trust SP Services (Dublin) Limited and Others vs SpiceJet Ltd – Case Summary". https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/05/goshawk-v-spicejet-case-summary-may-2021.pdf (accessed on March 9, 2022).

55 Reed Smith. "Lessors Not Frustrated by 'Hell or High' Water Clauses". https://www.reedsmith.com/en/perspectives/global-air-freight/2022/01/lessors-not-frustrated-by-hell-or-high-water-clauses (accessed on March 2, 2022).

56 Marcus Roberts, "Current Contractual Issues: Frustration in the Age of Covid-19", (delivered on Auckland District Law Society CPD Seminar Paper 2021, March 9, 2021).

57 Watson Farley & Williams. "English Court Rejects Covid-19 Frustration Argument in Aircraft Leasing Case". https://www.wfw.com/articles/english-court-rejects-covid-19-frustration-argument-in-aircraft-leasing-case/ (accessed on December 12, 2021).

that Elitaliana Srl had accepted the risks of aircraft operation by signing the aircraft lease agreement.[58]

E. Implementation of Force Majeure on the Covid-19 Pandemic in Relation to Aircraft Lease Agreement

The Covid-19 pandemic has caused airlines to massively grounded their aircrafts because they cannot operate due to flight travel restrictions in the world. Research from Nhamo et al. indicates that most airports are even struggling to meet the unprecedented demand for aircraft parking spaces.[59]

The International Air Transport Association (IATA) released a data regarding decline of 74.4% passengers in February 2021, more than a year since the appearance of the Covid-19 outbreak for the first time, compared to the number of passengers in the same month before the Covid-19 outbreak on February 2019. Airline traffic in Asia Pacific specifically decreased by 95.2% in February 2021, compared to February 2019. Passenger capacity fell by 87.5% and occupancy rate of the aircraft (seat load factor) decreased by 50% to 31.1%. IATA states that the decline in demand for the aviation industry was due to simultaneous travel restrictions, despite relaxation of domestic travel.[60] IATA predicts the number of losses experienced by the aviation industry caused by Covid-19 in 2020-2022 is cumulatively at US$201 billion.[61] IATA's previous predictions on the impact of the Covid-19 pandemic on the performance of the aviation industry, especially airlines, have been corrected several times due to the fact that the situation is worse than its prior predictions. This is also reflected in the prediction of cash burn in 2021, which was previously predicted to be experienced by airlines of around US$48 billion, which was later corrected by the IATA for the worse, at US$75 billion to US$95.[62]

The IATA released IATA World Air Transport Statistics (WATS) that contains aviation industry performance figures. It shows the devastating impact on global air transportation during the Covid-19 pandemic crisis, including decrease in revenue from passengers by 69% in 2020, amounting to US$189 billion, with a total net loss of US$126.4 billion. The decline in the number of passenger transportation in 2020 was declared the highest decline in the history of the aviation industry since 1950.[63]

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58 Reed Smith.

59 Kaitano Dube, Godwell Nhamo, and David Chikodzi, 1-12.

60 International Air Transport Association (IATA). "Negative Passenger Demand Trend Continues in February". https://www.iata.org/en/pressroom/pr/2021-04-07-02/ (accessed on March 6, 2022).

61 IATA. "Losses Reduce but Challenges Continue – Cumulative $201 Billion Losses for 2020-2022". https://www.iata.org/en/pressroom/2021-releases/2021-10-04-01/ (accessed on March 6, 2022).

62 IATA. "COVID-19 Cash Burn Continues – Urgent Preparations for Restart". https://www.iata.org/en/pressroom/pr/2021-24-02-01/ (accessed on March 6, 2022).

63 IATA. "Airline Industry Statistics Confirm 2020 Was Worst Year on Record". https://www.iata.org/en/pressroom/pr/2021-08-03-01/ (accessed on March 6, 2022).

In Indonesia, the Government through Presidential Decree Number 12 of 2020 on the Designation of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster has designated Covid-19 as a national disaster, meaning the impact of the Covid-19 pandemic and its implications are so significant. However, the coordinating minister for Political, Legal, and Security Affairs, Mohammad Mahfud Mahmodin, explained that the determination of the presidential decree does not necessarily become the basis for a party in the contract to claim the occurrence of a force majeure event but the conditions to be seen case by case.[64]

The following table compares the legal provisions of force majeure in Indonesia and English.

Table 1. Comparison between Indonesian and English Law on Force Majeure

Indonesian Law	English Law
The Indonesian law respects contract agreed upon by parties as law for the involving parties (*pacta sunt servanda*)	Like the Indonesian law, the English law also upholds contracts between the parties as provisions governing the affairs of involving parties
Obligations in the contract can be deviated by the application of the doctrine of *rebus sic stantibus*	Obligations in the contract can be deviated by the application of the doctrine of frustration.
Force majeure is not known explicitly, but stated implicitly in Article 1244 and Article 1345 of the Civil Code	Force majeure is not known explicitly but it can be the implementation of the doctrine of frustration due to the occurrence of a frustrating event.
A force majeure event does not necessarily become a reason for the non-fulfillment of obligations in the contract by the affected party.	Like the Indonesian law, a force majeure event does not necessarily become a reason for the non-fulfillment of obligations in the contract by the affected party.
The judge's considerations in deciding the force majeure case are based on (1) the influence of the circumstances/events on the fulfillment of the obligation by the parties; and (2) force majeure provision in the contract.	Judges' considerations in deciding force majeure cases are based on (1) force majeure provision in the contract; and (2) there must be an impossibility of performance caused by a force majeure event.
A force majeure event does not necessarily cause the contract to be void.	The implementation of the doctrine of frustration causes the

[64] Muhammad Fajar Hidayat dan Desi Sommaliagustina, "Implikasi Yuridis Penetapan Covid-19 sebagai Bencana Nasional dalam Pelaksanaan Kontrak", *Jurnal Selat* 8, No. 1 (October 2020): 67-88.

	contract between the parties to be void.
There are disparities in court decisions in Indonesia on the criteria of force majeure in contract implementation.	The English courts consistently apply a high threshold like in the provided examples which all reject the application of force majeure.

Both have something in common, namely the force majeure provisions or clauses in principle regulate the deviation from the obligation to perform by one or the parties based on the contract due to the occurrence of events beyond the control of one or the parties affected by the event. The force majeure provision deviates from the principle of *pacta sunt servanda* that the agreement made by the parties applies as law. Nevertheless, there are still differences of opinion regarding the extent to which force majeure can be interpreted and then applied under the Indonesian law. Is it necessary to prove that a force majeure event directly affects the ability of a party to perform its obligations under the contract?

There are two possible consequences of a force majeure event, namely temporary and permanent consequences. If the event temporarily obstructs the performance of the contract, the obligation to perform the contract can only be suspended. Then, if the contract execution is hindered due to permanent force majeure, the affected party can be released from the obligation to implement the contract.[65] Kaya and Dharmawan, in Hidayat and Sommaliagustina, are of the opinion that the absolute consequence of force majeure is the release of parties affected by force majeure from the obligation to pay fees, compensation, and interest arising from the terms of the contract. It also causes the contract to be void. Force majeure, which is relative in nature, does not result in the contract being void.[66]

Whether Covid-19 is a force majeure or an event that cannot be predicted by the parties, experts have dissenting opinions. Some argue that the occurrence of a pandemic like Covid-19 is a recurring event, referring to previous pandemics in the world. According to medical publications, for example, before Covid-19, the occurrence of a local or global epidemic in the future was statistically certain. Due to the nature of the pandemic as a recurring event, the possibility of a recurrence of the event should be predictable by the parties.[67]

A criterion to determine a force majeure event is that the event must be unpredictable for the affected party. It means that at the time a party enters into the contract, the party is unable to predict the risk of the occurrence of the force majeure event. The predictability can be tested by considering whether a party

[65] S. Esra Kiraz and Esra Yıldız Üstün, 437-465.
[66] Muhammad Fajar Hidayat and Desi Sommaliagustina, 67-88.
[67] Andre Janssen and Christian Johannes Wahnschaffe, 466-495.

acting fairly in the same situation could have predicted the occurrence of the event at the time of entering the contract.[68]

To be considered force majeure, an event must also be unexpected, unpredictable, and beyond the control of the affected party. Janssen and Wahnschaffe suggest that 'reasonableness' is the key to determining whether the consequences of an event cannot be controlled by the affected party. The debtor must have made every reasonable effort to protect his ability to carry out the obligations in the contract, including if the implementation of the obligations causes the debtor to pay higher costs, reduce the debtor's profits, even to the point of harming the debtor financially.[69]

Both Indonesian and English laws do not necessarily make a force majeure situation an excuse for the affected party not to carry out obligations. The force majeure alone cannot relieve a party of obligations under contract, but the impact of the force majeure must really occur beyond the control of the affected party, and directly cause the affected party to have difficulty in carrying out obligations.[70] The Covid-19 cannot necessarily be considered a force majeure situation but the impact of Covid-19, such as the government's lockdown policy, closure of national borders, and restrictions on activities are circumstances that can be categorized as force majeure.[71] This categorization also cannot necessarily apply to all business actors in all sectors but it is necessary to look at the causal relationship between the pandemic and the difficulty for the affected parties to carry out obligations.[72] For example, business actors in the tourism sector and the aviation industry, of course, are greatly affected by the crisis caused by the Covid-19 pandemic. Furthermore, a judge's decision is still needed to approve the release of obligation because it is affected by force majeure.

Judges does not only examine the occurrence of force majeure event but also the contract that binds parties. If the contract has provided for force majeure clauses and events in accordance with the provisions, the affected party can be released from obligation based on the terms of contract. However, in the event of a situation beyond the control of a party but the situation does not include force majeure according to the terms of the contract among parties, judge will assess whether the party is truly unable to carry out its obligations due to a force majeure situation.[73]

In relation to aircraft lease agreement, the hell or high-water clause limits the judge's interpretation in applying force majeure provisions. In general, the clause is

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68 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

69 Andre Janssen and Christian Johannes Wahnschaffe, 466-495.

70 S. Esra Kiraz and Esra Yıldız Üstün, 437-465.

71 S. Esra Kiraz and Esra Yıldız Üstün.

72 Dona Budi Kharisma. "Pandemi Covid-19 Apakah Force Majeure?". Rechtsvinding. https://rechtsvinding.bphn.go.id/jurnal_online/PANDEMI%20COVID19%20APAKAH%20FORCE%20MAJEURE%20.pdf (accessed on March 9, 2021).

73 Andre Janssen and Christian Johannes Wahnschaffe, 466-495.

structured rigidly in such a way to form a statement of agreement from lessee on the obligation to fulfill the contract regardless of events that may limit the obligations. By signing an aircraft lease agreement that includes a hell or high-water clause, lessee is deemed to have agreed to the clause and has considered the risks that may arise during the lease term.

This study is of the position to view the Covid-19 pandemic as a force majeure event because it has very distinctive nature that affects the world economy broadly and significantly. It cannot be predicted and controlled by parties to contract, especially considering its impact on lessee of aircraft lease agreement. The current restrictions on flight travel, both domestically and internationally, are not something that can be predicted, given the impact of this government policy to the aviation industry.[74]

The Covid-19 pandemic may not be categorized as a force majeure event but government policies following the Covid-19 pandemic can be categorized as force majeure because it makes airlines as lessees in aircraft lease agreement to be unable to operate the leased object. They cannot generate income to pay rent. There is a cause-and-effect relationship between the Covid-19 pandemic, which resulted in the issuance of government policies, and the inability of airlines to operate their aircraft. It is ultimately impossible for airlines to carry out obligations. Therefore, the closure of national borders, flight restrictions, and lockdowns caused by the Covid-19 pandemic should be categorized as force majeure.[75]

The situation where airlines cannot operate almost all their aircrafts, while the main income is derived from the operation of the aircraft, is a condition beyond prediction and the risk taken by the airline. This condition is a special case for airlines. Therefore, the failure to pay rent by airlines due to the Covid-19 pandemic should be categorized as a force majeure event. It is supported by data that the losses suffered by airlines due to the Covid-19 pandemic have been beyond the expectations and predictions of various parties since the beginning of the pandemic. Stakeholders of the aviation sector cannot predict the worst-case scenario for the impact of the pandemic on the aviation sector.[76]

Although aircraft lease agreement generally includes a hell or high-water clause, it is also necessary to study the background of the inclusion of the clause. The hell or high-water clause can not only be interpreted explicitly as imposing an absolute obligation to carry out the contract to lessee but also to protect lessor against claims without good faith from the lessee to avoid the obligation to pay rent. The hell or high-water clause is included to limit the possibility of claims from lessee not to carry out payment obligations but should not be applied in absolute

[74] S. Esra Kiraz and Esra Yıldız Üstün, 437-465.
[75] S. Esra Kiraz and Esra Yıldız Üstün.
[76] S. Esra Kiraz and Esra Yıldız Üstün.

terms without considering the condition of lessee at the time the claim is submitted.

The Covid-19 pandemic is very unpredictable and has caused the financial condition of airlines to be very bad.[77] In categorizing the Covid-19 pandemic as a force majeure event, it is not necessary to immediately waive the airline's obligation to pay rent under the aircraft lease agreement. However, neither the lessor nor the judge can immediately reject the lessee claim due to the Covid-19 pandemic, on the grounds that the aircraft lease agreement that has been approved by the lessee includes a hell or high-water clause. Lessors and judges must be able to examine on a case-by-case basis whether the lessee's non-performance of the obligation to pay rent is really because the lessee is affected by the Covid-19 pandemic.

In addition, it is also necessary to examine lessee's intentions in solving problems that arise due to failure to pay rent. The lessee's good faith in negotiating with lessor, agreeing to pay part of the payment obligation, or reporting financial statements openly to lessor needs to be taken into consideration to determine whether the lessee is truly unable to perform obligations under the contract due to things beyond control or power. It is because there is a need for intervention or special actions taken by considering the real difficulties of lessee to carry out the obligation to pay the rent, among others, by requiring lessor to restructure the payment schedule. In the case of the lessee's failure to pay, the bargaining position of the airline as very unfavorable to ask the lessor to renegotiate the payment scheme. Therefore, special treatment and intervention are needed, especially from judges in deciding cases of force majeure interpretation of aircraft lease agreement during the Covid-19 pandemic.

This restructuring option is also the most feasible and best long-term option in the current situation to ensure airlines and the aviation industry survive and recovered after the Covid-19 pandemic crisis.[78] The downturn in the airline industry will certainly affect the ability of the business that depends on airline's ability to lease its assets. This option has also been used by several airlines such as Aeromexico,[79] Philippine Airlines, Malaysia Airlines, Thai Airways, Virgin Australia and AirAsia X.[80] The Indonesian airline, Garuda Indonesia, at the time of writing is in

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77 IATA, "Airline Industry Statistics Confirm 2020 Was Worst Year on Record".

78 Tay & Partners.

79 Pilar Wolfsteller. "Aeromexico Shows 'Signs of Recovery' in Q4". https://www.flightglobal.com/strategy/aeromexico-shows-signs-of-recovery-in-q4/147541.article (accessed on March 9, 2021).

80 Liz Lee dan Jamie Freed. "Malaysia's AirAsia X Creditors Agree Restructuring, Airbus Orders Cut". https://www.reuters.com/business/aerospace-defense/airasia-x-restructuring-plan-backed-by-first-group-creditors-2021-11-12/ (accessed on March 9, 2021).

the process of suspending its debt payment obligations in the commercial court and seeking to restructure contracts with its creditors.[81]

F. Conclusion

Both Indonesian and English laws recognize force majeure event as the basis for any party to deviate from its contractual obligations, if the affected party can prove that the event directly affects their ability to perform the contract. In the English law, courts consistently reject the application of force majeure that is not stipulated explicitly in the contract, while Indonesian court decisions on the implementation of force majeure are vary.

Aircraft lease agreement rarely includes force majeure clause applicable to lessee. In fact, most aircraft lease agreement includes a hell or high-water clause that requires lessee to fulfill their obligation to pay rent regardless of any circumstances. The English courts consistently apply the hell or high-water clause to decide cases related to aircraft lease agreement. This study is of the position that the Covid-19 pandemic and its impacts on the aviation industry are very distinctive. The Covid-19 has fulfilled the elements of a force majeure event. As the lessees in the aircraft lease agreement, airlines are almost unable to operate their aircrafts during the Covid-19 pandemic. However, they still face obligations to pay rent due to the hell or high-water clause in the aircraft lease agreement. The determination of the Covid-19 pandemic as a force majeure event of the aircraft lease agreement does not necessarily relieve the lessee's obligation to pay rent. Nevertheless, it is needed as a basis for parties to renegotiate or restructure lease payment scheme by considering the impacts of the Covid-19 pandemic on the ability of parties to fulfill its contractual obligations.

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