

The Principle of *Rebus Sic Stantibus* as an Alternative Solution for Banks in Negotiating Bad Debt Settlement Due to Force Majeure after Earthquake in the Special Region of Yogyakarta, Indonesia

Lathifah Hanim

Doctoral Student of Law Science Program, Universitas Sebelas Maret (UNS) Surakarta. Lecturer at the Faculty of Law, Universitas Islam Sultan Agung (Unissula) Semarang, Jalan Raya Kaligawe KM 4 Semarang.. Email: Lathifah.Hanim@yahoo.co.id.

Abstract

The research is conducted to answer the research problem, which is whether the principle of *rebus sic stantibus* can be used as an alternative solution for banks in negotiating bad debt settlement due to force majeure after earthquake in the Special Region of Yogyakarta, Indonesia. The results of the research show that the principle of *rebus sic stantibus* can solve the problems of changes in circumstances. This indicates that the principle of *pacta sunt servanda* can be substituted by the principle of *rebus sic stantibus*. This principle is based on the assumption that an agreement can be terminated if the circumstances change since the period of time when the agreement was made. Therefore, based on the principle of *rebus sic stantibus*, the parties who agree on a certain agreement is allowed to postpone their involvement in implementing the agreement, and they are even justified to withdraw from the agreement. The conclusion of the research is that the principle of *rebus sic stantibus* is appropriate to be implemented by banks in solving the problems of changes in circumstances in negotiating bad debt settlement due to force majeure after earthquake.

Keywords: Force Majeure, principle of *rebus sic stantibus*

I. Introduction

This research is conducted for the reason that the Special Region of Yogyakarta is one of the many areas in Indonesia that is prone to earthquake. Therefore, the research is expected to contribute to knowledge in terms of providing comprehension to law enforcement officials and scholars especially treaty law experts in implementing agreement in force majeure in Indonesia. In particular, the researcher intends to provide legal certainty or a solution for creditors (banks) in negotiating bad debt settlement due to force majeure after earthquake. Legal agreements related to force majeure are expected to provide solutions for the implementation of the agreement in the society related to the principle of *pacta sunt servanda* or *rebus sic stantibus*.

There are two reasons why debtors do not comply with the responsibilities settled in the agreement. The first reason is the debtor's mistakes, which may occur due to deliberate actions or negligence. The second reason is force majeure, which is beyond the debtors' will, a reason for which the debtors cannot be blamed. If the debtors do not comply with their responsibilities due to their faults, this is called a breach of contract. If the debtors do not meet the obligations not because of their faults, this means that there is a force majeure.

When the debtors are said to be in a force majeure, the creditors do not have the rights to demand for compensation as they do in breach of contract cases. Force majeure refers to the situations in which debtors are unable to fulfill their responsibilities due to unforeseen conditions beyond their control, and thus they are exempt from paying compensation and interests. A force majeure may lead to termination of an agreement. This means that the creditors cannot ask for compensation, the debtors can no longer be declared negligent and the risk does not belong to the debtors.

An example of a force majeure happens in the District Court of Sleman, case number 105.Pdt.G-2010-PN.Slmm. The prosecutor of the case is Agus Sukarno, the first defendant is PT Bank Central Asia Tbk. cq. PT BCA Tbk. Regional Office Semarang cq. PT BCA Tbk. main branch office Yogyakarta, and the second defendant is Arif Hidayat, S.E., and the third defendant is the State Property Office and Auction (*Kantor Pelayanan Kekayaan Negara dan Lelang/KPKNL*) of Yogyakarta. The prosecutor is the debtor, and the defendant, PT BCA Yogyakarta, is the creditor. The creditor gives a 70 million Rupiah loan to the debtors for housing purchase /home improvement (KPPR). The agreed credit period is 15 (fifteen) years. The second defendant is the winner of the auction for the collateral object conducted based on the second announcement on encumbrance auction execution. The third defendant is KPKNL as the intermediary party and the executor of the auction. The collateral for the credit is an ownership certificate (*Sertifikat Hak Milik/SHM*) number 3949/Sariharjo, which is a certificate verifying the prosecutor's ownership of a property situated in the Village of Sariharjo, Ngaglik, Sleman, Yogyakarta. In 2006, an earthquake occurred in Yogyakarta, causing damages to the prosecutor's property and causing difficulties in his business. For that reason, the installment payment that is supposed to be paid to the first defendant is delayed. However, the prosecutor still made the effort to make the

payment. The delay in payments is not caused by a breach of contract, as alleged by the first defendant, but it is an after effect of the earthquake, which affects the economic and business situation of the prosecutor as an earthquake victim. The decision of the judges state that the exceptions filed by the first and the second defendant through their attorneys cannot be entirely accepted. The prosecutor filed a reconvention, in which his claim is partially granted. The reconvention states that the prosecutor, which is the second defendant of the convention, is a buyer with good intention who should be protected by the law. The reconvention also decides that the auction treatise number 14/2009 dated 1 July 2009 is valid according to law. Therefore, the reconvention defendant/the convention prosecutor is guilty and has the obligation to immediately empty his property (land and house) and hand over the ownership certificate number 3949/Sariharjo to the reconvention prosecutor, together with the buildings and everything built thereon. If the reconvention defendant is not willing to do the handover, the head of the court of Sleman will conduct the handover process forcibly with assistant from the police department; and the convention prosecutor/the convention defendant must pay for the courts fee of Rp 421.000.¹

In the case above, the judge of the district court of Sleman has not considered the action of the prosecutor (debtor) as an action that might be based on force majeure. The prosecutor claims that after the 2006 earthquake happened, his house is damaged and his business is affected. The situation makes it hard for him to make payments in the credit installments to the first defendant. The delay in the payment is caused by force majeure, in which the earthquake affected his economic and business situations.

The law of treaties in Indonesia, which is subject to the Indonesian Civil Law Code (KUHPerdata) as a manifestation of the values contained in the Napoleonic Code, does not acknowledge the principle of *rebus sic stantibus*. The Napoleonic Code that was established during the era of liberalism glorifies the principle of *pacta sunt servanda*. The Napoleonic Code is an amendment to the strict implementation of canonical laws relating to the principle of *rebus sic stantibus*, which intimidated the interests of the bourgeoisie at that time. The principle of *pacta sunt servanda* was then converted into the Article 1338 of the Indonesian Civil Law Code, which states:

“Any agreement that was validly made is enacted as law for those who make the agreement.” “An agreement cannot be withdrawn unless both parties consent or without appropriate reasons according to the law.” “An agreement must be executed with good intention.”²

The principle of *rebus sic stantibus* in many ways still cause different interpretations in its implementation. If the principle of *rebus sic stantibus* is associated with the principle of *pacta sunt servanda*, there is a slight contradiction between the two.³ The principle of *pacta sunt servanda* states that an agreement must be fulfilled by as a mandatory treaty according to the law. The principle of *rebus sic stantibus* states that certain treaties may be postponed, and even become inapplicable because of a fundamental change of circumstances. The definition of such circumstances is as follows:

The global economic crisis makes many world class companies collapsed. The crisis also occurred in Indonesia in 1997, marked by the depreciation of Rupiah to nearly 300% against the US Dollar. Many companies in Indonesia had binding contracts or agreements with their trading partners overseas, which requires them to use global currencies such as the US Dollar and GB Pound sterling. Due to the economic crisis, those companies have to bear a heavy burden in implementing the clauses in their agreements with their trading partners. The implementation of an agreement is principally subject to the principle of *pacta sunt servanda*, which can be interpreted as “promises must be kept”. Gradually, the principle of *c* is challenged by people who argue that this principle only exists in a state where there is no radical change in circumstances during the implementation of the agreement. Therefore, in many countries, especially those that apply common law system, the principle of *pacta sunt servanda* is modified to be more flexible by adopting the principle of *rebus sic stantibus* that reached its glory during the 12th to the 14th century.⁴

The earthquake that occurred in Yogyakarta in May 2006 was a natural disaster, which occurred unexpectedly beyond the power of human being. The strong tectonic earthquake that shook Yogyakarta and Central Java, on May 27, 2006 at approximately 5:55 PM lasted 57 seconds, and was measured 5.9 on the Richter scale. The earthquake killed 3,522 people died and destroyed 5,412 buildings.⁵ An earthquake is a shock that shook an area ranging from low level to high level of harm. An earthquake with a high scale can make a devastated anything that is on the surface of the earth. Houses, buildings, towers, roads, bridges, parks, and so forth can be crumbled to the ground when hit by a large earthquake

¹Data obtained from the district court of Sleman on 21 Januari 2013.

²Faisal Akbaruddin Taqwa, *Rebus Sic Stantibus in the Repertoire of Treaties Law*, accessed from www.isjn.or.id on 10 September 2012 at 23:10 WIB (GMT+7).

³*Ibid*

⁴Faisal Akbaruddin Taqwa, *Rebus Sic Stantibus in the Repertoire of Treaties Law*, accessed from www.isjn.or.id on 10 Oktober 2012 at 23:10 WIB (GMT+7).

⁵Data obtained from a Research conducted in the Statistical Office of the Data Center (*Pusat Data Kantor Statistik*) of Yogyakarta on 20 Februari 2013.

Bad debts in Yogyakarta as an effect of the earthquake have not been entirely resolved. The Bank of Indonesia recorded by March 31, 2014, out of 88.3 billion Rupiah of bad debts, there was approximately 53 billion Rupiah cleared by commercial banks and rural credit banks (*Bank Perkreditan Rakyat/BPR*). In Yogyakarta, 555 of the bad debts occurred in the Bank of the People of Indonesia (*Bank Rakyat Indonesia/BRI*).¹

Based on the description above, the researcher intends to and is interested in conducting a research and write a journal based on the findings of the research. The research is entitled: “The Principle of *Rebus Sic Stantibus* as an Alternative Solution for Banks in Negotiating Bad Debt Settlement Due to Force Majeure after Earthquake in the Special Region of Yogyakarta, Indonesia”

II. Problem Statement

The research question is whether the principle of *rebus sic stantibus* can be used as an alternative solution for banks in negotiating bad debt settlement due to force majeure after earthquake in the Special Region of Yogyakarta, Indonesia.

III. Literature Review

1. The Principle of *Rebus Sic Stantibus*

The term *rebus sic stantibus* is derived from a Latin sentence, “*contractus qui habent tractum succesivum et dependentiam de future rebus sic stantibus intelligentur*,” which can be loosely translated as “Contracts providing for successive of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same.”²

The principle of *rebus sic stantibus* is implemented in the international law and acknowledged by most modern authors.³ Most international law authors agree that this principle means that any treaty or agreement is valid as long as the basic or the fundamental circumstances remain the same. The same opinion is expressed by Boediono⁴ who states that an agreement is made and implemented as long as the situations and the circumstances of the agreement makers do not change.⁵

According to the Black’s Law Dictionary⁶ *rebus sic stantibus* is the principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances.

Rebus sic stantibus is one of the principles that can be used to accommodate whenever there is a fundamental change in circumstances that is unfavorable for one of the parties in the agreement. The court will be used if the renegotiation of the agreement does not reach a consensus decision. When difficult circumstances arise, the first step to be taken is to renegotiate between the two parties in order to continue the agreement. If the renegotiation fails, then the court will take part in modifying the agreement.

2. Bank Credit Agreement

Credit agreement is regulated in the Act No. 7 of 1992 as amended by the Act No. 10 of 1998. This Act is a *lex specialis*. The *lex generalis* is the Indonesian Civil Law Code (KUHPerdata) Book III Chapter XIII on Loan, and Chapter I-IV on General Provisions.⁷

In the Indonesian Civil Law Code, there is no provision on how an agreement should be formed, meaning that an agreement can be in either written or unwritten form. In a credit agreement, there is also no provision that the agreement must be in a particular form.⁸

In banking practice, credit agreement is usually based on the Second Book on Collateral Loan (bank) and the Third Book of the Indonesian Civil Law Code. The matters pertaining to bank collateral loan are subject to the provisions of the collateral law as regulated in Book II of the Indonesian Civil Law Code and other

¹ *Ibid.*

² Asril Sitompul, “*Pacta Sunt Servanda in Treaties Law*”, on <http://pihilawyers.com/blog/p=16> accessed on 17 Februari 2013 at 22:30 WIB (GMT+7).

³ Ian Brownlie, *Principles of Public International Law*, 4th Ed, Oxford, London, 1990, page 620.

⁴ Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia (The Principle of Balance for Indonesian Treaties law, Treaties Law Based on the Indonesian Principle of “Wigati”)*, Citra Aditya Bakti, Bandung, 2006, page 473.

⁵ Rebecca M.M. Wallace, *International Law*, 2nd Ed, Sweet & Maxwell, London, 1992, page 237.

⁶ Bryan A. Garner, *opcit*, page 1381

⁷ Sri Gambir Melati Hatta “*Perkreditan dan Tantangan Dunia Perbankan*” (*Credit and the Challenges in the Banking World*) Article on www.legalitas.org accessed on 20 Desember 2013 at 11:00 PM WIB (GMT+7).

⁸ Djuhaendah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah dalam Konsepsi Penerapan Asas Pemisahan Horizontal (Suatu Konsep dalam Menyongsong Lahirnya Lembaga Hak Tanggungan) (Collateral Material House for Land and Other Materials Attached to the Land in the Conception of Implementing Horizontal Separation Principle (A Concept in Anticipating the Establishment of Mortgage House)*, Citra Aditya Bakti, Bandung, 1996, page 179

legislations. Other matters related to credit agreement is subject to the provisions of the agreement as established in Book III of the Indonesian Civil Law Code.¹

The legal basis of credit agreement can also be found in the Cabinet Presidium Instructions No. 15/IN/10/66 on Credit Policy Guidelines dated October 3, 1966 in connection with the Bank of Indonesia Unit I Circular Letter No. 2/539/UPK/Pemb dated October 8, 1966; the Bank of Indonesia Unit I Circular Letter No. 2/649/CGU/Pemb dated October 20, 1966; and the Cabinet Presidium Instructions No. 10/EK/2/1967 dated February 6, 1967, which states that banks are prohibited from giving loan in any form without a clear credit agreement between the bank and the customer or the Central Bank and the other banks. In addition, the Board of Directors of the Bank of Indonesia Decree No. 27/162/KEP/DIR and the Bank of Indonesia Circular Letter No. 27/7/UPPB dated March 31, 1995 on the Obligation to Formulate and Implement Bank Credit Policy for Commercial Banks states that every approved credit agreed by the credit applicant must be stated in a written credit agreement.²

A credit agreement is an agreement between a debtor and a creditor (such as banks) in which the debtor is obliged to pay the loans granted by the creditor, based on the terms and conditions agreed by both parties. Credit agreement is also called a principal or fundamental agreement.³

A credit agreement is called a fundamental agreement because it involves a handover of an amount of money from the creditor (such as a bank) to the customer (the debtor). The agreement thus serves as a warrant of the rights and obligations limitations between the creditor and the debtor as well as a tool for monitoring the credit. The collateral agreement is an *accessoir* (follow-up) agreement that functions to convince the bank (creditor) that the debtor has the ability to pay off the loan in accordance with the agreement.⁴

3. Force majeure

A force majeure is a situation happening beyond a debtor's will and control, which makes the debtor unable to perform his/her obligations, for example natural disasters such as floods and earthquakes, a terrible fire, etc.⁵

There are three factors defining a force majeure.⁶ First, the debtor cannot perform his/her obligations. Second, the situations are not caused by the debtor's mistakes. Third, the circumstances are caused by unforeseen external factors beyond the debtor's control. Due to the force majeure, the creditor cannot demand that the debtor must fulfill the agreement and cannot claim that the debtor is negligent and therefore cannot file a claim. Provisions about force majeure are found in Article 1244 and Article 1245 of the Indonesian Civil Law Code. Article 1244 states:

"The debtor should be penalized by paying for the compensation, losses, and interest, if he/she cannot prove that the reason behind his/her inability to implement the agreement is unforeseen, beyond control, and cannot be accounted to him/her, although there was no bad intention on him/her."

Next, Article 1245 states:

*"There is no compensation of costs, losses, and interest, when a force majeure or unforeseen events cause debtors to be unable to perform their obligations and follow a certain agreement, or do something that is forbidden."*⁷

Based on the two articles above, a force majeure may result in remissions for the debtors, for example, they do not need to pay for compensation, losses, and interest to the creditors.⁸

There are two types of force majeure, absolute and relative.⁹ Absolute force majeure occurs when a debtor is completely unable to pay his/her debts to the creditor due to an unforeseen event that is beyond his/her control, such as earthquake, flood, volcanic eruption, etc.¹⁰ Relative force majeure is a condition in which it is still possible for the debtors to perform their obligations, but to perform the obligations they need to give up on or sacrifice something significant, use a power beyond human ability, or they will possibly suffer from a huge loss. In other words, relative force majeure happens when a debtor must accomplish two things at the same time, and both require sacrifice. For example, a debtor has the responsibility to pay for his debt on December 10, but at the same time, his wife is giving birth by a C-section surgery, which costs a considerable amount of money. The

¹Djoni S. Gazali, *Hukum Perbankan (Banking Law)*, Sinar Grafika, Jakarta, 2012, page 319.

²Rahmadi Usman, *Aspek-Aspek Hukum Perbankan di Indonesia (Aspects of Banking Law in Indonesia)*, Gramedia Pustaka Utama, Jakarta, 2001, page 263-264.

³Mulyoto, *op.cit*, page 58.

⁴Mulyoto, *ibid*.

⁵Wawan, *op.cit*, page 106.

⁶*Ibid*

⁷*Ibid*

⁸*Ibid*

⁹Salim, *Pengantar Hukum Perdata (Introduction to Civil Law)*, page 183

¹⁰*Ibid*

problem occurs because the amount of money owned by debtor is only sufficient to pay for either the debt or the surgery. Under this circumstance, it can be said that the debtor is facing two situations that leads to a force majeure; if he pays his debt, he will not be able to pay for his wife's surgery, and vice versa. The case above is considered relative force majeure because the debtor is able to resolve at least either situation. He can either request a payment due to the hospital, and the hospital may grant his request, so that he will be able to pay for his debts. However, if the hospital does not grant special consideration, he must pay for the surgery, and as a result, he must pay the fines for his late debt payment.¹

IV. Research Method

This research is a doctrinal research, which studies how the law should be established or created to solve a certain case. According to Peter Mahmud, doctrinal research is a process of determining the rules of law, the principles of law, and legal doctrines in order to answer any legal issues faced.²

According Soetandyo Wignyoebroto, there are five concepts of law. First, law is the principle of truth and justice that is natural and universally applicable. Second, law is positive norms in the legal system of national legislation. Third, law is what is decided by the *in concreto* judge, and systematized as judge-made law. Fourth, law is institutionalized social behavioral patterns that exist as empirical social variables. Fifth, law is a manifestation of the symbolic meanings of social behavior as seen in the interactions among them.³

The researcher uses the first and the second concept of law according to Soetandyo Wignyoebroto. Since the research is based on legal research conducted by doctrinal approach, it is also based on the concept of legal positivists that argues that legal norms are identical with written norms created and implemented by authorized state institutions.⁴

V. Discussion and Findings

1. Cases of Force Majeure in Indonesia

In settling bad debt cases caused by the earthquake in Yogyakarta, many banks, such as *Bank Rakyat Indonesia* Bantul branch, *Bank Negara Indonesia* Bantul, Mandiri Bank Bantul, *Bank Perkreditan Rakyat* Sleman, and *Bank Perkreditan Rakyat* Bantul, use the principle of *rebus sic stantibus*. When customers of each bank cannot perform the obligations stated in a the credit agreement (they cannot pay the debt installments) because there was an earthquake (force majeure), the bank will seek to renegotiate the agreement. The creditor and the debtor will create an agreement for the credit installments that must be paid by the debtor to the creditor based on the capability of the debtor. There are three options to pay off the debt: rescheduling the debt, reconditioning the debt, and restructuring the debt and the foreclosure of collateral.

In the author's opinion, the principle of *rebus sic stantibus* can be used in settling bank credit agreement in cases of force majeure –not only earthquake but also flood, volcanic eruption, riots, etc. During a force majeure, debtors are encouraged to use the principle of *rebus sic stantibus* instead of *pacta sunt servanda* by conducting a renegotiation in order that the debtors can pay off the bank credits without difficulty. Renegotiation is done by discussing the difficulties faced by the debtors in performing their obligations in order to achieve the best solution for both parties to pay off the debts.

In making the agreement, creditors and debtors do not want either party to be disadvantaged. In order that a bank credit agreement has a “win-win solution,” starting from the beginning to the end of its implementation, both parties should always avoid anything that might lead to disputes and anything that may damage the partnership established under the agreement. Should there be a dispute, it will be solved through a negotiation. Negotiation as a whole and coherent process in a business contract must always be implemented in the pre-contractual phase, during the making of the agreement, as well as during the implementation of the agreement, even in case of dispute. Through negotiation, it is expected to create a harmonious and mutual relationship between the parties, which will support a situation that is conducive to the business.⁵ The parties hope that the agreement they create can run as expected. However, there is always a possibility of dispute, for example when there is a force majeure due to earthquakes, floods, or riots.

¹Wawan, *op.cit.* page 108

² *Pedoman Pembimbingan Tesis dan Pedoman Penulisan Usulan Penelitian & Tesis (Thesis Supervision Guidelines and Guidelines for Writing Research and Thesis Proposal)*, Master of Law Program, Faculty of Law, Universitas Sebelas Maret Surakarta, 2013, page 11

³Setiono, *Pemahaman terhadap Metodologi Penelitian Hukum (Understanding the Methodology of Law Research)*. Law Science Department, Graduate Program, Universitas Sebelas Maret Surakarta, 2010, page 20

⁴Ronny Hanitiyo Soemitro, *Metodologi Penelitian Hukum (Methodology of Law Research)*, Ghalia Indonesia, Jakarta, 1990 page 32

⁵Agus Yudha Hernoko, Agus Yudha Hernoko, 2008. *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial (Treaties Law of Proportionality Principle in Commercial Contracts)*. Yogyakarta: LaksBang Mediatama, page 312.

There is a case of force majeure happening when the researcher is conducting the research. In this case, a commercial court may have unintentionally considered the principle of *rebus sic stantibus* in solving a bankruptcy case, without comprehensively elaborated in the legal reasoning. The case number 12/Pailit/2000/PN.Niaga.Jkt.Pst is a Bankruptcy petition case against PT. Bakrie Finance Corporation, Tbk in the Commercial Court of the State Court of Central Jakarta. PT. Bakrie Finance Corporation, Tbk is engaged in leasing and construction services and in its business is involved with many loans with various financial institutions abroad using the exchange rate of US Dollar. Due to the economic crisis of 1997 which was marked by the depreciation of Indonesian Rupiah on US Dollar, when the company's debts to a syndicate of banks and financial institutions abroad¹ were due in 1999, PT. Bakrie Finance Corporation, Tbk. had difficulties in paying the debts. The company filed a bankruptcy petition, arguing that the economic crisis, which has affected the decline of the rupiah against the US dollar, led to a highly increased and unreasonable payment obligation that was difficult for the debtor. The petition also claimed that PT. Bakrie Finance Corporation, Tbk has attempted with good intention to renegotiate the debts, and some creditors including the Asian Development Bank, Hanvit Bank Singapore Branch, and Arab Banking Corporation have rescheduled the debt payments from PT. Bakrie Finance Corporation, Tbk. However, the petitioner did not consider the good intention of the company. The commercial court did not accept the petition for the reason that the petitioner does not have *legitima persona standi in judicio*. However, the processes going on in the commercial court of Indonesia, particularly in bankruptcy cases, accept the argument of difficulties due to economic crisis as a reason for the emergence of *rebus sic stantibus* conditions.

The economic crisis that has affected in the decline of Rupiah against US Dollar indicates a change in the circumstances² that led to increased and unreasonable payment obligations that is incriminating PT. Bakrie Finance Corporation, Tbk. However, the consideration of the judges of the Supreme Court in this case does not emphasize on the change of circumstances but insists on the principle of *pacta sunt servanda*. This is implied in the consideration of the judges as follows:

"According to Article 1338 of the Indonesian Civil Law Code, what has been agreed to by the Cassation Petitioner and Cassation Respondent in Exhibit P-1 (Facility Agreement) is an Act for the Petitioner and the Respondent of the Cassation and must be respected by Judex Factie".³

No consideration of changes in the circumstances in this case is due to the implementation of the principle of *rebus sic stantibus* in treaties law in the Indonesian Civil Law Code. As a result, a debtor with good intentions of paying off debts will face difficulties and experience a great loss. According to Levenbach⁴ with his theory "*economies synallagma*" states, "the financial consequences of changed circumstances are spread over both parties in order to achieve balance between the obligations of both parties." In other words, in cases of changed circumstances that cause financial loss, it is advised to consider sharing of risk between the parties.

Another example of force majeure is the case in the State Court of Malang⁵ number 151/Pdt.G/2012/PN.Mlg with Rahmat Sanjaya as the prosecutor and PT Tri Jaya Property as the defendant. Both parties agreed to enter into an agreement for the purchase of a unit of housing worth Rp 800 million purchased by the prosecutor from the defendant. The prosecutor has paid an advance money of Rp 160 million and the remainder will be paid upon the handover of the house by PT Tri Jaya Property. However, until the promised time limit, the defendant could not perform its legal obligation of handing over the house to the prosecutor. The prosecutor suffers losses and demands that the defendant refund the advance money and requests for cancellation of the agreement. The defendant refuses to pay full refund and is only willing to refund 50% of the advance money after being cut with various costs. The defendant argues that the property handover to the prosecutor cannot be done in time because of shortage of building materials, especially cement, so that the situation can be categorized as a force majeure beyond the responsibility of the defendant (based on Article 1244 of the Indonesian Civil Law Code). The judges consider that the rising price of building materials is a predictable risk for the defendant as an entrepreneur in the field of property, so that it cannot be categorized as a force majeure. The judge decided to reject the exception of the defendant entirely, and in favor of the prosecutor's claim entirely.

Another case of force majeure occurred in the State Court of Denpasar, in case number 62/Pdt.G/2001/PN.Dps.⁶ The prosecutors have liquidity problems in making credit installment payments to the

¹ The international creditors of PT. Bakrie Finance Corporation, Tbk which filed for bankruptcy petition are AB CAPITAL MARKETS (HK) Ltd, CHO HUNG Leasing Finance(HK) Ltd, HAN MI Leasing and Finance (HK) Ltd, KEB Leasing and Finance Ltd. All of which are syndicated and have disbursed loans in form of overdraft loan facilities and term loan of US \$ 21,000,000,-

² Agus Yudha Hernoko, *op.cit*, page 287.

³ Consideration of the Supreme Court Judges in the Supreme Court Decision No. 12 K/N/2000.

⁴ See Supreme Court Decision No. 3438 K/Pdt/2000

⁵ See the State Court of Malang Decision No. 151/Pdt.G/2012/PN.Mlg.

⁶ Data obtained from the State Court of Denpasar on January 15, 2013.

second defendant. One of the considerations of the judges states that according to common knowledge, granting and revoking licenses are human acts under normal circumstances. Legally, revocation of licenses cannot be regarded as a force majeure. If the specified requirements have been met, it is impossible to revoke a business letter.

In Indonesian jurisprudence, there is attraction between two important principles in treaties law, the principle of *pacta sunt servanda*. At first, the court upheld the principle of *pacta sunt servanda*, but recently this has shifted toward decency or good intention. Good intention is even used by the judges to restrict or abolish contractual obligations if it turns out that the content and the implementation of an agreement is in contrary to justice.¹

The principle of *pacta sunt servanda* becomes the basis for implementing the rights and obligations of the parties participated in an agreement. Based on the principle of *pacta sunt servanda*, one party can ask the other party to implement what has been agreed in the agreement. This means that anyone who has made a promise must perform the obligations in accordance with their promise.² In addition, Hans Kelsen states that the principle of *pacta sunt servanda* is the basic norm of the international law.³

The principle of *pacta sunt servanda* arises from the statement that an agreement is naturally binding based on two reasons. The first reason is the nature of simplicity in which one must interact and cooperate with other people, meaning that they have to trust each other, which in turn will provide honesty and loyalty. The second reason is that every individual has the right, and the most basic one is property rights that can be transferred. If an individual has the right to release his/her rights, there is no reason for the individual to be prevented from releasing less important rights such as through agreements.⁴

Gentili states that the principle of *rebus sic stantibus* can be used to solve problems caused by changes in circumstances.⁵ This means that the implementation of the principle of *pacta sunt servanda* can be substituted by the principle of *rebus sic stantibus*.⁶ This principle is based on the assumption that an agreement can be terminated if there is a change in circumstances. Therefore, based on the principle of *rebus sic stantibus*, the parties who make an agreement are allowed to postpone their involvement in implementing the agreement, and they are even justified to withdraw from the agreement.

The law of treaties in Indonesia, which is subject to the Indonesian Civil Law Code as a manifestation of the values contained in the Napoleonic Code, does not acknowledge the principle of *rebus sic stantibus*. This is reasonable because the Napoleonic Code was established during the era of liberalism that glorifies the principle of *pacta sunt servanda*. The Napoleonic Code is an amendment to the strict implementation of canonical laws relating to the principle of *rebus sic stantibus*, which intimidated the interests of the bourgeoisie at that time. The principle of *pacta sunt servanda* was then converted into the Article 1338 of the Indonesian Civil Law Code, which states:

“Any agreement that was validly made is enacted as law for those who make the agreement.” “An agreement cannot be withdrawn unless both parties consent or without appropriate reasons according to the law.” “An agreement must be executed with good intention.”

Based on Article 1338 above, every agreement in its practice should be subject to the principle of good intention (*bonafidelgood* faith) because it is binding as a law. An exclusion of these provisions is found in the provisions about force majeure, which is Article 1244 and Article 1245 of the Civil Law Code. The legal system of Civil Law Code does not introduce the principle of *rebus sic stantibus* in the jurisdiction of treaties law, instead it prioritizes the aspects of force majeure.

Business practices in Indonesia should consider including the clause of *rebus sic stantibus* in treaties making, especially for long-term agreements that have a huge investment value. The experience of the 1997 economic crisis that hit Indonesia is one of the reasons behind the importance of the inclusion of the clause. *Rebus sic stantibus* clause is also considered more flexible and more accommodating than *overmacht* clause because the clause is appropriate with the business characters that require dynamic space while still maintaining the continuity of the business relationship among the parties.⁷ Moreover, the clause of *rebus sic stantibus* opens

¹Ridwan Khairandy, *op.cit*, page 302.

²Dewi Safytra, Paper on *Pacta Sunt Servanda*, page 4, accessed on August 5, 2012.

³Francois Rigaux, “Hans Kelsen on International Law”, *European Journal of International Law* 9, page 328, accessed from www.ejil.org/pdfs/9/2/1493.pdf on October 10, 2012 at 09:00 PM WIB (GMT +7).

⁴Grotius, H., *The Law of War and Peace: De Jure Belli et Pacis*, 1646 ed., Kelsey, F.W. trans, Oxford, 1916, page 25 and Pufendorf, S., *The Law of Nature and Nations: De Jure Nature et Gentium*, 1688 ed. Oxford, 1934, accessed on <http://tldb.uni-koeln.de/TLDB.html>, on October 20, 2012, at 08:00 PM WIB (GMT +7).

⁵Douglass M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena*, Martinus Nijhoff Publishers, Netherland, 2008, page 400

⁶Dewi Safytra, *op.cit*, page 21.

⁷Agus Yudha Hernoko, *op.cit*, page 261

wider opportunities for the parties to resolve disputes between them out of the court through renegotiation of the terms of the agreement so that it becomes more adaptive to changes in the circumstances.

2. *Rebus Sic Stantibus* as an Alternative to Accommodate Changes in Circumstances

The principle that should be used in settling bad credits due to force majeure caused by earthquake is done by restructuring, reconditioning, and rescheduling. Essentially, banks do not want to incur losses. By offering credits, it will strengthen its capital, expand its business, and so forth. Each bank has insurance agency partners. With insurance, it will reduce the risks that might occur.¹

Therefore, according to the law, global changes such as economic crisis and earthquake require a law that is more adaptive to changing circumstances. *Rebus sic stantibus* clause is one of the alternatives to accommodate the fundamental changes in circumstances that are disadvantageous for one of the parties, especially in long-term business agreements that have great investment value. Although the treaties law in Indonesia has not properly accommodated the clause of *rebus sic stantibus*, it is not impossible that in the future the clause will be included as a protective clause for the parties involved in an agreement.

According to the results of the research, the principle of *rebus sic stantibus* should be used in negotiating bad debt settlement due to force majeure after earthquake, to solve the problems caused by changed circumstances. This is also an indication that the principle of *pacta sunt servanda* can be substituted by the principle of *rebus sic stantibus*. This principle is based on the assumption that an agreement can be terminated if there are changes in the circumstances starting from the time when the agreement was made. Therefore, based on the principle of *rebus sic stantibus*, the parties who made the agreement are allowed to postpone the implementation of the agreement and even to withdraw from the agreement. The parties (the debtor and the creditor) can conduct a renegotiation (*rebus sic stantibus* principle) for the continuation of the implementation of the agreement they have established together.

VI. Closing

1. Conclusion

In coping with changed circumstances, the principle of *rebus sic stantibus* should be used in negotiating bad debt settlement due to force majeure after earthquake. This means that the implementation of the principle of *pacta sunt servanda* can be complemented by the principle of *rebus sic stantibus*. This principle is based on the assumption that an agreement can be terminated if there are changes in circumstances. Therefore, based on the principle of *rebus sic stantibus*, the parties who made the agreement can request to postpone their involvement in implementing the agreement, and they are even justified to withdraw from the agreement.

2. Recommendation

The researcher recommend that academics, practitioners, legal experts, as well as experts in banking agreement conduct a deeper study to find a solution of how to ideally implement the principles of *rebus sic stantibus* in case of force majeure, especially due to earthquake, and how to formulate it in an agreement. The clause of force majeure should not stand alone as a clause that is “universally applied”, but instead should be established as a distinct clause (in a separate section or subsection) in more details and depth, which includes subjective or temporary force majeure clause and objective or permanent force majeure clause.

REFERENCES

Agus Yudha Hernoko, 2008. *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial (Treaties Law of Proportionality Principle in Commercial Contracts)*. Yogyakarta: LaksBang Mediatama.

Asril Sitompul, “*Pacta Sunt Servanda dalam Hukum Perjanjian*” (*Pacta Sunt Servanda in Treaties Law*), on <http://pihilawyers.com/blog/p=16> accessed on Februari 17, 2013 at 10:30 PM WIB (GMT +7).

Dewi Safytra, Paper on *Pacta Sunt Servanda*, accessed on August 5, 2012.

Douglass M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena*, Martinus Nijhoff Publishers, Netherland, 2008.

Djoni S. Gazali, *Hukum Perbankan (Banking Law)*, Sinar Grafika, Jakarta, 2012.

Djuhaendah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah dalam Konsepsi Penerapan Asas Pemisahan Horizontal (Suatu Konsep dalam Menyongsong Lahirnya Lembaga Hak Tanggungan) (Collateral Material House for Land and Other Materials Attached to the Land in the Conception of Implementing Horizontal Separation Principle (A Concept in Anticipating the Establishment of Mortgage House)*, Citra Aditya Bakti, Bandung, 1996.

Rebus Sic Stantibus in the Repertoire of Treaties Law, accessed from www.isjn.or.id on 10 September 2012 at 23:10 WIB (GMT+7).

¹ An interview with Rustamsyah, SE. Head of FSA Administration Sub Section of Semarang and Yogyakarta area on January 7, 2014.

Francois Rigaux, “*Hans Kelsen on International Law*”, *European Journal of International Law* 9,p.328, accessed from www.ejil.org/pdfs/9/2/1493.pdf on October 10, 2012 at 9:00 WIB PM (GMT +7).

Grotius,H., *The Law of War and Peace: De Jure Belli et Pacis*, 1646 ed., Kelsey, F.W. trans, Oxford, 1916.

Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berdasarkan Asas-asas Wigati Indonesia (The Principle of Balance for Indonesian Treaties law, Treaties Law Based on the Indonesian Principle of “Wigati”)*, Citra Aditya Bakti, Bandung, 2006.

Ian Brownlie, *Principles of Public International Law*, 4th Ed, Oxford, London, 1990.

(*Thesis Supervision Guidelines and Guidelines for Writing Research and Thesis Proposal*), Master of Law Program, Faculty of Law, Universitas Sebelas Maret Surakarta, 2013.

Pufendorf, S., *The Law of Nature and Nations:De Jure Nature et Gentium*, 1688 ed. Oxford, 1934, accessed from <http://tldb.uni-koeln.de/TLDB.html>, on October 20, 2012, at 8:00 PM WIB (GMT +7).

Supreme Court Decision No. 12 K/N/2000.

Supreme Court Decision No. 3438 K/Pdt/2000.

the State Court of Malang Decision No. 151/Pdt.G/2012/PN.Mlg.

Rahmadi Usman, *Aspek-Aspek Hukum Perbankan di Indonesia (Aspects of Banking Law in Indonesia)*, Gramedia Pustaka Utama, Jakarta, 2001.

Rebecca M.M. Wallace, *International Law*, 2nd Ed, Sweet & Maxwell, London.1992.

Ridwan Khairandy, 2004. *Iktikad Baik dalam Kebebasan Berkontrak (Good Intention in the Freedom of Contract)*. Jakarta: Universitas Indonesia, Faculty of Law, Graduate Program.

----- . 2013. *Hukum Kontrak Indonesia dalam Perspektif Perbandingan (Bagian Pertama) (Indonesian Contract Law in Comparative Perspective (Part One))*. Yogyakarta: FH UII Press.

Ronny Hanitiyo Soemitro, *Metodologi Penelitian Hukum (Methodology of Law Research)*, Ghalia Indonesia, Jakarta, 1990.

Setiono, *Pemahaman terhadap Metodologi Penelitian Hukum (Understanding the Methodology of Law Research)*. Law Science Department, Graduate Program, Universitas Sebelas Maret Surakarta, 2010.

Soetandyo Wignjosoebroto, *Silabus Metode Penelitian Hukum (Syllabus of Legal Research Methods)*, Graduate Programs, Universitas Airlangga, Surabaya, tt.

Sri Gambir Melati Hatta”*Perkreditan dan Tantangan Dunia Perbankan” (Credit and the Challenges in the Banking World)* Article on www.legalitas.org accessed on 20 Desember 2013 at 11:00 PM WIB (GMT+7).

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

