Is the COVID-19 pandemic a force majeure under Indonesian law?

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April 3, 2020

The global and fast-paced spread of the Coronavirus (COVID-19) has inevitably impacted the undertaking of business around the globe, including in Indonesia. Due to the risk that this global pandemic poses to ongoing business operations, business practitioners are encouraged to carefully consider its potential impact on their business practice, as well as the proactive and preventive measures which should be taken to mitigate such risk. In consideration of the foregoing, this Legal Memorandum serves as an outline for the legal application of force majeure to navigating the crisis due to the Coronavirus outbreak under the Indonesian laws.

Force majeure under Indonesian law

Under Indonesian laws, force majeure is generally regulated under Articles 1244 and 1245 of the Indonesian Civil Code ("**ICC**"), which generally provide that when a failure in performance is caused by the occurrence of a force majeure event, such failure cannot be attributed to the defaulting party. Consequently, the defaulting party will not be liable for damages. To that aim, the party asserting the force majeure defense will have to prove that the event was unforeseeable or unanticipated and such failure was not attributable to its fault and it was not accountable for it.

Contractually speaking, under the basic principle of 'freedom to contract' the contracting parties are free to define under the agreement the scope of force majeure, as well as to set its parameters as they see fit. In essence, the force majeure would typically include any circumstances the occurrence of which could not reasonably have been foreseen by the parties and was completely beyond the parties' control. As a matter of practice, although the following requirement is not expressly stated under the law, the approach typically adopted is that the mere occurrence of such an identified event will not automatically relieve the non-performing party – additionally, it also has to be proven that the party asserting the force majeure could not have prevented or avoided the consequences of the impediment.

It should be understood that there is no universally accepted definition of force majeure under Indonesian Civil Law which determines the requirements to successfully invoke a force majeure defense, and parties may negotiate their own rules on the criteria for force majeure when drafting their contract. Nonetheless, as foreshadowed in the foregoing statutory provisions, the contracting party may invoke the defense of force majeure when it can successfully satisfy the requirements that the failure to perform was due to an impediment beyond its reasonable control, the occurrence of which event could not reasonably have been expected at the time the agreement was duly concluded, and the party, upon exercising its reasonable best efforts, could not avoid or overcome the impact of the impediment.

Elements of force majeure

In light of the provisions set out in Article 1244 and 1245 of the ICC, we can conclude that there are 3 (three) primary elements that must be fulfilled to qualify an event as force majeure:

a. Unforeseeability

It is a generally acknowledged in the civil law system that the event asserted to be a force majeure event must have been unforeseeable at the time of contracting. Accordingly, the affected party (obligor) will not be entitled to invoke force majeure in its defense if the affected party could have anticipated or foreseen the impediment at the time the contract was concluded.

b. No-fault Requirement

It must be proven that the occurrence of the supervening event was not the fault of the party asserting the force majeure defense. In this instance, to the extent that performance is still possible, the affected party can and must perform. In such circumstances, any failure of possible performance will be deemed to be due to the affected party and attributable to it.

c. Necessity of Good Faith

The good faith principle is extensively recognized as one of the fundamental principles in contract law, including in Indonesian Civil Law. The general civil law approach to good faith obliges the contracting party to perform contract duties in an honest, fair, and reasonable manner. Having been commonly accepted as an important behavioral criterion for the purpose of assessing and regulating the conduct of the contracting parties, this obligation typically also extends to a pre-contract duty to negotiate fairly and openly with the counterparty. Nonetheless, it must be noted that the extent and scope of application of the good faith principle may vary from one civil law jurisdiction to another.

COVID-19 in Indonesia

The fast-paced development of the Coronavirus pandemic has significantly impacted the ability of businesses around the globe to maintain their operations and meet their existing contractual obligations. Upon the pandemic declaration by the WHO, we find that some governments have imposed travel and large-gathering restrictions and encouraged their citizens to conduct their study and work at home. Companies and business practitioners from all sectors have experienced severe business interruptions due to contagion concerns and the promulgation of government regulations restricting large gatherings and travel to certain countries, as well as instructions from the authorities to temporarily suspend all business operational activities.

In Indonesia, a National Task Force, led by the Head of the National Agency for Disaster Management (*Badan Nasional Penanggulangan Bencana* – "**BNPB**") has been established under Presidential Decree No. 7 of 2020, which was subsequently amended through Presidential Decree No. 9 of 2020, to ensure the collaboration of various ministries and agencies from the central and sub-national levels of government and the national police and national army, in spearheading measures to prevent the further spread of the virus. The task force is also responsible for coordinating with relevant stakeholders and handling the surveillance of suspected patients. Aside from the Task Force, President Joko Widodo, at a press conference on 15 March 2020, has urged the public to work, study and conduct religious practices from home.

Further, by virtue of the Decree of the Head of BNPB No. 13.A of 2020 on the Extension of Certain Circumstances Status of Disaster Emergency due to the Outbreak of Coronavirus in Indonesia, the government has extended the disaster emergency period from 29 February 2020 until 29 May 2020.

The COVID-19 outbreak has been considered as a non-natural disaster with a national disaster status by virtue of Presidential Decree No. 12 of 2020 on the Imposition of the Non-natural Disaster of Coronavirus Disease 2019 (COVID-19) outbreak as a National Disaster, and in consideration of its potential for a maximum level of threat, the country is currently under the specific circumstances status of a disaster emergency, which has been followed by the

promulgation of various regulations and governmental orders instructing, among others, the suspension of certain operational business activities.

Applicability of force majeure provisions

Contracting parties need to check the force majeure clause in their contract. If the contract sets out a valid force majeure clause, whether or not the COVID-19 outbreak could be deemed a force majeure event will depend on the terms drafted under the contract, which must be read with any applicable regulatory requirement. Contractual force majeure clauses that we find in practice usually include a list of sample force majeure events. In general, it will be easier for the affected party to invoke force majeure defense if the proposed event is expressly listed in the contract. In our experience, it is not very common to find the contracting parties specifically including “epidemic” or “pandemic” or in more general terms, “disease” or “outbreak”, as a force majeure event. An outbreak of disease may also be covered under general terms such as “national or state emergency” in the event such an outbreak has been officially declared by the authorities to be an emergency situation or disaster that requires urgent handling or “government order” or “act of government” where an instruction, order, or appeal has been issued by the authorities to mitigate the outbreak and the issuance thereof may impede or prevent the performance of the contract, *e.g.* travel restrictions or business closure.

However, when the force majeure clause is drafted in a general manner with broad criteria and does not expressly specify the above terms (*e.g.* beyond the parties’ reasonable control), in order to determine whether an event is a force majeure, the parties may refer to the objective test as set forth in the contract or in the ICC. It is worth noting that, as long as it satisfies the requirements of a force majeure (either contractually or statutorily), an event that is not specifically listed as a sample of force majeure event under the contract may be invoked as a force majeure defense by the affected party. Thus, this will be a fact-specific issue which must be assessed on a case-by-case basis.

In the absence of a contractual force majeure clause or where the agreement of the parties does not expressly cover this matter, the provisions under the ICC would apply. By way of interpretation of Articles 1244 and 1245 of the ICC, we can conclude that there are 3 (three) primary elements that must be fulfilled to qualify an event as a force majeure event as mentioned above.

A party invoking the COVID-19 outbreak as its force majeure defense must prove that there existed no reasonable possibility that the impediment would occur (*i.e.* the element of unforeseeability) and such impediment is unavoidable by any means – in other words, even if the affected party had taken steps to avoid the impediment, the event would still have occurred anyway. To put it simply, the asserting party must be able to prove that the COVID-19 outbreak has made contractual performance impossible to be carried out by the party. In this respect, please note that the courts nowadays tend to practically implement a broader interpretation on the ‘impossibility’ element, as they also acknowledge the applicability of relative force majeure theory, under which the contractual performance may still be doable, but with great or unreasonable difficulties and sacrifice.

The analysis and stipulation herein may not be used and will not be valid and/or relevant if a judge and/or the courts in Indonesia issue any decree or judgment from time to time which does not agree with or which contradicts this analysis and stipulation. Indonesian court judgments are not systematically published, and the courts may be unfamiliar with certain sophisticated commercial or financial transactions, leading in practice to a lack of certainty in the interpretation and application of Indonesian legal principles. There have been instances where the courts have not determined cases based solely on the legal analysis presented in the relevant proceedings.

For further information related to the services provided, please contact the Partner listed under key contact.

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