

NEWSLETTER

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CAN THE CONTRACTUAL PARTIES CLAIM A COVID-19 PANDEMIC AS FORCE MAJEURE EVENT?

The rapid spread of COVID-19 has caused the World Health Organization (WHO) declares a public health emergency and leading to Indonesian government closes international borders for temporary. Business sectors have been affected since the contractual parties cannot deliver their obligations on time. Therefore, contractual parties are looking to their agreements or contracts to find ways to escape liabilities by using force majeure as an excuse. The question would relate to the contractual parties' good faith so that such party will not be considered as the defaulting party because of non-performance due to this Covid-19 situation? Can the Force Majeure clause automatically be applied in their agreements or contracts? Can the contractual parties use Presidential Decree of the Republic of Indonesia Number 12 of 2020 concerning the Stipulation of Non-Natural Disaster of the Corona Virus Disease 2019 (Covid-19) outbreak as a National Disaster ("**President Decree No. 12/2020**") to determine Force Majeure event?

Under Indonesian Law, the clauses related to a Force Majeure event can be found in Article 1244 and 1245 of Indonesian Civil Code ("**Indonesian Civil Code**"). These Articles stipulate that the failure of the affected party to perform its obligations due to a Force Majeure event would make the affected party will not be liable for damages. Further, Indonesian Civil Code also acknowledges the principle of 'freedom to contract' as stipulated in Article 1338. It means the parties under the agreement are free to stipulate its Force Majeure clause. Therefore, to claim the Covid-19 Pandemic as Force Majeure event, the contracting parties need to review their Force Majeure clause.

However, recently the Force Majeure clauses are often considered as 'boilerplate' or 'standard clause'. The parties are often not paying much attention on this clause. Therefore, it would be difficult if there are no clear definition and clear obligations that shall be performed by the affected party in the Force Majeure event.

The followings are the general questions that need to be considered by a party who is claiming a Covid-19 as force majeure event:

1. What is the definition of Force Majeure clause in the agreement? Is the definition of Force Majeure covering the Covid-19 Pandemic or disease or outbreak or national order or act of government such as the issuance of President Decree No. 12/2020?
2. What are the obligations of the affected party? Do they need to notify the other party about this Covid-19 Pandemic within certain period of time?
3. What are the reasonable endeavors of the affected party to rectify its obligations; and
4. What are further consequences of the agreements or contract following the Force Majeure event?

Hence, although our Indonesian Civil Code clearly states that the parties are not liable to pay losses and its interest in the occurrence of Force Majeure event, but the Parties need to identify the Force Majeure clause which is stipulated in the agreements or contracts, such as the wording of the definition of the Force Majeure event shall clearly stipulate that Covid-19 or any pandemic events or act of government such as the issuance of the President Decree No. 12/2020 shall be considered as Force Majeure event, as well as the obligations of the affected party. For instance, if the Force Majeure clause in a contract only covers the natural disaster, the parties to such contract will not be able to easily claim the same. If the affected party fails to fulfill one of the requirements of the Force Majeure clause or unable to prove that such non-performance event was caused by Force Majeure, then such party may become liable to the losses and interest because of non-performance.

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