

Client Alert

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For More Information:

Bima Sarumpaet
Partner
+62 21 2960 8513
bima.sarumpaet
@bakermckenzie.com

Lanang Kusuma
Senior Associate
+62 21 2960 8537
lanang.kusuma
@bakermckenzie.com

Commercial Leases in the Wake of COVID-19 Outbreak

Recent Developments

Over the course of a few weeks, the COVID-19 outbreak has been declared a pandemic by the World Health Organization, and a public health emergency by the government of Indonesia. The outbreak, which has now developed into a global threat has brought a halt to the country's economy and day-to-day business. In the wake of COVID-19, lessees and lessors may have to face sudden challenges due to implications of the sudden economic halt. As the government has imposed additional public health requirements and mandated the closing of non-essential businesses and/or limiting their operation hours, the question arises as to whether the COVID-19 outbreak can be considered as a force majeure event, particularly for commercial lease agreements.

Force Majeure under Indonesian Law

The Indonesian Civil Code ("ICC") does not provide a clear definition of force majeure. However, there are a number of provisions in the ICC that refer to force majeure, as follows:

1. Article 1244 of the ICC

"An obligor shall pay for costs, loss and interest if it cannot prove that the breach or the delayed performance of the contract is caused by an unexpected event, and (such breach or delayed performance) cannot be held against it if there is no bad faith on its part."

2. Article 1245 of the ICC

"No costs, loss and interest shall be borne by an obligor if due to a force majeure or an unexpected event the obligor is prevented from delivering or performing what it is obliged to deliver or perform, or due to the same reasons the obligor has performed a prohibited action."

In the ICC, the elements that must be fulfilled for a party to be exonerated from its non-performance due to a force majeure are that the event is unforeseeable, the unforeseeable event is not within the affected party's control, and the affected party is acting in good faith.





Common Questions on COVID-19 as a Force Majeure Event in Leases

1. Can the parties claim that Covid-19 is a force majeure event, which excuses the parties from performing the lease obligations?

This depends on whether or not there is a specific force majeure clause in the lease, which generally provides an inclusive list. Typically leases will provide that the force majeure must result in the destruction of the premises or the lessee's inability to occupy premises. It may also provide that if the force majeure exists for an agreed extended period of time then either party can terminate.

If there is no specific force majeure clause, then based on the above ICC clauses a party may possibly claim a force majeure event given the pandemic and/or public health emergency declaration as noted above.

2. If the tenant cannot use its property, does it have to continue paying rent?

Leases will typically have specific rent suspension provisions although this usually depends on whether or not the building or premises is tenantable or fit for use. If a lessee is denied access due to force majeure, then typically rent may be discounted or suspended.

3. If the government has imposed additional public health requirements, can the lessor require the lessee to comply with these? And who pays for these additional items?

Leases will normally contain a general covenant requiring the lessee to comply with laws and regulations, so the lessor can require the lessee to comply with additional public health requirements imposed by the government. However, there are no laws or regulations that generally allow lessors to require lessees to comply with additional requirements imposed by the lessor (which are not based on laws or regulations) unless these are specifically set out as an amendment to the lease agreement.

The main obligation of the lessor is to provide and maintain the premises for the interest of the lessee. Since the Lessor is not only obligated to provide the premises to the lessee but also to maintain the premises, if the requirement to comply with public health requirements lies with the lessor, the lessor may have to be responsible for additional items related to public health requirements unless specified differently in the list of service charges (which may or may not be inclusive). However, it is uncommon to have a sweeper clause enabling costs to be charged to the lessee if incurred in accordance with the principles of good estate management.

As there is no one size fits all force majeure clause in leases, it is important to carefully review the relevant provisions in the lease agreement and consider whether the elements of force majeure have been fulfilled before determining the next steps either as a lessor or a lessee.

www.hhp.co.id

HHP Law Firm
Pacific Century Place, Level 35
Sudirman Central Business
District Lot. 10
Jl. Jenderal Sudirman Kav. 52-53
Jakarta 12190
Indonesia

Tel : +62 21 2960 8888
Fax: +62 21 2960 8999