

Client Alert

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COVID-19 Outbreak: Things to Consider Before Declaring Force Majeure

The COVID-19 outbreak has rendered performance of certain obligations under agreements difficult or impossible. As a result of the outbreak, parties are looking to rely on force majeure, which has the following effects:

1. The affected party is excused from its obligations for the period of the force majeure event. After the force majeure event is over, the party must resume its obligations.
2. The affected party is not liable to pay damages for non-performance of its obligation.
3. In extreme cases, the agreement may be terminated.

While the severity of the outbreak is indisputable with the government declaring it a pandemic and health emergency, the outbreak does not necessarily mean that parties can automatically rely on force majeure to be exonerated from their non-performance.

There are a number of issues that must be considered before parties can claim that they should be exonerated from their obligations due to the COVID-19 outbreak.

Follow Contractual Clauses on Force Majeure

In practice, agreements often contain force majeure clauses, which set out events that can be considered as force majeure events. These clauses are also usually followed by procedures that must be followed in case of a force majeure event, e.g., notification and negotiation requirements. Parties affected by the COVID-19 outbreak should fulfil these requirements.

Parties can also rely on force majeure even if the agreement is silent on the matter as force majeure is recognized under the Indonesian Civil Code.

Elements of Force Majeure

Under the Indonesian Civil Code, the following elements must be fulfilled for parties to be exonerated from their non-performance:

1. The event is unforeseeable. This means that the event is actually unexpected considering the affected party's experience, knowledge and capacity. The event must occur after the conclusion of the agreement and must not be contemplated in the agreement as otherwise the event is no longer unforeseeable.
2. The unforeseeable event is not within the affected party's control.



3. The affected party is acting in good faith.

Most importantly, the event must actually impede the performance of the affected party. Thus, even if the COVID-19 outbreak fulfills the above elements, it must be analyzed how the performance of the affected party is impeded.

Impediment to the Performance of Obligations

To be exonerated from its non-performance on the basis of force majeure, the COVID-19 outbreak must impede the party's performance. Alternatively, the outbreak must cause another event (such as government restrictions) that impedes the party's performance.

An analysis of the effect of the COVID-19 outbreak on the agreement and performance needs to be done to determine whether a party can be exonerated from its non-performance. The outbreak may render the performance of obligations impossible or merely difficult, depending on the type of agreement and obligations. For instance, a party that has an obligation to provide goods or services may be affected differently than a party that has an obligation to make payments.

In our experience in court and arbitration, the degree of the impediment usually becomes the crux of the issue. Factual and legal analysis needs to be made on a case-per-case basis to determine whether the impediment is sufficient to exonerate a party from its non-performance on the basis of force majeure.

In a few cases, we have also seen courts using the doctrine of good faith under the Indonesian Civil Code to exonerate a party or reduce their liability because the performance of the obligation was too difficult, though not necessarily impossible.

It should be noted that Indonesian courts are not bound by previous court decisions. So it remains to be seen how courts will decide on the effect of the COVID-19 outbreak on parties' obligations and whether it is sufficient to exonerate parties from their non-performance.

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