

## COVID-19 and *Force Majeure*

COVID-19 continues to spread rapidly around the globe, including Indonesia. Consequently, on 12 March 2020, COVID-19 was declared a pandemic by the World Health Organization.

Due to this pandemic, many businesses and factories are temporarily closed causing critical implications for businesses, both international and domestic. This is especially true for projects at the construction stage, as the raw materials, machinery and manpower needed for construction rely heavily on industries in the affected areas.

In this advisory, we explore the concept of *force majeure* under contracts entered into in Indonesia.

### **Force Majeure under Indonesian Law**

The basic and main concept of *force majeure* is recognized under Indonesian law, ie under Article 1244 and 1245 of the Indonesian Civil Code ("**ICC**").

Article 1244 of ICC:

*"A debtor must compensate for costs, damages and interests if he cannot prove, that the non-performance or late performance of his obligation under an agreement is caused by an unforeseen event, for which he is not responsible, even if he has no bad faith."*

Article 1245 of ICC:

*"A debtor does not need to compensate for costs, damages or interests, if a force majeure or an accidental event prevented him from paying or performing an obligation, or for this reason he committed a prohibited act."*

Based on the above articles, it is commonly accepted in Indonesia that to claim *force majeure*, it must be proved that the non-performance of a contract was caused by facts or circumstances:

- a. that were beyond the non-performing party's control (unforeseen event);
- b. for which the non-performing party is not responsible; and
- c. the non-performing party was acting in good faith (not claiming *force majeure* in bad faith).

### **Makarim & Taira S.**

Summitmas I, 16<sup>th</sup> & 17<sup>th</sup> Fls.  
Jl. Jend. Sudirman Kav. 61-62  
Jakarta 12190  
Indonesia  
P: (62-21) 5080 8300, 252 1272  
F: (62-21) 252 2750, 252 2751  
[www.makarim.com](http://www.makarim.com)

M&T Advisory is an email publication prepared by the Indonesian law firm, Makarim & Taira S. It is only intended to inform generally on the topics covered and should not be treated as legal advice or relied upon when making investment or business decisions. Should you have any questions on any matter contained in M&T Advisory, or other comments generally, please contact [advisories@makarim.com](mailto:advisories@makarim.com)

Moreover, to implement a contract, Indonesia also applies the 'freedom of contract' principle under Article 1338 of the ICC, under which every agreed to clause is binding as law on the parties. Article 1388 ICC allows the parties to a contract to agree on more detailed conditions and requirements for events of *force majeure* in addition to those under Articles 1244 and 1245 of the ICC. Therefore, it is common in Indonesia for the parties to include a specific clause specifying what constitute events of *force majeure* in the agreement between them.

### **Is a Pandemic a *Force Majeure* Event?**

Whether the COVID-19 pandemic constitutes a *force majeure* event depends on the definition of *force majeure* (if any) in the contract.

In our experience, typically, Indonesian contracts have 2 (two) types of *force majeure* clauses:

- a. one that is not exclusive; under this type of clause, what constitutes a *force majeure* event is not exclusive, and a party can claim *force majeure* as long as the conditions agreed to for *force majeure* to apply exist; or
- b. one that is exclusive; under this type of clause, *force majeure* events are limited to those defined in the contract.

It is also worth noting that it is not uncommon to find contracts in Indonesia which only allow *force majeure* to apply if the Government declares an event as such.

Given this, whether the COVID19 pandemic can be regarded as a *force majeure* event depends on the *force majeure* clause of the contract.

### **The Consequences of *Force Majeure***

Like what constitutes an event of *force majeure*, the consequences of *force majeure* may differ from one contract to another.

In our experience, most contracts provide the following remedies and consequences in the event of *force majeure*:

- a. the affected party will be excused from its non-performance under the contract; and/or
- b. either party may terminate the contract in the event of a prolonged *force majeure* event that substantially prevents the performance of the contract.

### ***Force Majeure* in Construction Contract**

Taking an example, in construction contract, there are several clauses that should be noted in relation to the *force majeure* event, among others, as follows:

- a. Force majeure

As explained above, whether the COVID-19 pandemic constitutes a *force majeure* event depends on the definition of *force majeure* (if any) in the contract. An example of a definition of *force majeure* event which is commonly used in a construction contract in Indonesia follows:

*"In this Clause, force majeure means an exceptional event or circumstance:*

- a. which is beyond a Party's control;*
- b. which such Party could not reasonably have provided against before entering into the Contract;*
- c. which, having arisen, such Party could not reasonably have avoided or overcome; and*
- d. which is not substantially attributable to the other Party."*

Based on the above *force majeure* provision, an affected party (ie contractor) may claim that the COVID-19 pandemic constitutes a *force majeure* event provided that the affected party can prove that the conditions above for *force majeure* have been met.

b. Extension of time and recovery of costs

If the contractor believes that it is being delayed due to a *force majeure* event, the contractor may claim an extension of time and costs from the employer. An example of a construction contract which allows the contractor to claim an extension of time and recovery of costs due to a *force majeure* event follows:

*"If the Contractor is prevented from performing any of his obligations under the contract by Force Majeure of which notice has been given, and **suffers delay and/or incurs Cost by reason of such Force Majeure**, the Contractor shall be entitled to:*

- a. **an extension of time for any such delay**, if completion is or will be delayed; and*
- b. **payment of any such Cost**."*

However, such claims are not always straight forward and are often disputed by the employer.

It is not uncommon for an employer to reject the claim for an extension of time due to *force majeure* on the ground that although there has been a *force majeure* event, there is no causal link between the *force majeure* event and non-performance of the contract. Given this, when giving notice of a *force majeure* event, the contractor must be able to establish that the *force majeure* event is directly linked to the non-performance.

As for the claim for additional cost, in most cases, the dispute will be on the quantum of the claim. The contractor must be able to justify that the cost claimed by the contractor are cost that are reasonably incurred due to the *force majeure* event.

If the parties cannot come to an agreement on the claim for an extension of time and/or recovery of costs, the parties may have to resort to the dispute resolution mechanism under the construction contract.

c. Termination

If a *force majeure* event continues for a prolonged period of time, some construction contracts allow the parties to the construction contract to terminate the contract like for example, under the following clause:

*"If the execution of substantially all the Works in progress is prevented for a continues period of **60 (sixty) days by reason of Force Majeure** of which notice has been given [...] then either Party may give to the other Party a notice of termination of the Contract.[...]"*

Usually upon termination the employer will determine the value of the work done and pay the relevant amount to the contractor, as described in the following example clause:

*"Upon such termination, the Employer shall determine the value of the work done and pay to the Contractor:*

- a. the amounts payable for any work carried out for which a price is stated in the Contract; and*
- b. the cost of plant and materials ordered for the works which have been delivered to the Contractor."*

The idea behind such a clause is to restore the contractor to the financial position it would have been in had the project never commenced. However, this is subject to the discussions between the employer and the contractor on the amount that needs to be paid by the employer to the contractor.

#### d. Dispute resolution

If the parties cannot agree on the claim for an extension of time, recovery of costs, payment upon termination due to *force majeure*, the parties may have to resort to the dispute resolution mechanism under the construction contract. An example of a dispute resolution clause which is commonly used in a construction contract in Indonesia follows:

*"Any dispute or differences arising out of or in relation to the Contract, its interpretation or construction shall be resolved amicably by the Parties, within 60 (sixty) days as of the receipt of the written notice of dispute. The respective representative of the Parties shall undertake every good faith effort to resolve the dispute in a fair manner.*

*Failing an amicable settlement within 60 (sixty) days of the date on which one Party receives notice from the other Party of the dispute, any Dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by [\[agreed dispute settlement forum\]](#)."*

Under the above provision, the parties must first try to settle the dispute amicably. Failing which, the parties may have to refer the dispute to the dispute settlement forum agreed to under the construction contract (eg SIAC Arbitration).

## **Conclusions**

- a. *Force majeure* provisions are recognized under Articles 1244 and 1245 of the ICC. However, whether the current COVID-19 pandemic can be recognized as a *force majeure* event and its consequences depend on the *force majeure* clause of the contract. It must therefore be assessed on a case-by-case basis.
- b. In the wake of COVID-19 pandemic, we believe there will be numerous contractors claiming for the event of *force majeure* under the relevant contract and to seek extension of time and recovery of cost, and therefore the contractor and employer may need to discuss the foregoing issues, for example, whether any amendments to the existing contract is required.

- c. Taking an example in a construction contract, in the event of *force majeure* event, it is important to also check several provisions that is relevant to a *force majeure* event such as (i) *force majeure* provisions; (ii) extension of time; (iii) termination; and (iv) dispute resolution.

\* \* \* \* \*

M&T Advisory is an email publication prepared by the Indonesian law firm, Makarim & Taira S. It is only intended to inform generally on the topics covered and should not be treated as a legal advice or relied upon when making investment or business decisions. Should you have any questions on any matter contained in M&T Advisory, or other comments generally, please contact your usual M&T contact or [advisories@makarim.com](mailto:advisories@makarim.com).

**Contacts:**

Stephen Sim	- <a href="mailto:stephen.sim@makarim.com">stephen.sim@makarim.com</a>
Dirgantara Adi Nugroho	- <a href="mailto:dirgantara.nugroho@makarim.com">dirgantara.nugroho@makarim.com</a>
Rudy Andreas H. Sitorus	- <a href="mailto:rudy.sitorus@makarim.com">rudy.sitorus@makarim.com</a>
Heru Mardijarto	- <a href="mailto:heru.mardijarto@makarim.com">heru.mardijarto@makarim.com</a>
Lia Alizia	- <a href="mailto:lia.alizia@makarim.com">lia.alizia@makarim.com</a>