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COVID-19: PRESSURE POINTS: IS YOUR CONTRACT AFFECTED BY THE COVID-19 PANDEMIC (INDONESIA)?

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Legal Briefings – By **Narendra Adiyasa, Iril Hiswara and David Dawborn**

In this article, we discuss steps that companies should take to protect their interests and assess their position where performance of their contractual obligations has been affected by the COVID-19 global pandemic. In particular, we look at whether the precautions implemented fall within the force majeure provisions so as to excuse performance.

INTRODUCTION

A force majeure event is something exceptional and beyond the control of the parties which prevents the performance of obligations. Where a party is put in delay or other breach by a force majeure event, it can be protected from the consequences of that breach.

It is not uncommon to see a force majeure clause in a commercial contract and often it comes with a detailed definition with a non-exhaustive list of what is, and what is not, a force majeure event. Whilst there may be variation in the definitions depending on the contract, in most cases the used definition in commercial contracts is similarly worded.

Generally, the used definition would include text requiring, amongst other things, that the event (1) must be beyond the reasonable control of the party, (2) must not have been reasonably foreseeable and (3) could not reasonably have been avoided. A party seeking to invoke force majeure will generally need to satisfy this threshold test and comply with notice provisions to ensure that the other party is promptly made aware of any force majeure event.

The question now is, whether the COVID-19 pandemic falls within the force majeure clause? If yes, what are the options available for the affected party?

EPIDEMIC AND PANDEMIC

The term “epidemic” or “pandemic” is often found in the non-exhaustive list in a force majeure clause. However, a problem arises as most jurisdictions in the world do not provide a clear legal definition for the word “epidemic” or “pandemic”. In particular there is no clear demarcation as to when an outbreak of a disease becomes an epidemic or pandemic. In this regard, the classification or advice by an international organisation of such an outbreak (e.g. the World Health Organization (WHO)) may be a good indication as to whether an outbreak falls within either of these definitions.

On 11 March 2020, the WHO declared the COVID-19 outbreak a global pandemic.

Even if the pandemic falls within the definition of force majeure in the relevant contract, it is important to note that being able to prove force majeure does not discharge the affected party infinitely from its contractual obligation. It only provides a temporary suspension/ exemption without liabilities. The affected party would be expected to serve notice to the other party as soon as the force majeure event is discovered and promptly resume its performance of contractual obligation upon the cessation of the force majeure event.

WHAT IF THERE IS NO FORCE MAJEURE CLAUSE IN YOUR CONTRACT?

If your contract is silent on the remedy, the first thing to do is to look at the governing law of the contract.

Under the Indonesian civil code, a party that breaches a contract for reasons beyond its control may be exempted from liability to compensate the other party for the breach. However, causation between the pandemic and the breach will need to be clearly established, and it will be a question of fact whether the pandemic has had any impact on a contract being performed in Indonesia. As the parties to a contract are free to modify the force majeure clause, the wording of this clause needs to be considered before relying on a force majeure defence.

Under English law, force majeure has not been recognised as a matter of law; it will depend what your contract says. Without a clear definition and provisions that effectively set out the parties' rights and remedies, contracting parties will be at the mercy of the rigid English doctrine of frustration of contracts and the inflexibility of the Law Reform (Frustrated Contracts) Act 1943. Proving a contract has been frustrated is far from straightforward.

CONCLUSION

- **Check your contract** – this is always the first step to establish what expressly agreed protections are available. The starting point should always be the governing law clause and in the context of current events, the force majeure clause (if any). However, the contract should be reviewed as a whole for other relevant provisions including requirements as to how to serve notice (such as what information you should include in the notice, what are the relevant time limits, etc).

- **Proper record keeping** – it is important to keep detailed records of the impact of the pandemic. Otherwise it may be difficult to prove your claim.

- **Inform your counterparty** – you will be in a much stronger position to recover time and cost if you update your counterparty on an ongoing basis after you have given formal notice, telling them what the problems are and what you are doing to address them.

- **Mitigate** – regardless of the governing law of the contract, there is always an underlying duty to mitigate, whether high or low, in the event of force majeure. If you can find solutions, you should do so.

Should you wish to discuss any of the issues outlined in this newsletter, or any other legal issues that may be relevant to your business, please do not hesitate to contact your usual Hiswara Bunjamin & Tandjung or Herbert Smith Freehills contacts.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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