

Jokowi Declares Covid-19 as a National Disaster: a Force Majeure Trigger?

On Monday, President Joko Widodo issued the Presidential Decree No. 12 of 2020, declaring the Covid-19 outbreak as a non-natural national disaster. Through this decree, the President directed all central and regional government apparatus, including the National Disaster Management Agency (*Badan Nasional Penanggulangan Bencana* or “BNPB”) and the Regional Disaster Management Agency (*Badan Penanggulangan Bencana Daerah* or “BPBD”) to establish policies that are in line with this decree.

Dissecting the Decree

Under the laws on disaster management (Law No. 24 of 2007 on Disaster Management, Government Regulation No. 21 of 2008 on Disaster Management Implementation and Government Regulation No. 22 of 2008 on Funding and Management of Disaster Assistance), there is three possible disaster status that the government can declare: (i) pre-disaster (*pra bencana*), (ii) emergency response (*tanggap darurat*), and (iii) post-disaster (*pasca bencana*). Based on the presidential decree, Indonesia is in the second status.

Previously, several regional governments have declared Covid-19 as a non-natural disaster at a regional scale, hence allowing the apparatus of these regional government, including their BPBD, to set policies that are relevant to Covid-19. In addition, the central government has also set up a task force, led by the Head of BNPB, who is tasked with handling the spread of Covid-19.

Based on the laws on disaster management, the government can declare the current pandemic as a specific circumstance disaster or an emergency disaster. A specific circumstance means a situation where an emergency has not been determined or where the emergency status has expired and not extended, but actions are needed to reduce risks and impacts from the disaster. The declaration of a disaster can be made by the president, governor or regent/mayor, depending on the scale of the emergency.

In our view, the presidential decree does not introduce any new measure. Rather, it bolsters the role of BNPB and BPBD in responding to the Covid-19 crisis. Specifically, in an emergency response situation, BNPB or BPBD can request and order any sector/institution and even members of the public (either an individual or a legal entity) to provide assistance to cope with the disaster at hand. In addition, while it is not stated explicitly, the declaration of national disaster allows BNPB or BPBD to mobilise human resources, equipment and logistics; securing access related immigration, customs, quarantine and licenses related to the entry of foreign goods and personnel; procure goods and services; manage money and/or goods, particularly the ready use funds (*dana siap pakai*); conducting rescue (including search and evacuation); and issue any command towards any sector or institution.

The foregoing measures follow the declaration of Covid-19 as a national disaster. This is just one of the options available for the central government under the regulatory regime of disaster management, which allows it to establish relevant measures, including, widening the authority of BNPB and BPBD. For the sake of completeness, the central government could have declared Covid-19 as either an epidemic or a health quarantine. We will discuss the other two legal regimes below.

Other Legal Regimes: Epidemic and Health Quarantine

The legal regime on disaster management is distinct for other regimes, which, despite their relevancies, are meant to enable the government to take other measures required to respond to the same events.

Epidemy

The legal framework for epidemic is set out in Law No. 4 of 1984 on Epidemic Diseases, Law No. 36 of 2009 on Health and Government Regulation No. 40 of 1991 on the Prevention of Epidemic Diseases.

Both the central government and the regional governments will play a role in dealing with an epidemic. The determination of an epidemic outbreak (*wabah*) based on epidemiological studies, is to be made by the Minister of Health. In contrast, the declaration of an outbreak in an area (*kejadian luar biasa*) is to be made by the regional government.

While the central government has not declared Covid-19 as an epidemic, it has declared Covid-19 as a specific infectious disease that can cause an outbreak.

Health quarantine

Meanwhile, health quarantine is regulated Law No. 6 of 2018 on Health Quarantine and Government Regulation No. 21 of 2020 on Massive Social Restrictions in the Framework of Accelerating the Handling of Covid-19.

As detailed in our previous client update ([click here to read](#)), this legal framework permits the government to restrict activities or mobility of residents. Specifically for Covid-19, the Health Minister has declared a massive social restriction (or PSBB) in DKI Jakarta. The PSBB declaration limits the activities of the public in light of the Covid-19 pandemic. As of the date of this client update, two regions, Banten and West Java, have followed DKI Jakarta's move in declaring PSBB.

Based on the PSBB declaration, the Minister of Health has issued guidance to the regional governments to, among others, prohibit physical attendance in schools and public facilities, as well as the undertaking of other efforts, such as a quarantine.

Can You Invoke Covid-19 as a Force Majeure?

Irrespective of which legal framework is in place, the key question surrounding the present Covid-19 crisis is whether it amounts to a force majeure event. By and large, the answer is not necessarily because the present situation does not automatically amount to a force majeure. Instead, a close review of your contract is required, and attention must be paid to which obligation or performance is affected.

Even before reviewing your contract, you should check whether your contract contains a force majeure clause and if it does, what is the scope of the “force majeure” or “hardship” or “*keadaan kahar*” clause in your contract. If you are contemplating to invoke this clause or perhaps faced with other party’s proposition of the same, you will want to consider the following questions before you take any action:

1. Does the contract classify a national disaster status (e.g. a non-natural disaster) as a force majeure event?
2. Whether there is a causal link between the non-natural disaster and alleged non-performance of the contract?
3. Whether the parties foresaw this non-natural disaster at the conclusion of the contract?
4. Whether a party is acting in bad faith when it attempts to invoke this non-natural disaster as a force majeure event?
5. Whether the parties can overcome the adverse consequences arising from the non-natural disaster?
6. Whether the non-natural disaster’s pernicious effects can be avoided by the contracting parties?
7. Has there been an effort by either party to mitigate the unfavourable consequences arising from the non-natural disaster?

As detailed in our previous client update ([click here to read](#)), there is no definite answer on whether Covid-19 and its implications fulfil the qualifications of a force majeure event under Indonesian law. In our view, it will depend on the relevant industrial sector and the specific type of obligation affected and whether non-performance is caused by Covid-19 pandemic.

If your contract contains a force majeure clause, then the next step will be to check whether such a clause includes a non-natural national disaster as a force majeure event. If it does, then you or your counterparty should be able to invoke Covid-19 as a force majeure. In addition, you or the counterparty must also show good faith, for example, by complying with the procedure to claim a force majeure event under the contract. This can easily be evidenced by, among others, promptly delivering a notification after the occurrence of the event.

Even if an agreement does not include a non-natural national disaster as a force majeure event or does not contain any force majeure clause at all, parties should bear in mind that some court decisions still recognise an extraordinary circumstance that hinders performance as a force majeure. Whatever the consequence of Covid-19 on the parties’ performance, the agreement between them is crucial. It is important that the parties commit to work together in every step of this process, whether to adjust the

agreement with the current state to restore the equilibrium or terminate the agreement on a fixed date and period.

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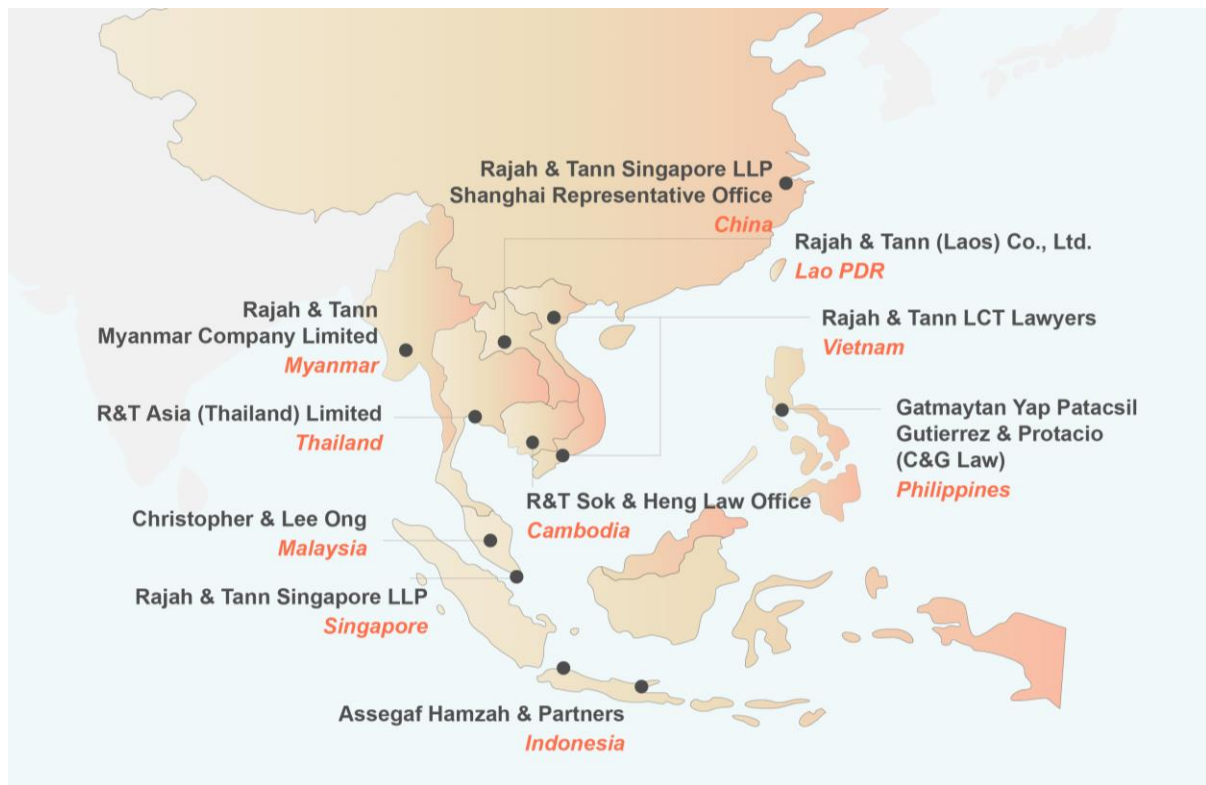
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