

Covid-19, Force Majeure and How it Could Impact Your Contract

These past few weeks have been a busy week for the Indonesian government as it continues to battle the spread of Covid-19. Some of the regulatory measures that were issued in recent days include regulations on public health emergency, massive social restrictions and state finance and financial system (Presidential Decree No. 11 of 2020, Government Regulation No. 21 of 2020 and Regulation in lieu of Law No. 1 of 2020, respectively).

Almost all industries have been impacted, and businesses are struggling to maintain their operation, and some are even being forced to close temporarily. In light of this, many business players have begun assessing their existing contracts, especially whether this outbreak can be considered as a force majeure event to relief affected parties.

Below we discuss the concept of force majeure under Indonesian law and whether Covid-19 satisfies this concept.

Force Majeure (*Keadaan Memaksa*) under Indonesian Law

Articles 1244 and 1245 of Indonesian Civil Code (“**ICC**”) defines force majeure as an unforeseeable situation that caused a debtor to be unable to perform its obligation as there is nothing that the debtor can do to rectify the situation. A force majeure provision provides relief for the defaulting party from paying penalties due to non-performance.

Apart from the ICC, regulations governing force majeure are scarce. Some of these regulations are those in the banking, oil and gas, construction and employment sectors.

Under the freedom of contracts principle acknowledged by the ICC, parties are bound by matters that they have agreed on. Accordingly, they will also need to refer to the force majeure provision under their contract to check on the effect of the occurrence of a specified event that may obstruct the performance of certain obligations.

Can Covid-19 be Considered as a Force Majeure?

As there is no definitive answer under the regulations whether the Covid-19 outbreak itself can constitute a force majeure event, we have to examine the impact of this outbreak on business performance, as well as the force majeure provision in the contract. Then, we should ask the following questions:

1. Is the Covid-19 outbreak explicitly or implicitly stated in the contract?
2. Has the outbreak rendered the performance of obligations or fulfilment of the contract to be impossible?
3. What are the efforts of the defaulting party in this circumstance?
4. What would be the consequences of force majeure?

What's next?

Before invoking a force majeure event or conversely, responding to a force majeure declaration, the parties should take the following actions:

1. **Review the force majeure clause** – check the force majeure provision in your contract to understand the scope of the force majeure circumstances, procedure as well as its limitations. You should also check the dispute settlement procedure and forum in the contract.
2. **Analyse circumstances and evidence** – before issuing force majeure notice, you as the affected party should analyse circumstances impacted by the outbreak and whether it can be regarded as a force majeure. You should also review the impact of invoking force majeure event. This analysis would need to be supported by proper records and evidence.
3. **Immediately notify the counterparty** – we strongly recommend that you immediately notify your counterparty of the occurrence of a force majeure event. The notification would need to set out the details of such an event. You may also want to present evidence to support your argument. Lastly, you should state the relief requested in the notification.
4. **Immediately respond to notification** – if you receive a force majeure notification instead, it is important that you immediately respond to such notification. The response may include an explanation on whether you accept the circumstance as a force majeure, additional inquiries on the circumstance or request to the counterparty to provide evidence.

Conclusion

After completing the above steps, you may end up in a re-negotiation of the contract. Here, you may wish to propose a new timeline for contractual performance, accept or offer relief to the counterparty or terminate the contract.

But you may also end up in a dispute, in which the parties will need to go through dispute settlement process that has been agreed in the contract. During the dispute settlement process, the court or arbitration body will examine whether the force majeure arguments are justified and determine further consequences for the parties.

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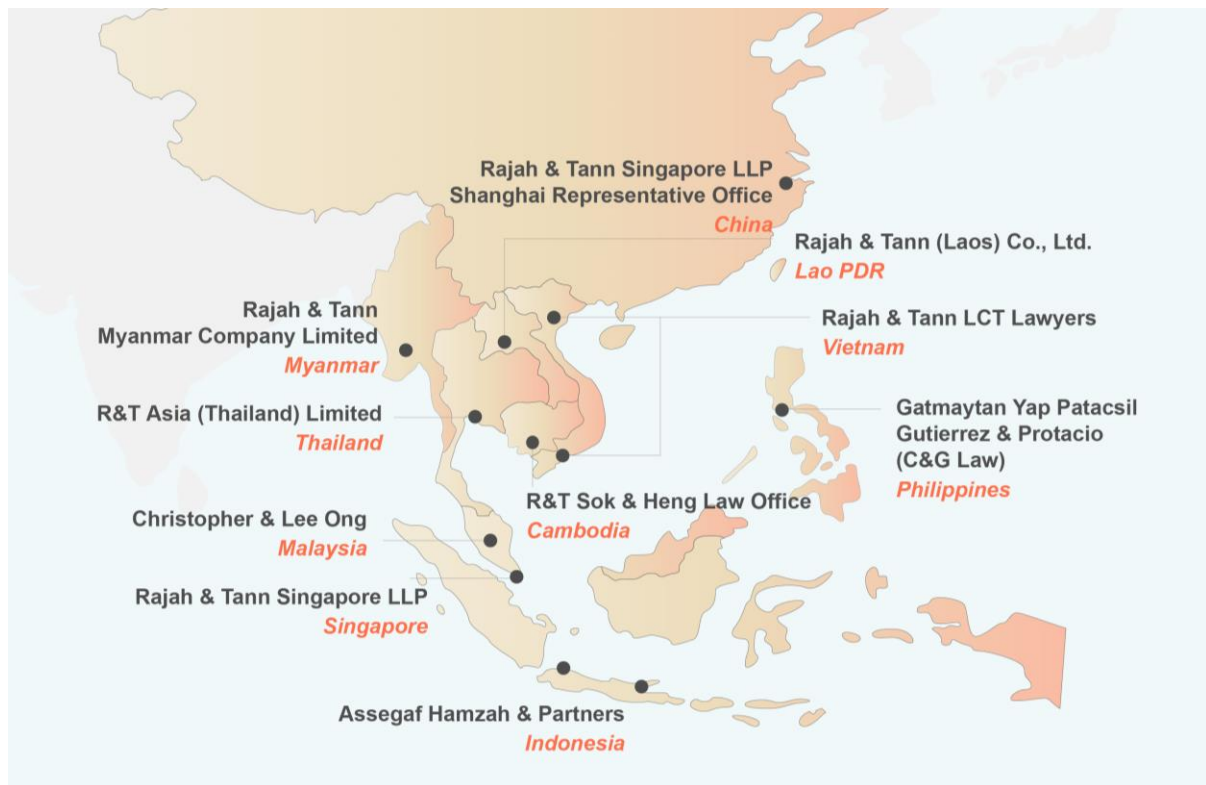
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