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Jakarta, April 2020

MEMORANDUM

From : Nurjadin Sumono Mulyadi & Partners

Subject : **Covid-19 Pandemic as a Force Majeure under Indonesian Law**

Dear Valued Clients,

The Novel Corona Virus Disease 2019 (“**Covid-19**”) has been declared by the World Health Organization (WHO) as global pandemic and the Indonesian Government has determined the non-natural disaster caused by the spread of Covid-19 as a national disaster by Presidential Decree No. 12 of 2020 on Stipulation of the Non-Natural Disaster of the Spreading of Corona Virus Disease 2019 (Covid-19) as National Disaster (“**Presidential Decree 12/2020**”). As one of the efforts to manage the significant increasing number of Covid-19 confirmed cases in Indonesia, the Minister of Health of Republic of Indonesia has set out a framework for the implementation of Large-Scale Social Restriction (*Pembatasan Sosial Berskala Besar*/ “**PSBB**”). One example of the implementation of the PSBB is in DKI Jakarta by the enactment of DKI Jakarta Governor Regulation No. 33 of 2020 on the Implementation of PSBB in the handling of Covid-19 in Jakarta.

With the implementation of PSBB, some individual, small and large businesses, are unable to meet their obligations under their respective agreements. It then becomes a question of whether or not a force majeure situation exists as a reason for non-fulfillment of the respective obligations.

In general, Covid-19 and Presidential Decree 12/2020 should not be the sole basis for determining that a force majeure situation exists and it should be determined on a case by case basis. The parties should refer to their respective agreement (s) to determine whether Covid-19 may be deemed as a force majeure event.

The dispute as to whether Covid-19 may be deemed as a force majeure will not arise if both parties mutually agree that Covid-19 constitutes a force majeure which hinder the performance of their respective agreement. As a result, the parties may agree to postpone the performance of obligations or to terminate the agreement.

However, a dispute may arise if the parties do not reach mutual consensus that the Covid-19 is force majeure situation that may hinder the fulfillment of obligations in their agreement. An amicable settlement would be more difficult to achieve when the respective agreements do not stipulate any force majeure clause or the agreement only regulate force majeure in general manner. In this situation, the parties would have a debate whether Covid-19 constitutes a force majeure and the defaulting party may be relieved from their non-performance of obligation. In the event of dispute arise, dispute settlement provisions may apply depending on what has been agreed by the parties to the agreement. If the agreement relates to industrial relations, then relevant employment regulations must be followed.

As Indonesia adopts a civil law legal system, what governs this particular matter are the prevailing regulations. It should be noted however, that under Indonesian Law, **there is no specific regulation which stipulates the definition of force majeure and specific event which constitutes as force**

majeure. However, the concept of force majeure can be found in Article 1244 and Article 1245 of the ICC.

Under the ICC, the elements of force majeure may be specified as follows:

1. It is an unforeseen event;
2. It causes the defaulting party to be unable to meet its obligation or causes delay in performance of such obligation or the performance of the obligation would be prohibited;
3. There are no unintentional circumstances;
4. The defaulting party is not responsible for that event; and
5. There is no bad faith from the defaulting party.

All of the above elements should be met in order to establish a force majeure.

In the event of dispute then the provisions related to force majeure under ICC should apply in the absence of a clear force majeure provision in an agreement.

The above-mentioned provisions of ICC will also apply to an agreement which has clearly stated 'pandemic' or 'non-natural disaster' as a force majeure. If there is a dispute on whether a party may be relieved from the non-performance of an obligation due to Covid-19, the elements of Article 1244 and Article 1245 of the ICC will be used as the basis to establish whether there is a causal relation between the non-performance of the obligation and the occurrence of Covid-19 and to determine if such party should be relieved from the obligation.

One of the judicial decision references for the above-mentioned case is Supreme Court Decision No. 587PK/Pdt/2010 of 2010. In that case, the parties categorized flood as a force majeure event in their agreement. However, the panel of judges in the Supreme Court ruled that the non-performance of the obligation due to the flood could not be justified. They considered the elements of Article 1244 and 1245 of the ICC which led to a decision that such flood, even though stipulated as a force majeure event under the agreement, did not release the defaulting party of its obligation. The panel of judges found that such flood was not an unforeseen event and that the parties should have been able to predict the occurrence of the flood because of the season prevailing at that time.

Based on such reference, it should be noted that even though Covid-19 was clearly included as a force majeure event in the agreement, it cannot be necessarily categorized as a force majeure and the reason for the non-performance of obligation. The determination of force majeure would also be subject to the elements of force majeure regulated under the ICC.

Based on the above explanations, the defaulting party shall refer to fulfillment of elements of the ICC as the basis of their argument in the event of dispute. The defaulting party will have to prove that Covid-19 was unforeseeable, there is no bad faith from the defaulting party, the failure was not caused by its fault (caused by something beyond its control), the defaulting party was not accountable for it, and there were no steps it could have taken to avoid the non-performance or prevent or avoid the risk.

More importantly, the defaulting party must be able to prove that there is a causal relation between Covid-19 and the non-performance of the obligation under the agreement. To strengthen their position in the legal proceeding, it is advisable for a party to take all necessary actions to mitigate the risk of non-performance and to the extent possible, these actions should be documented for their proof in the court.

Notwithstanding the foregoing, the ascertainment of the existence of a force majeure event and whether a party can be released from its obligation for that reason is subject to the determination of the courts in Indonesia based on the judge's interpretation of the force majeure provisions in the ICC and based on specific circumstances of such case. For example, even though a regulation imposing PSBB prohibits certain business activities, it may contain exemptions allowing other businesses activities to continue.

In addition, the Indonesian judges will also decide based on fair and just (*ex aequo et bono*) principle.

Conclusion

Covid-19 and Presidential Decree 12/2020 should not be the sole basis for determining that a force majeure situation exists. It should be determined on a case by case basis and the provisions related to force majeure under ICC should apply. The defaulting party must be able to prove the causal relation between Covid-19 and the non-performance of the obligations under the agreement. Furthermore, the determination of whether a force majeure exists is subject to the determination of the courts in Indonesia based on the judge interpretation and specific circumstances of such case.

Please note that the information contained in this memorandum should be only used as a general guideline with respect to force majeure and may not contain legal advice for your specific cases. The information herein should not be used or relied upon in regard to any particular facts or circumstances without seeking legal advice from us. If you need further information and legal advice regarding force majeure in your specific issue, please do not hesitate to reach the contact persons below.

Sincerely,

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