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COVID-19 AND ITS IMPACT ON INDONESIA AND SINGAPORE

By WongPartnership and Makes & Partners, member firms of WPG, a regional law network.

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COVID-19 and its Impact on Indonesia and Singapore

COVID-19 has caused widespread disruption across the globe. As the numbers of infected persons and the death toll continue to rise exponentially with little sign of abating, countries have imposed increasingly strict social distancing and border control measures. In Indonesia, on 31st March, President Jokowi declared COVID-19 to be a public health emergency and on 15th April, Indonesia expanded a partial lockdown to more areas near Jakarta, bringing more than 15 million people under large scale social distancing rules. In Singapore, the Singapore government imposed a "circuit-breaker", with all non-essential services to stop operations at their workplaces from 7th April 2020 to 4th May 2020 and with all public spaces cordoned off to prevent social gathering.

Such measures have had, and are expected to continue having, severe commercial repercussions for businesses both in Indonesia and Singapore, especially those which are involved in sectors such as the F&B and tourism sectors. In light of these problems, businesses are looking to their existing contracts to restructure, minimise or avoid liability for their non-performance. Available remedies will in turn depend on the governing law of such contracts, and whether the contracts contain clauses addressing a material change in circumstance.

Given that Singapore law and Indonesia law are the two most common choices of governing law of Indonesia-related transaction documents, the position under both Singapore and Indonesia law will be considered.

WHERE THE GOVERNING LAW OF THE CONTRACT IS SINGAPORE LAW

Where the governing law of the contract is Singapore law, there are at least four potential ways in which affected businesses may avoid liability for contractual non-performance: (a) by relying on the doctrine of frustration, (b) by relying on a material adverse change or effect clause, (c) relying on a force majeure clause, or (d) if applicable, parties may also seek temporary relief under the COVID-19 (Temporary Measures) Act 2020 ("**COVID Act**").

Doctrine of Frustration

When is a contract frustrated?

A contract is frustrated when, through no fault of either party, an unforeseeable external catastrophic event has occurred after the formation of the contract, which has so drastically altered the contractual arrangements agreed upon that to insist upon continued performance would be to hold the parties to a fundamentally different contract altogether.[1]

Whether there has been a radical change in obligations will depend on each individual case, but generally, the courts will very rarely find that contracts have been frustrated, since the courts are reluctant to interfere with contracts which parties have entered into willingly.

[1] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("***RDC Concrete***") at [59].

Circumstances in which frustration have been made out include:

a) **If contractual performance becomes illegal:** This can either be due to the enactment of a new law or due to a change in circumstances which have made performance illegal.

b) **If contractual performance becomes impossible:** There is no need for performance to be literally impossible; whether the contract is frustrated or not depends on the extent of the impossibility. Further, whether this ground is made out often depends on whether the parties had specified the **manner** of performance which has now been rendered impossible. For example, if the contract provides for logs to be floated down a river to a timber mill but the river dries up, the contract will be frustrated as the specified method of performance has now become impossible.

However, where the alleged event merely causes the contract to be more difficult or expensive to perform, that will generally not be sufficient to frustrate the contract unless the increase in costs is so extreme as to be "astronomical".[2]

What happens when a contract is frustrated?

Where a contract is frustrated, all parties to the contract are discharged from further performance by operation of law *i.e.*, there is no need for the contract to stipulate for this consequence. The Frustrated Contracts Act also allows the courts to consider the expenses and benefits of each party to the contract and decide on an equitable manner of cancelling the contract.

Will COVID-19 amount to a frustrating event?

Whether COVID-19 will frustrate the contract depends on the precise circumstances of each contract, particularly whether it has now become impossible to perform the contract (although it bears reiterating that such performance need not be *literally* impossible).

Material Adverse Change/ Effect

A material adverse change / effect clause is a contractual mechanism which allows for termination or a modification of contractual obligations in the event of a "material adverse change" ("**MAC**") or a "material adverse effect" ("**MAE**"). However, there can be difficulties in invoking a MAC / MAE clause as such clauses may not specify events which lead to a MAC / MAE, coupled with the fact that materiality will need to be demonstrated clearly and objectively. Hence, invoking a MAC / MAE clause will likely require a highly factual analysis and may differ depending on the facts of each case.

Force Majeure Clauses

Force majeure clauses are where parties contractually agree on how to deal with specific future events that might arise, over which the parties have little or no control, that might impede or obstruct the performance of the contract.[3]

[2] *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 1 SLR(R) 945 at [24].
[3] *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR(R) 316 at [60].

What does a force majeure clause look like?

A force majeure clause has three key features, namely: (a) the clause stipulates a list of events or circumstances which are usually beyond the control of the parties; (b) the clause states the impact of the event on a party's performance; and (c) it provides the consequences if an event which satisfies (a) and (b) are made out. An example with the relevant features is highlighted below:

> "*The Supplier **(c)** shall be under no obligation to supply the concrete if the **(b)** said supply has been disrupted by virtue of **(a)** inclement weather, strikes, labour disputes, machinery breakdowns, riots and shortage of material, acts of God, or any other factors arising through circumstances beyond the control of the Supplier*".

What relief is available under a force majeure clause?

A force majeure clause derives its force solely from the intentions of the contracting parties and the relief it provides is available regardless of whether the specified event would have been sufficient to frustrate the contract.[4] Since a force majeure clause is purely contractual, the relief it provides will be determined by the specific content of the clause itself. Some common examples of relief include (a) an extension of time given to the party in default or (b) the suspension of the defaulting party's duty to perform the contract.

What must a party seeking to rely on COVID-19 to activate a force majeure clause show?

The party seeking to rely on COVID-19 to activate a force majeure clause must first show that COVID-19 falls within the specified list of events in the clause. In this regard, force majeure clauses which refer to "pandemics" or "epidemics" would stand a good chance while clauses referring to more ambiguous events, such as "acts of God" would require more persuasion before the courts.

Further, the party must show that COVID-19 has impacted its contractual performance in the prescribed way, whether be it "disrupted", "hindered" or "prevented" (depending on the precise term used in the clause).[5] The courts have noted that where a commercial transaction is involved, the determination of whether the force majeure event has sufficiently "prevented", "hindered" or "disrupted" the performance of the contract will be informed by commercial considerations e.g., the court may consider the practices of the specific industry.

It should be noted that clauses which do not prevent the literal performance of a contract but would render the continued performance of a contract commercially impracticable would generally constitute a "hindrance" or "disruption" within the meaning of the force majeure clause.[6] However, the courts have adopted the view that increased costs are generally insufficient, in and of themselves, to constitute a "hindrance" or "prevention" that could invoke a force majeure clause though the position may be otherwise if the increase is astronomical.[7]

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4 *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2010] 1 SLR 1083 at [25].
5 *RDC Concrete* at [54].
6 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 ("***Holcim (Singapore)***") at [56].
7 *Holcim (Singapore)* at [53].

Impact of the Covid-19 Act

On 7 April 2020, Singapore enacted the COVID Act to protect certain categories of businesses and persons which have been adversely affected by COVID-19. The COVID Act provides some temporary measures and relief for the inability to perform, which aim to provide affected businesses and individuals with much needed short-term cashflow.[8] Such relief only applies to contracts defined in the Schedule to the COVID Act, including amongst others, loan facilities by a licensed bank, performance bonds, hire-purchase agreements, event contracts, tourism-related contracts and construction or supply contracts. Additionally, the scheduled contract must have been entered into or renewed (other than automatically) before 25 March 2020.[9]

Under Section 5 of the COVID Act, a party may serve a notification for relief on a counterparty to a contract (or any guarantor or surety for its obligation in the contract) if it can show that:

a) It is a party to one of the scheduled contracts defined in the Schedule to the COVID Act;

b) The obligation is to be performed on or after 1 February 2020; and

c) The inability is to a material extent caused by a COVID-19 Event.

The counterparty who receives the notification may not take various actions (such as the commencement or continuation of an action or enforcement of security) until after the earliest of the following:

a) The expiry of the 6 month prescribed period;

b) The withdrawal of the notification for relief; and/or

c) An assessor determines that the case is not one to which Section 5 of the COVID Act applies.

Additionally, Section 5(13) of the COVID Act makes clear that such temporary measures and relief do not affect the operation of force majeure clauses in the contract where applicable.

WHERE INDONESIA LAW GOVERNS THE CONTRACT

Indonesia law recognises the concept of force majeure. Articles 1224 and 1245 of the Indonesia Civil Code ("**ICC**") state that:

> *Article 1244*
>
> *The debtor shall compensate for the costs, losses and interests if he cannot prove that the non-performance or late performance of his obligation is caused by an unforeseen event that he cannot be held responsible for, although he did not act in bad faith.*

[8] For a full list of temporary relief, please refer to Section 5(3) of the COVID Act. Relief for specific contracts are also provided in Sections 6 and 7 of the COVID Act.

[9] See Section 4(1) of the COVID Act.

Article 1245

No payment of costs, losses and interest shall be paid by the debtor, if an act of God or an unforeseen event prevents him from performing his obligation, or causes him to perform a prohibited act.

While the laws do not provide for a specific definition of force majeure, it is generally viewed that, in order for a force majeure event to come under the purview of Articles 1244 and 1245 of the ICC, it should meet the following criteria:

a) The event is beyond the control of the debtor;

b) The event is unforeseen at the time that the parties entered into the agreement;

c) The event is preventing the debtor from fulfilling its obligation;

d) The event is unintentional or the debtor has not intentionally caused the event; and

e) The debtor is not acting in bad faith.

Examples of force majeure events include:

a) A change in applicable laws that would result in the debtor violating the laws and/or facing a severe penalty if the debtor continues performing its obligations;[10]

b) A risk of war, loss of object of agreement due to seizure by the armed forces;[11] and

c) Unexpected events that cannot be resolved by the parties to the agreement or prevented by the parties.[12]

What Happens When a Force Majeure Event Occurs?

Termination of agreement when primary object of an agreement is destroyed

Article 1444 of the ICC states that if the primary object of an agreement is destroyed completely, the agreement will be terminated.

No liability for cost, losses and interests arising from FM

Based on Articles 1244 and 1245 of the ICC, the debtor cannot be held liable for any costs, losses and/or interests arising from a force majeure event. However, consistent with the common principle of civil law evidence, the burden of proof lies on the debtor who is claiming the benefit of a force majeure event to show that its inability to perform the obligation was caused by a force majeure event.

10 Oey Tjoeng Tjoeng v. Super Radio Company NV No. Reg. 24 K/Sip/1958.
11 NV Handel Maatschappij L'Auto v. G.G. Jordan No. Reg. 15 K/Sip/1957.
12 P. Adianto Notonindito v. PT Tirta Sartika No. Reg. 3389 K/PDT/1984, Rudy Suadana v. PT Gloria Kaltim No. 409 K/Sip/1983.

The force majeure could either be complete or partial, and permanent or temporary

A force majeure can either be (a) complete or partial, and (b) permanent or temporary. Complete and/or permanent force majeure means that the force majeure event has caused all obligations to become incapable of being fulfilled. In such cases, there would be no utility to having the agreement anymore and, therefore, the agreement may be terminated.

On the other hand, partial force majeure means that only some (and not all) contractual obligations cannot be performed, while temporary force majeure results in the obligations being incapable of being carried out temporarily. For the former, the debtor should still complete other parts of the obligations in accordance with the agreement. As for the latter, the debtor may postpone the performance of its obligation until after the force majeure event is resolved.

Is the Force Majeure Governed by the Agreement?

Whether or not a force majeure event exists and the consequence thereof is generally determined based on the contractual terms set out in the relevant agreement. Article 1338 of the ICC states that "*[a]ll legally executed agreements shall bind the individuals who have concluded them by law. They cannot be revoked otherwise by mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith*".

All terms, including any force majeure clauses, set out in the agreement shall bind both parties. However, if the agreement is silent on the definition and consequences of force majeure, the general rules under prevailing laws and regulations, including the ICC, would apply.

Generally, the courts have adopted a broad scope and interpretation of a force majeure. Past court decisions have found, for example:

a) If, under an agreement, a specific event is not explicitly categorised as force majeure, the judge will consider whether the failure by a party to perform its obligations under such agreement is caused by an unforeseen event which could not be prevented by such party;[13]

b) The existence of force majeure may be determined based on the definition or requirements set out in prevailing laws and regulation (which includes an administrative action taken by, or order from, the relevant government institution that binds the relevant party), or an unforeseen event that cannot be resolved by the relevant party or is beyond the control of the parties;[14] and

c) In rendering his decision, a judge would also take into consideration what is just and expedient.[15]

[13] SC Decision No. Reg. 15 K/Sip/1957 and vide SC Decision No. 409 K/Sip/1983.
[14] SC Decision No. 3389 K/PDT/1984.
[15] Commercial Court Decision No. 21/Pailit/2004/PN Niaga.Jkt.Pst.

Does the Covid-19 Pandemic Qualify as a Force Majeure Event?

As of the date of this notice, the Indonesian government has declared a state of emergency as a result of the COVID-19, and this status is expected to last until 29 May 2020. In the wake of the emergency status stipulations, the Indonesian government has issued numerous policies and regulations to (a) address the effect and (b) mitigate the risks of the COVID-19 outbreak in Indonesia.[16]

Such regulations consider the COVID-19 pandemic as a force majeure event. In particular, the Decree of the Director General of Tax No. Kep-156/PJ/2020 on Tax Policy in relation to the Outbreak of Coronavirus Disease 2019 explicitly states that as a result of the spread of COVID-19, the current situation (in Indonesia) as per 14 March 2020 until 30 April 2020 is stipulated as a force majeure event.

CURRENT STATUS OF DISPUTE RESOLUTION MECHANISMS IN INDONESIA AND SINGAPORE

Parties who wish to utilise the court system in Indonesia and Singapore to adjudicate on these issues during such times should be aware of how COVID-19 has affected the operation of the court systems in both countries.

In Singapore, due to the aforementioned "circuit-breaker", every matter which has been scheduled for hearing in the Singapore Supreme Court within the period of 7 April to 4 May 2020 has been adjourned to a later date, unless the matter is assessed to be essential and urgent. In determining whether a matter is essential and urgent, the court will consider whether the determination of the outcome of the matter is time sensitive. A matter is not essential and urgent merely because it is convenient for the parties to have the matter heard early. Parties will also have to satisfy the court that in preparing, presenting or conducting for the hearing, safe distancing measures will be abided to.[17]

Further, parties should note that even after the "circuit-breaker", it is highly probable that safe distancing measures will continue to operate. These measures include the use of technology, such as holding hearings via video-conferencing or tele-conferencing.[18]

In Indonesia, all relevant parties to a case are strongly advised to undertake court administration and conduct hearings via the e-court application system and the e-litigation application system. Nonetheless, judges have wide discretion to decide on whether physical attendance for hearings are necessary.[19]

Outside of the court system, parties should be aware that the Singapore International Arbitration Centre ("**SIAC**") is operating as normal, though Notices of Arbitration and applications for emergency relief to the SIAC are now to be filed electronically only. However, the Indonesian BANI Arbitration Centre has

[16] Such regulations include the Government Regulation in Lieu of Law No. 1 of 2020 on State Financial Policies and the Stability of the Financial System in relation to the Handling of the Coronavirus Disease (Covid-19) Pandemic and/or Threats That Are Potentially Harmful to the National Economy and/or the Stability of the Financial System enacted on 31 March 2020, the Government Regulation No. 21 of 2020 on Large-Scale Social Restrictions for the Accelerated Mitigation of the Coronavirus Disease 2019 (Covid-19) enacted on 31 March 2020, the Decree of the President No. 11 of 2020 on the Determination of a Public-Health Emergency in relation to the Corona Virus Disease 2019 enacted on 31 March 2020 and the Ministry of Finance Regulation No. 23/PMK.03/2020 on Tax Incentives for Taxpayers Impacted by the Coronavirus Outbreak enacted on 1 April 2020.

[17] Registrar's Circular No. 4 of 2020.

[18] Registrar's Circular No. 3 of 2020.

[19] Supreme Court Circular Letter No.1 of 2020 Guidelines for Executing Duties During the Prevention Period of Covid-19 Spread in the Supreme Court and Lower Judicial Bodies.

temporarily suspended all arbitration hearings, though it can still be served for administrative and secretarial purposes between 10am to 3pm every Monday and Thursday.

UNSURE? SEEK LEGAL ADVICE

In these circumstances, whether a contracting party is able to invoke the doctrine of frustration, a MAC /MAE clause or a force majeure clause will depend on a careful analysis of the facts and the relevant contractual provisions. Parties may also consider seeking temporary relief under the COVID Act if the requirements are satisfied. Parties should obtain legal advice before seeking relief under their contracts, or the COVID Act.

If you would like information on this or any other area of law, you may wish to contact the Partner at WongPartnership or Makes whom you normally work with or the following:

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In addition to WongPartnership, a Singapore-headquartered firm with offices in Shanghai and Myanmar, the network includes member firms Al Aidarous Advocates and Legal Consultants (Middle East), Foong & Partners (Malaysia), Makes & Partners (Indonesia) and Zambrano Gruba Caganda & Advincula (Philippines). Together, WPG is able to offer the expertise of over 400 professionals to meet the needs of clients in key sectors throughout the region.

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Both firms regularly work together on a range of corporate/M&A transactions, both inbound and outbound, in Indonesia and the region. Working seamlessly on various matters, the team has been able to deliver commercially focused advice and negotiation skills that drive successful outcomes for clients. Through a full-service offering, we are able to deliver to clients access to a team of highly experienced dispute resolution lawyers, including a number of specialists who are recognised leaders in their fields, who are committed to protecting their clients' interests throughout the region.

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