ACTIO

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How To Design Force Majeure Clauses in Contracts

Force Majeure and Hardship: a Comparison

Can Natural Disasters Free a Party from Its Obligations?

FORCE MAJEURE

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"Latent brain functions can be enabled by force majeure when we are facing the weirdness of an unknown reality."
- Toba Beta

Dear Readers,

Since February 2020, the world is focused on the prevention and handling of the transmission of Covid-19 (Corona Virus). Transmission of Covid-19 has obstructed and affected business activities and suspended and changed business processes and habits in all areas of life.

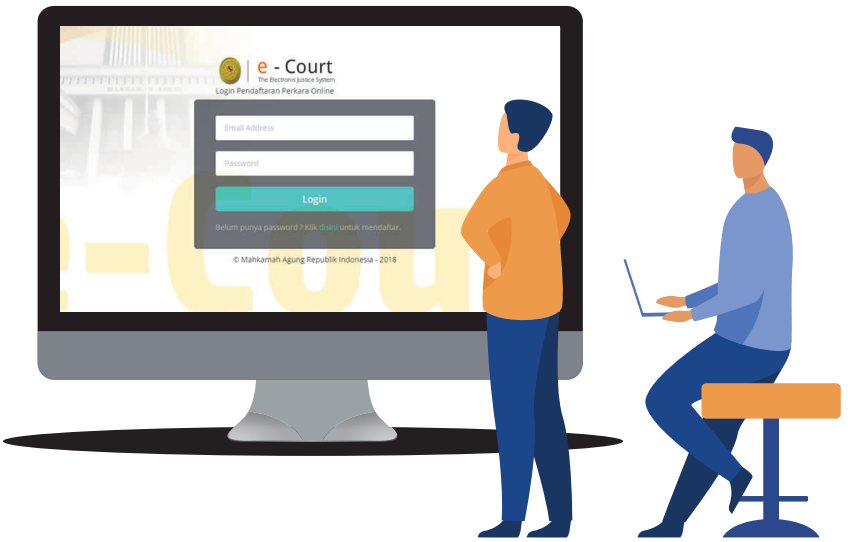
We are especially concerned about the Pandemic and how it is affecting the economy of many businesses and industrial sectors. Therefore, Anggraeni and Partners has strived to attend and assist clients in dealing with legal issues arising from the Covid-19 Pandemic.

We chose Force Majeure as the theme of ACTIO 13. We believe this area of the law is a topic in contract law that is frequently discussed since the outbreak of Covid-19. Many parties have taken the view that Covid-19 is a Force Majeure event which frees them from their legal obligations. While others are of the view that contractual obligations continue and need to be fulfilled in accordance with the contract, since most contracts do not regulate Covid-19 or Pandemics as a Force Majeure event.

Discussions in the ACTIO article in this edition include changes to the Procedure for Judicial Implementation of the Covid Pandemic 19 and Analysis of the Implementation of Law Number 24 Year 2007 Concerning Disaster Management in the Handling the Covid Pandemic 19.

In conclusion, the ACTIO Team wish you happy reading and hope our articles will be useful for the readers. Keep your spirits up and stay healthy in the "New Normal"

Regards,
Setyawati Fitri A, S.H., LL.M., FCIArb., FAIADR.



AMMENDMENTS TO JUDICIAL HEARING PROCEDURES RELATING TO COVID-19 PANDEMIC

The Covid-19 (Corona Virus) infections in Indonesia impacts on the effectiveness and efficiency of the whole community in carrying out its activities. The high infection rate of Covid-19 (Corona Virus) resulted in the implementation of physical distancing and work from home policies for the entire community and businesses. The Supreme Court issued Circular Letter No. 6 of 2020 on Working System to formally apply to the Supreme Court and other Courts concerning the Implementation of New Normal ("Circular Letter 6/2020").

Circular Letter 6/2020 provides that to prevent the spread of Covid-19 (Corona Virus) and to ensure that judicial services can be carried out, it is announced that Parties in civil courts, civil religious, and civil administrative Courts must implement e-litigation. In relation to criminal cases the Circular Letter 6/2020 asks Parties to refer to the prevailing laws and agreement Number 402/DJU/HM.01.1/4/2020; KEP-17/E/Ejp/04/2020; PAS-08.HH.05.05 of 2020 between the Attorney General of the Republic of Indonesia and the Ministry of Law and Human Rights of the Republic of Indonesia concerning the implementation of trial by teleconference ("Agreement 13 April 2020") The Agreement provides that until the official announcement by the Government to revoke the emergency conditions of the Covid-19 outbreak, all criminal trials will be carried out via teleconference.

Trial proceedings via teleconference is a positive step to pursue the principle of justice in a quick, simple and affordable. However, as stated by one of the members of the Ombudsman of the Republic of Indonesia that proceedings through teleconference might potentially cause maladministration due to the existence of a court that does not yet have experts and electronic devices that can facilitate the trial procedure through teleconference. Therefore, with the implementation of the new normalization transition, it will be seen whether the government will provide adjustments and/or issued a policy on the procedures for implementation as well as the infrastructure needed to properly conduct the trial procedures. **YAN/MAD/HES**

Source

- https://www.hukumonline.com/berita/baca/lt5edfd188dad3f/problematika-sidang-pidana-daring-saat-pandemi?page=all accessed on 10 June 2020
- https://www.ombudsman.go.id/news/r/-ombudsman-ri-temukan-potensi-maladministrasi-terkait-penyelenggaraan-persidangan-online-di-tengah-pandemi-covid-19 accessed on 10 June 2020
- https://mediaindonesia.com/read/detail/319431-ombudsman-sidang-online-16-pn-berpotensi-maladministrasi accessed on 10 June 2020

IMPLEMENTATION OF LAW NUMBER 24 OF 2007 CONCERNING DISASTER MANAGEMENT IN THE HANDLING OF COVID-19 PANDEMIES

Law No. 24 of 2007 concerning Disaster Management ("Law 24 of 2007") article 1 paragraph 3, categorizes the Covid-19 pandemic as a non-natural disaster, that is, disasters caused by events that fall into epidemics and pandemics. Furthermore, in Law 24 of 2007 the central government and regional governments have the responsibility and authority in disaster management.

The responsibilities and authorities of the central and or regional governments include disaster risk reduction, community protection, community fulfillment guarantees, disaster impact recovery, and allocation of funds for disaster management, placement of coping policies, making contingency plans, formulating preventative policies, and distributing money or goods to the community.

The central government and / or local government have clearly implemented the Large-Scale Social Restrictions (PSBB) provisions in order to prevent the spread of Covid-19. The handling of the Pandemic by the government is generally considered to be good even though the number of patients affected Covid-19 continues to increase every day. Allocation of funds to conduct social assistance programs in the form of special food distribution in Jakarta, Bogor, Depok, Tangerang and Bekasi (Jabodetabek) and Direct Cash Transfers or Bantuan Langsung Tunai (BLT) for outside of Jabodetabek have also been well implemented. The government, through the Ministry of Social Affairs, has also opened a public complaints service related to social assistance for communities affected by Covid-19. Government policy in limiting all transportation activities, both land, sea and air which directly limits the Eid homecoming activities to reduce the rate of transmission and spread of Covid-19 in Indonesia is also considered the right step in preventing the spread of Covid-19.

In addition, Article 26 of Law 24 of 2007 contains rights for people affected by national disasters, in this case Covid-19. These rights include getting social protection and a sense of security, getting education, training, and skills in carrying out disaster management, and are entitled to get the fulfillment of basic needs, including the right to receive compensation due to the disaster. The above has been carried out well by both central and regional governments by massive dissemination and education of Health SOPs. These include the avoidance of large gatherings, always wearing face masks, and regularly washing hands using hand sanitizers.

There is clearly a role for the community to successfully end the threat of Covid-19 in Indonesia. The government expects the cooperation of all RTs, RWs and village heads in the implementation of independent isolation and quarantine from individuals and groups. **DGM/TWK/HES**

NATURAL DISASTER WOULD IT EXEMPT THE PARTY FROM ITS OBLIGATION?

Every obligation is made either through an agreement or by operation of law, which imposes rights and obligations on every party.[1] However, in practice not all obligations can be fulfilled by the parties. One of the reasons is because there is a force majeure.

Force majeure is generally understood to mean an unexpected circumstance, unintentional, and where the debtor cannot be held liable because the debtor is forced not to fulfill his obligation agreed to in the agreement.[2] In other words, force majeure causes the debtor a justified reason not to fulfill his obligation.

To take an advantage of a Force Majeure, there must be no intention or fault on the part of the debtor.[3] Furthermore, there are 2 types of force majeure, namely absolute and relative force majeure. An absolute force majeure is a situation where the debtor it is impossible to fulfill his obligation because the object of the agreement is lost, and it cannot be predicted beforehand. Meanwhile, the relative force majeure is a situation where the debtor has difficulty fulfilling his obligation because there is an event that prevents him from doing it, and it cannot be predicted beforehand.[4]

Force Majeure in Indonesia is regulated under the Civil Code. However, the Civil Code does not provide any explicit definition of force majeure. Nevertheless, some requirements can be concluded in order for an event to be considered as force majeure, with the following requirements:

1. The debtor does not carry out or delays in carrying out his obligation due to the event (Article 1244 of the Civil Code);
2. The Debtor does not have bad faith (Article 1244 of the Civil Code);
3. The Debtor does not carry out his obligation because of an unintended circumstance (Article 1245 jo. Article 1553 of the Civil Code);
4. If the debtor performs his obligation, then it will be deemed as a prohibited act (Article 1245 of the Civil Code);
5. The circumstance did not arise from the debtor's fault (Article 1545 of the Civil Code).

Natural disaster is an example of force majeure that can cause the obligations agreed in the agreement to be unfulfilled or underperformed, which is often included in various types of agreements.[5] However in order for a natural disaster to be categorized as force majeure, the Court will consider the events on a case-by-case basis. The following judicial decisions

1. Abdulkadir Muhammad, Hukum Perdata Indonesia, PT Citra Aditya Bakti, Bandung, 2014, page 231.
2. R. Subekti, Hukum Perjanjian cetakan kedelapan belas, PT Intermasa, Jakarta, 2001, page 55.
3. J. Satrio, Wanprestasi Menurut KUHPerdata, Doktrin, dan Yurisprudensi, PT Citra Aditya Bakti, Bandung, 2012, page 105.
4. Abdulkadir Muhammad, supra note no. 1, page 243-244.
5. Rahmat S.S. Soemadipradja, Penjelasan Hukum Tentang Keadaan Memaksa (Syarat-syarat Pembatalan Perjanjian yang Disebabkan Keadaan Memaksa/Force Majeure), Nasional Legal Reform Program, Jakarta, 2010, page 79-84.

reflect the consideration of the judge who rejected natural disaster to qualify as a force majeure:

1. Supreme Court No. 2458K/Pdt/2008
Plaintiff and Defendant were bound in a coal purchase agreement. In practice, the Defendant admitted the delay of the coal delivery, the Defendant only delivered it to Philippines once and did not deliver it to Thailand at all. However, the Defendant claimed the coal delivery failure was due to rain which caused flood and the connecting bridge to the shipping area was damaged.

The tribunal (Judex Factie) stated that predictable rainfall cannot be considered as a force majeure. This statement was supported by witness statements which states that rain always falls in March, April, and May every year. There the Court declared the Defendant was in default.

2. Supreme Court No. 2301K/Pdt/2009
The Plaintiff is the owner of 70M and 72M material tower along with their complementary accessories, while the Defendant is a delivery service company. Both parties are bound by a goods delivery agreement. However, the Defendant neglected to carry out their responsibility of sending goods because KM. Kurnia, the ship which was used as delivery transport, had been attacked by storms and large waves which caused the ship to sink in the Juante Sea. The Defendant did not cover insurance for the goods even though it was the Defendant's obligation under the agreement.

The judge stated that the Defendant should have covered insurance for the material tower before sending it to the destination. In conclusion, the sinking of the ship could not be used as a reason for force majeure which caused the Defendant failure to fulfill their obligation.

3. Langsa District Court No. 01/Pdt.G/2011/PN.Lgs
The Plaintiff is a commercial agricultural State-Owned Enterprise while the Defendant is a company that has competence in managing plantations. The Plaintiff and Defendant were bound by the Plaintiff's operational management agreement for palm oil plantation ("KSO Agreement"). The Defendant had an obligation to pay compensation of 1 billion every month and other costs as agreed in the KSO Agreement. However, the Defendant failed to pay until the Defendant had a debt of IDR 8.379.861.486,00 (eight billion three hundred seventy-nine million eight hundred sixty-one thousand four hundred eighty-six Indonesian Rupiah) to the Plaintiff. The Defendant argued that one of the KSO Plantation, Krueng Luas, was flooded so the KSO Management's income was reduced and the Defendant faced difficulty to pay.

The Judge stated that: "Based on the statements from all witnesses, both from the Plaintiff and Defendant, there is a fact that every year floods occur at Krueng Luas for approximately 40 days. In addition, the position of the Krueng Luas is adjacent to the river so when the rainy season comes, overflow of a river can or always come close to the palm plantation every year. But this situation cannot be qualified as an unexpected situation, it can be predicted from the beginning and has been resolved at the time of aanwijzing."

The Judge further stated:"The issue is how capable the Defendant is in anticipating these circumstances that can be estimated normatively because such data are contained in the tender document provided by the Plaintiff."

Based on the judicial decisions above, it can be concluded that in Indonesia, natural disaster is not automatically categorized as force majeure which can be used to exempt the debtor from fulfilling his obligation. Even though a natural disaster occurs, a Force Majeure would not be recognised by the Court if the defaulting Party:

(i) could predict or contemplate the situation and/or the event,
(ii) there is still other alternative for the debtor to carry out his obligation, and
(iii) the debtor did not do his best effort to overcome the situation.

In conclusion, natural disaster cannot generally be used as force majeure in these situations. It will of course be open for litigants to argue that a natural disaster was unpredictable, beyond contemplation, and was of such nature as rendering performance impossible despite his best efforts. We will have to wait to see how an Indonesian Court would deal with such a case. **DRP/SCN/HES**

DECIDED CASES ON THE APPLICATION OF FINANCIAL HARDSHIP IN INDONESIA

The 1997-1998 Monetary Crisis, known as Krismon, caused the US Dollar to appreciate almost 600% against the rupiah in less than one year.[1] This was unprecedented for the Indonesian economy especially for Indonesian companies who had taken US Dollar denominated loans before Krismon. The crisis extended to to all US Dollar denominated contracts as Indonesian parties found it difficult to make repayment in US Dollars. More than 70% of companies listed on the capital market suddenly became insolvent or went bankrupt.[2]

These facts illustrate a situation that can cause a burden on both a personal financial condition as well as a corporate hardship to sustain its business activity. These situations are based on a doctrine recognised in Indonesia called financial hardship. Financial hardship, in Indonesia is called keadaan sulit, a concept originating from Anglo-Saxon jurisdictions. However, the concept in Indonesia is defined as an event that has fundamentally changed the balance of the contract, which is caused by a very high cost of contract implementation, burdening the parties that carry out the contract (debtor) or the value of contract implementation to be very less for the party receiving (creditor).

According to Agus Yudha Hernoko, Financial Hardship can lead to the following conditions:[3]

1) The injured party has the right to request contract renegotiation from the other party. The request must be submitted immediately by showing the basis (legal) request for the renegotiation.
2) Requests for renegotiations do not automatically give the injured party the right to terminate the contract.
3) If the renegotiation fails to reach an agreement within a reasonable timeframe, the parties can submit it to the court.
4) If the existence of a Financial Hardship is proven in court, then the court can decide to (a) terminate the contract on a fixed date and time; or (b) amend the contract by returning to a more balanced situation.

1. https://finance.detik.com/bursa-dan-valas/d-4196577/ini-bedanya-pelemahan-rupiah-2018-dan-krismon-1998 accessed on 31/3/2020
2. https://news.detik.com/kolom/d-4032343/memori-krisis-moneter-19971998
3. Agus Yudha Hernoko, Legal Proportional Principle Agreement in Commercial Contracts (Yogyakarta: LaksBang Mediatama, 2008), p. 255. As cited by Soemadipradja, Legal Explanation of Forced State, p. 13.

These are startling legal consequences as the Court may now become an arbiter of what is fair in the circumstances.

In Indonesia there is no regulation on financial hardship, therefore, in general, judges will decide on financial hardship issues with the provisions of overmacht.[4] Overmacht, is called keadaan memaksa in Indonesia, broadly translated as Force Majeure. Courts may recognise a keadaan memaksa as a force majeure that releases party from its obligations in an agreement. It follows that there is no liability to provide compensation, costs, and interest, and / or from liability to fulfill these obligations. This is independent of whether there is a Force Majeure clause. Force Majeur is generally regulated in Articles 1244 and 1245 of the Indonesian Civil Code.

According to doctrine, Force Majeure can be divided into several classifications, one of which is absolute and relative force majeur:[5]

1. Absolute Force Majeure: is defined as an event where it is no longer possible to carry out the agreement, for example the machinery has been destroyed because of a fire.
2. Relative Force Majeure (not absolute) is a situation where the agreement can still be carried out, but with a commercial payment that are too large from the debtor, for example, the price of goods soaring too high.

Based on the explanation above, there are similarities in the concept of financial hardship and relative Force Majeure. Agus Yudha Hernoko also equates these two concepts.[6] Events which are a condition for a financial hardship and relative force majeur are actually similar although there is a clear difference in their legal consequences. In a financial hardship, it does not result in an agreement being void, but, it gives the right to renegotiate. Whereas in a force majeure situation, it exempts the non performing party from having to pay compensation, and can also result in the agreement being declared void.

Indonesia Courts have not been unified in opinion and clarity regarding financial hardship issues. This can be seen in the decision of case number 535 / Pdt.G / 2014 / PN.JKT.PST and case No. 3087K / Pdt / 2001. In both cases, one of the parties stated that there was a 1998 economic crisis which was a forced situation. Both verdicts rejected the reasons for the economic crisis as a force majeure. However, in case 535 / Pdt.G / 2014 PN.JKT.PST, the tribunal accepted that Krismon was a change in circumstances resulting in enormous losses and the tribunal considered this event not to be the fault of the parties, adding that the event was beyond the prediction of both parties. The tribunal felt it was appropriate for the risk / loss caused by the monetary crisis to be borne by both parties with the same comparative burden. The panel of judges then determined the amount of money to be paid based on justice changing the terms of the agreement of the parties.

Although stare decisis is not a recognized principle in Indonesia, there is no doubt that such a precedent, and the legal reasoning behind the decision, will haunt lawyers and parties who are more desirous of certainty in the law. **VKA/SCN/HES**

4. Ibid., p. 254;
5. Soemadipradja, forced state, p. 37;
6. Rahmat S.S. Soemadipradja, Legal Explanation of Forced Conditions, p. 3

A COMPARISON OF FORCE MAJEURE AND THE HARDSHIP PRINCIPLE

Based on the freedom of contract, the parties are allowed to determine events that can be categorized as force majeure. However by convention, past use and habit, events that are categorized as force majeure are usually related to natural and social events, for example: earthquakes, floods, hurricanes, and civil wars. In Indonesia, events related to the economy and commercial considerations are categorized as hardship. In Indonesia, economic-related events are categorized as force majeure, including the monetary crisis based on Decision No. 3087K/Pdt/2001, and economic crisis based on Decision No. 285PK/Pdt/2010). These cases are dealt with my colleague in an article published in Actio 13.

Is economic hardship an accepted doctrine in Indonesia? Unlike force majeure that has been expressly regulated in the provisions of Article 1244, 1245, 1444 and 1445 of the Indonesian Civil Code, hardship has yet to be regulated and in cases where hardship-related cases occur, the judge generally will decide based on the interpretation of force majeure. The hardship clause is usually used to overcome the absence of an expressed force majeure clause that does not cover commercial hardship. The rules on hardship stipulate that if the implementation of the contract becomes more difficult for one of the parties, the party is somehow bound to carry out the engagement subject to the provisions of the hardship.[1]

Clearly, this sets up a degree of uncertainty as to what amounts to hardship, allowing one party to be excused from the legal consequences of a breach. This uncertainty can be mitigated by inserting a force majeure clause or hardship clause in a commercial contract based on clear objective criteria based on its characteristics. This would go a long way to remove some doubt as to whether an intervening event has occured which should allow Parties to partially or fully escape their contract obligations.

1. Article 6.2.1 of UNIDROIT Principles of International Commercial Contracts 2010, page 19

Force majeure and hardship have the following similarities and differences:
The similarities between hardship and force majeure are:[2]

a. There is an event that prevents the performance of obligation by one of the parties (debtor);
b. The events occur unexpectedly at the time of formation of the contract;
c. The event was not caused by one of the partie's mistakes.

There are several important differences between force majeure and hardship including :
In a Force majeure situation, then:

a. the contract will be deemed expired (except for partial force majeure, there is an obligation to continue the remaining part), referring to Article 1381 of the Civil Code, force majeure is one of the reasons that caused the abolition of the agreement.
b. The debtor is no longer deemed liable for the risk.

In hardships, events that impede the fulfillment of obligation focus on events that fundamentally change the balance of contract, either because of inflated implementation costs or because of the change of implementation value received:

a. Has caused significant change which will cause irreversible losses to the other parties;
b. If proven, the contract does not expire but might be renegotiated by the parties for the continuance;
c. In the event renegotiation fails then the dispute will be brought before the court for adjudication;
d. The Judge may decide to terminate or revise the contract in order to restore the proportional balance.[3]

The legal ramifications of the similiarities and differences should be clearly spealt out during contract negotiation to minimise uncertainty.

Based on the similarities and differences in characteristics between force majeure and hardship mentioned above, then from the perspective of commercial contracts, hardship is seen as more of the flexible and accommodating to provide a way out when disputes arise.

However, despite its recognition by the Court, current business practices in Indonesia have yet to implement the hardship doctrine, as proven by a lack of precedents of having such provisions written into standard boilerplate contracts.

A workable compromise would be to include language dealing with hardship within expressed force majeure clauses. The inclusion of hardship clauses in contracts, especially for long-term contracts with very large investment values, is important to overcome difficulties in dealing with this emerging doctrine of hardship. Dramatic fluctuations in oil, commodities and labour prices are fundamental to long term viability of business organisations. It may be time for lawyers to advise clients of these risks rather than to leave it to the vaguaries of the Court system.

Ultimately, the existence of hardship or force majeure clauses in the contract depend on the language used and the substance of these clauses which will have to provide a flexible space for the possibility of circumstances that will fundamentally affect the balance of the contract in its implementation. **HWO/ALH/HES**

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2. Taryana Soenandar, Prinsip-Prinsip Unidroit: Sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional, Jakarta: Sinar Grafika, 2006, page 121-123.
3. Article 6.2.2 Jo. Article 6.2.3 of UNIDROIT Principles of International Commercial Contracts 2010, page 19

TECHNIQUE TO DRAFT FORCE MAJEURE CLAUSE

The infections of Covid-19 (Corona Virus) has widely affected business activities. All business activities that are hampered and/or stalled due to the Pandamic will have stakeholders now reviewing their agreements to checks clauses that may govern and protect them from such an unexpected situation or force majeure.[1]

When drafting an agreement clause, force majeure clauses commonly make use of boilerplate clauses embedded in the culture of the organisation. It is clear that under the Indonesia Civil Law, there exists the principle of freedom of contract which is stipulated under Article 1338 of the Civil Code (Civil Code). Therefore, legally there appears no prohibition for the parties to bind themselves to the agreement that only regulates general provisions (examples: floods, fires, riots, etc.) in their force majeure clause. However, there may be greater protection if parties elect phrases and wordings that are more specific in their force majeure clauses.

1. Article 1245 Indonesia Civil Code, defines force majeure as:
"The debtor needs not compensate for costs, damages or interests, if an act of God or an accident prevented him from giving or doing an obligation, or because of such reasons he committed a prohibited act."

The surgence of Covid-19 (Corona Virus) has clearly made the force majeure clause an important clause in agreements. The following are a suggested list of considerations that should be considered when drafting force majeure clauses to accommodate the interests of the parties in an agreement.

1. In drafting an agreement, it is necessary to understand client's business and client's objectives, so that in designing the clause in the agreement will accurately reflect the aspirations and objectives of the client. Understanding the client's business and objectives will provide important information on what kind of events that should be reflected and inserted into the force majeure clause.

2. Upon determining the events that are considered as a force majeure situation, it would be better to add a clause regarding notification by the party affected by a force majeure. Notification from the party affected by a force majeure shall include the reasons as well as the estimated delay or suspension before expected completion. This is to clearly reflect when the Parties can consider non- performance a breach.

   Notification of the force majeure serves as proof of the occurrence that a contemplated event has obstructed or affected the fulfillment of the obligations of either party, that can of course lead to 3 (three) possibilities, namely:

   a. temporary suspension of the fulfillment of obligations on the agreement by the client until the force majeure situation ends;
   b. grant of extension of time for the fulfillment of client obligations to the agreement; or
   c. in the event force majeure does not return to normal in the foreseeable time, it may prompt rights of the parties to terminate the agreement

3. It is important to also provide a clear, and where possible, an objective trigger event, in determining when the force majeure clause is activated. This can be tied to events such as a government announcement of an emergency. Other critics may argue that a loosely worded trigger event is preferable since no contract can envisage and predict every premutation and possibility of a Force Majeure. At the end of the day, this is a risk assessment exercise depending on clients' risk appetite. Our duty as drafters extends to proper advise and consideration of the client of this issue.

4. If there are no provisions of force majeure, the alternative is to renegotiate with the other parties to resolve this matter either by inserting force majeure clause or to ammend the schedule of obligations completion.

Based on the above explanation, it is essential to understand that all the clauses contained under the agreement have their functions and roles that might affect the parties, therefore considering the matters stated above will help in designing the clauses in the agreement, especially on force majeure provisions to provide security and legal certainty to clients.
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