

Project delays and disruption as the impact of COVID-19 and the proceedings of civil case examination in Indonesian civil court and/or arbitration

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On 7 January 2020, the Chinese authorities announced that they had identified a new virus belonging to the coronavirus family. It was originally named 2019-nCoV, now referred to as COVID-19. A series of events were then triggered off. As the death toll climbed and the number of confirmed cases spread across the world, governments took drastic measures to contain the spread.

This paper provides an opinion on the impact of COVID-19 and the approaches available to recover loss incurred related to delay and disruption resultant from the impact of COVID-19. The paper also provides a brief overview of key contractual clauses, current COVID-19 situation in Indonesia, an explanation of the Indonesian civil court and arbitration procedures during the COVID-19 pandemic, and the defence against liquidated damages (contract penalties).

I. TYPE OF CONSTRUCTION CONTRACT

In the construction industry there are many forms of contracts whether bespoke contracts that have been drafted by a Client/Employer for specific projects or standard forms of contracts that are widely used across the construction industry, such as the International Federation of Consulting Engineers (FIDIC), the New Engineering Contracts (NEC), and the Institute of Construction Engineers (ICE).

While contractual entitlement and obligations may vary between different forms of contract, the main content and contractual provisions remain similar in principle, as summarized below:

- Completion/Handover of Works – The completion or handover of works contractual provision will set out the date of completion/handover and the process of how the works will be handed over to the Client/Employer;
- Extension of Time – The contractual provision that enables the extension of the contract period, usually due to excusable delays set out in the contract provision;
- Variation/Change – Variation or Change contractual provisions, provides the mechanism to makes changes to the scope of works mainly in the form of addition, modification or omission to the contract works; and
- Force Majeure – The contractual provision to provide relief against contractual obligations in the event that unforeseen and predetermined events occur such as natural disaster, outbreak of war, terrorism and the like.

Although most contracts, whether standard form or bespoke, will contain the above contractual provisions to some degree, the approach implemented will be adapted to suit the project, to ensure contractual compliance.

II. CURRENT COVID-19 SITUATION IN INDONESIA

On 13 April 2020, the President of Indonesia declared that COVID-19 has been categorized as a national disaster and more recently the Indonesian Minister Of Public Work And Community Housing released the instruction number: 02 / IN / M / 2020 concerning protocol prevention of Corona Virus Disease 2019 (COVID-19) during the build of a construction project, the construction work may be suspended:

1. If you have high risk because the project location is at the center of the infections; or
2. If a positive worker and/or status of a Patient Under surveillance (PDP) has been found on site; or
3. If the Head of Ministry / Institution / Agency / Regional Head has issued a regulation to suspend construction activities temporarily due to force majeure.

Furthermore, a change of contract conditions may be proposed if the material and/or equipment and /or spare parts are imported from a country determined as high risk of Covid-19, and/or from a country that is not infected by Covid-19 but the delivery process is constrained by the limitation of the procurement of imported goods in Indonesia, with a requirement that such construction providers must inform this condition to Indonesian Minister Of Public Work And Community Housing Instructions using the mechanism in accordance with the Ministerial instruction.

In Indonesian Construction Law, it is stated that the Construction Work Contract must include a description of the circumstances that can be considered force majeure, it is stated that the event/circumstance must occur outside the will and ability of the parties that cause harm to either party, but does not clearly define what event/circumstance is to be considered force majeure.

It is highly recommended that parties must undertake a contract review in order to identify their obligations and entitlements to contractual relief, in particular the force majeure provisions, since each situation will have different legal consequences.

In our opinion, if "pandemic", "natural disaster" or "government regulation" is listed in the force majeure provision in the contracts and one or more parties cannot fulfill their obligations because of the effects of COVID-19, then the parties are entitled to proceed in accordance with the force majeure provisions and rely on the relief prescribed therein. It is advised to investigate the impact of COVID-19 both prior to and after the declaration of a national disaster by the Indonesian government.

III. **INDONESIAN CIVIL COURT AND ARBITRATION PROCEDURES DURING THIS PANDEMIC COVID-19 ERA**

As an effort to prevent the spread of Covid-19 and in accordance with the principle of the Salus Populi Suprema Lex Esto (Public safety is the highest law), the environment of the Supreme Court of the Republic of Indonesia and the judiciary under it applies adjustments to the work system of Judges and Judicial Apparatuses, one of which is to encourage justice seekers to utilize E-Court and E-Litigation, which in accordance with Number 1 letter b page 2 of the Indonesian Supreme Court Circular No. 1 of 2020 which has experienced two changes, namely the Supreme Court Circular No. 2 of 2020 and Indonesian Supreme Court Circular No. 3 of 2020, and point B number 4 Circular of the Secretary of the Supreme Court No. 1 of 2020. E-Court and E-Litigation are the implementation of case administration and electronic examination of cases.

When approaching a claim from a technical perspective in traditional litigation and/or e-litigation, there is an emphasis on demonstrating that your assessment/claim correctly, as to the claimant has the burden of proof, to prove beyond a reasonable doubt that what is being claimed is the truth. This requires all claimed items and the approach being scrutinised to ensure that everything is in accordance with the contract and legislation.

While the current and ongoing impact of COVID-19 remains relatively unknown there are two significant bodies of work which can be referred to as representative of industry-standard guidelines for the analysis of project delays to support and strengthen your claims, and they are as follows:

- a) The American Association of Cost Engineers (AACE International) and its paper 'Forensic Schedule Analysis', first published in 2007 and updated in 2011.
- b) The UK's Society of Construction Law (SCL) and its paper 'Delay and Disruption Protocol', second edition February 2017.

The SCL Protocol's Guidance Part B: (Guidance on Core Principle), describes methodologies for extension of time assessments to be made 'at the time' (during the project) and Section 11 (Core Principle) deals with delay analysis 'after the event' (when the project is already completed) and Section 18, of SCL Protocol describes common methodologies for the disruption claims.

Further to project delay claims, there are two other areas to be assessed against the contract which are Prolongation Cost and Disruption. A prolongation cost claim focuses on the identification of time-related indirect costs incurred due to the prolongation of a contract period.

Disruption (as distinct from delay) is a disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular work activities and the disruption caused these work activities are not able to be carried out as efficiently as reasonably planned (or as possible). The disruption analysis is used to demonstrate the loss of productivity and hence additional loss and expense over and above that would have been incurred were it not for the disruption event.

The success of a claim is usually dependent on the quality of the records kept throughout the project. However, the forum for the dispute resolution can also impact the outcome, whether it is a traditional form such as litigation or alternative dispute resolution such as mediation, expert determination or arbitration.

IV. DEFENCE AGAINST LIQUIDATED DAMAGES (Contract Penalties)

In consideration of delays and disruption seen on construction projects due to COVID-19, it is likely that most projects will experience delays or be unable to achieve their contractual milestones and completion dates, whereby the employer would be entitled to impose liquidated damages/contract penalties. There are a number of approaches that can be taken to defend against liquidated damages:

- Issue a Notice of Delay to your Employer as per the contract provisions and register your intention to claim extension of time ("EOT").
- Submit an EOT claim in accordance with the contract provisions, which will effectively postpone the completion date that the employer is entitled to impose liquidated damages;
- Utilise the force majeure provisions in the contract, to seek relief against liquidated damages and contractual completion dates, if available and a pandemic is included as a force majeure event;
- Any existing or new legislation that could provide relief against the employer imposing liquidated damages. This could be in form of the prevention principle and 'time at large', or a ministerial instruction such as the Minister Of Public Work And Community Housing instruction; and
- The approach would be determined on a case by case basis, to ensure that a robust defence against the incurrence of liquidated damages is implemented.

V. CLOSING STATEMENT

Whilst the future is as uncertain, what is certain is that quality project records will be invaluable in the quantification of the effects and impact of this unprecedented event, and reassess the clauses within your contracts, especially ones related to the external delays and disruptions (such as Force Majeure).

If you would like further information on the above subject please contact us on the details below:

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