

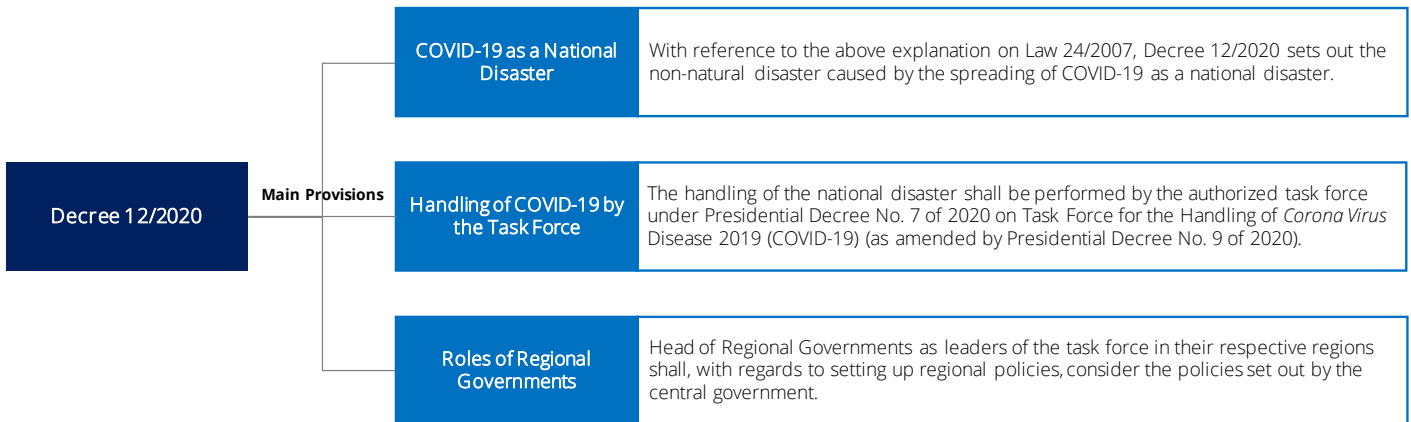


# Determination of Corona Virus Disease 2019 (COVID-19) Spreading Non-natural Disaster as a National Disaster and Its Implications with Force Majeure Event and Contractual Performance

Non-natural disasters are defined as disasters caused by non-natural events or series of events such as technological failure, epidemic, and disease outbreak.

Law No. 24 of 2007 on Disaster Management (“Law 24/2007”) defines Disasters as events or series of events which threaten and disrupt public’s lives and livelihood, caused by natural and/or non natural factors, as well as human factors, resulting fatalities, environmental damage, loss of property and physiological effects.





## Can a National Disaster be considered as a Force Majeure Event?

### Disclaimer:

*The below is generic information, which may or may not, be entirely applicable to your case (as contracts and agreements may differ on a case-per-case basis and subject to the governing law of such contracts as well).*

In general, force majeure events are defined as circumstances not within the reasonable control, directly or indirectly, of the party affected, but only if and to the extent that such circumstance, despite the exercise of reasonable diligence, cannot be prevented, avoided or removed by the affected party.

### Example of Force Majeure Events:

- Acts of rebellion, riot, civil commotion, strikes of a political nature
- Acts or campaigns of terrorism, or sabotage of a political nature
- Nuclear, chemical and/or biological contamination
- Strikes or other industrial actions
- Acts of war (whether declared or not), invasion or act of foreign enemy
- Extraordinary lightning, fire, earthquake, epidemic or pandemic, tsunami, flood, storm, cyclone, typhoon, tornado or other natural calamity, etc.



### Our Views:

Subject to the terms of relevant contracts/agreements, a “national disaster” is likely able to be considered as a force majeure event, as the occurrence of such national disaster is beyond reasonable control of the contracting parties, cannot be prevented and/or avoided, as well as supported with the issuance of decrees and/or regulations by the government (e.g. Decree 12/2020).

However, it does not necessarily mean that a party can directly terminate the contracts/agreements or neglect its contractual obligation as such matter will need to be reviewed/analyzed further based on the terms of such relevant contracts/agreements.

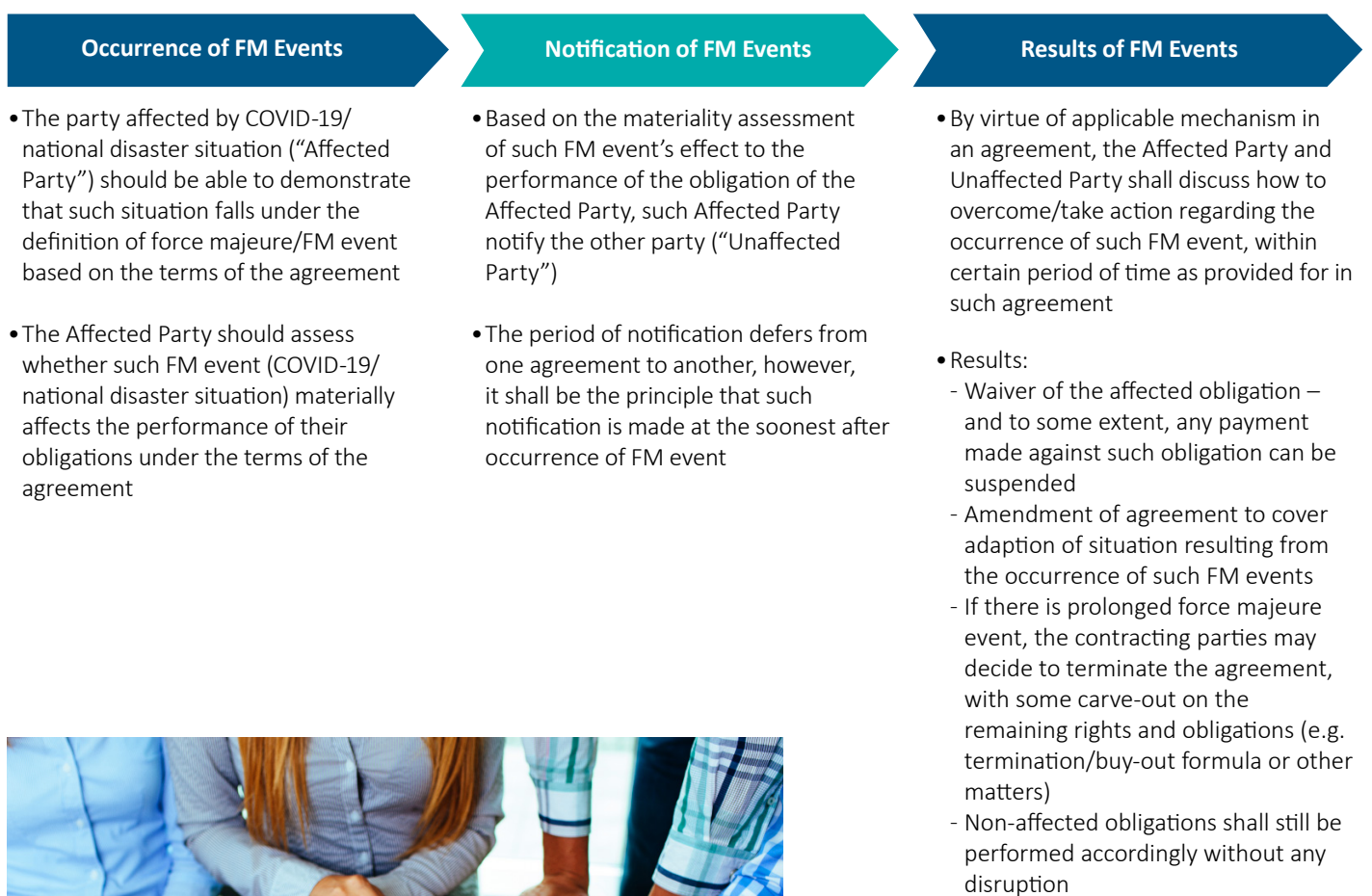
### Notes:

Please note that NOT all contracts/agreements contain force majeure provisions given their nature and the risk sharing profile regime that is adopted in such contracts/agreements (e.g. it is quite rare in a loan/facility agreement to contain force majeure provisions as lenders do not necessarily want to assume this risk and pass such risk to the borrowers, which may later on be covered by insurance, security packages and other commitments). In addition, it is advisable also to note potential cross-default which may occur under related contracts/agreements when an underlying contract/agreement is affected by force majeure (e.g. in a typical project finance documents, the main facility agreement would normally provide certain rights for the lenders towards the borrowers when the underlying project documents being affected by force majeure – such as when the project documents suspended/terminated, it will provide rights for the lender to call default, accelerate repayments, enforce security, etc.)

## Generic Approach for Force Majeure Events in Agreements

### Disclaimer:

*The below is a generic approach on force majeure/FM provision applied in certain agreements used in Indonesian market, that may be applied to a COVID-19 situation (may not be applicable to your case, as contracts and agreements may differ on a case-per-case basis and subject to the governing law of such contracts as well).*



## Key Takeaways – Practical Considerations

With reference to previous elaborations, below are several key takeaways and practical considerations which you may need to consider:

### Associated Risks

The parties to acknowledge that there are risks associated to the current national disaster/COVID-19 situation which may affect performance of their contractual obligations, such as:

- Penalties
- Default
- Acceleration of unpaid obligations
- Enforcement of secured assets
- Delay of counter-performance
- Increase of expenditures
- Employee-related issues (layoffs, redundancy)
- Project buy-out
- Temporary takeover
- Supply-chain disruption
- Capital/ margin call
- Cross-default
- Contract suspension
- Contract termination
- Litigation/ arbitration

### Possible Follow-up Actions

The following are some possible follow-up actions which may be implemented:

- 01** Review contracts/agreements in order to understand applicable force majeure regime, procedural matters which needs to be followed (e.g. notification, remedial actions) and prescribed contractual consequences thereof
- 02** Identify and assess direct and indirect risks, costs and exposures which may be incurred (including those arising from other related contracts/ commitments)
- 03** Ensure that the Affected Party has performed its obligations which are not affected by the force majeure event
- 04** Engage communication/discussion with the Unaffected Party/counterparty in accordance with any prescribed procedural matters set out in the agreement to come up with agreed remedial actions (e.g. contract amendment)
- 05** Engage communication/discussion with other relevant stakeholders (e.g. governmental agencies, subcontractors, financiers, and employees)





## Contact us

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