Insight

Force Majeure in Construction Contracts: Why Risk Allocation Matters More Than the Event

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Introduction

Construction projects are increasingly exposed to risks that extend beyond technical execution. Regulatory changes, permitting delays, government intervention, and shifting public policies can disrupt project performance and significantly increase commercial exposure. When these events occur, parties frequently invoke force majeure to excuse non-performance. Indonesian courts, however, have shown that the decisive issue is rarely whether an extraordinary event occurred. Instead, the central question is whether the parties had already allocated the legal and commercial consequences of that event in their contract.

This distinction is particularly significant in construction projects, where regulatory uncertainty forms part of the ordinary business environment. A delay in obtaining a building permit may excuse performance in one contract but constitute the contractor's own responsibility in another. The difference lies not in the event itself, but in the contractual allocation of risk. Accordingly, force majeure should be understood not merely as a doctrine addressing extraordinary events, but as a legal mechanism that determines when contractual risk allocation may exceptionally be displaced

Why Force Majeure Is Ultimately About Risk Allocation

Articles 1244 and 1245 of the Indonesian Civil Code provide the statutory basis for force majeure by relieving a party from liability where non-performance results from circumstances beyond its control and without fault. Yet these provisions do not operate independently from the contract. Instead, they function as an exception to the parties' agreed allocation of rights and obligations, meaning that contractual risk allocation remains the primary reference point before statutory relief becomes available.

This approach is consistent with Indonesia's construction law framework. Law No. 2 of 2017 on Construction Services and Government Regulation No. 22 of 2020, as amended by Government Regulation No. 14 of 2021, place the Construction Work Contract at the centre of project governance without providing an independent definition of force majeure. The legislation therefore recognises that construction risks are primarily managed through contractual arrangements rather than statutory intervention.

The same principle is reflected internationally. The FIDIC Conditions of Contract 2017, the UNIDROIT Principles, the CISG, and the ICC Force Majeure Clause 2020 all assess whether an impediment falls outside the risks reasonably assumed by the affected party instead of relying solely on a predetermined list of extraordinary events.

Issue	**Indonesian Law**	**International Practice**	**Practical Insight**
Primary Inquiry	Can statutory relief override contractual liability?	Does the event fall outside the assumed contractual risk	Contract remains the primary mechanism for allocating risk.
Key Assessment	Beyond control and without fault	Beyond control, unforeseeable, unavoidable	Causation and contractual responsibility prevail over the mere existence of an external event.

Viewed from this perspective, force majeure is less a catalogue of extraordinary events than a doctrine that preserves contractual certainty by determining when an agreed allocation of risk should exceptionally give way to circumstances beyond the parties' reasonable control.

Case Analysis (MA No. 2301 K/Pdt/2009 & No. 323 K/Pdt/2021)

This approach is increasingly reflected in Indonesian jurisprudence. In **Supreme Court Decision No. 2301 K/Pdt/2009**, the Court rejected a force majeure defence despite the existence of external obstacles affecting project performance. Rather than asking whether the event was extraordinary, the Court examined whether it directly caused the contractor's inability to perform and whether that risk had already been assumed under the contract. By insisting on a clear causal relationship, the Court confirmed that increased costs, commercial hardship, or operational disruption do not automatically transfer contractual responsibility.

The same reasoning appears in **Supreme Court Decision No. 323 K/Pdt/2021**, where a developer argued that delays in governmental approvals constituted force majeure. The Court disagreed, explaining that obtaining licences and regulatory approvals forms part of the ordinary commercial environment of property development. Because permitting risks are generally foreseeable, they remain with the party responsible for project execution unless the contract expressly reallocates them.

That conclusion should not, however, be understood as establishing an absolute rule that governmental action can never constitute force majeure. Extraordinary measures—such as emergency legislation, project-wide suspensions for public safety, or new regulations enacted after contract formation that legally prohibit construction—may still satisfy Articles 1244 and 1245 of the Civil Code. The distinction lies between ordinary regulatory risks, which are inherent in construction projects, and exceptional governmental intervention that fundamentally alters the contractual equilibrium. In other words, the decisive issue is not whether government action occurred, but whether the resulting risk falls outside the parties' contractual allocation of responsibility.

The emerging judicial trend therefore reflects a broader commercial policy. Rather than allowing parties to invoke force majeure whenever projects become more difficult, Indonesian courts seek to preserve contractual certainty by holding parties to the risks they knowingly assumed. Only where an external event genuinely exceeds that allocation will statutory relief become available. The jurisprudence thus reinforces a simple principle: contracts allocate risk first, while force majeure operates only as a limited corrective mechanism.

These decisions also carry an important drafting lesson. Rather than treating force majeure as a standard boilerplate provision, parties should negotiate the clause as part of their broader contractual risk allocation, ensuring that foreseeable project risks are assigned to the party best positioned to manage them.

Practical Lessons for Construction Contracts

For construction businesses, these decisions demonstrate that effective risk management begins long before a dispute arises. The most valuable force majeure provision is not the one that lists the greatest number of extraordinary events, but the one that clearly distinguishes between foreseeable project risks and exceptional events beyond the parties' control.

Three practical considerations deserve particular attention. First, contracts should allocate responsibility for obtaining permits, licences, and regulatory approvals with precision. Secondly, they should distinguish routine administrative delays from extraordinary governmental measures that legally prevent performance. Finally, contracts should specify the commercial consequences when such risks materialise, including extensions of time, cost adjustments, or other agreed relief mechanisms.

Consider an EPC project. The contractor may reasonably assume responsibility for obtaining ordinary construction permits and managing routine administrative delays because those risks are foreseeable and directly connected to project execution. By contrast, a subsequent statutory prohibition or emergency government order that makes construction legally impossible may be allocated to the employer or treated as a shared project risk. Such an approach provides greater commercial certainty than relying on broad force majeure language after a dispute has already arisen.

Ultimately, effective drafting is not about predicting every disruptive event. It is about deciding, before the project begins, which party is best positioned to manage each category of risk.

Conclusion

Indonesian courts are gradually reshaping the commercial understanding of force majeure. The decisive inquiry is no longer simply whether an extraordinary event occurred, but whether that event justifies departing from the contractual allocation of risk agreed by the parties. This approach strengthens commercial certainty while encouraging more deliberate and sophisticated contract drafting.

For businesses involved in construction projects, the practical implication is clear. Force majeure should no longer be regarded as a boilerplate clause copied from standard templates. Instead, it should be negotiated alongside other commercial terms to ensure that the contract reflects the parties' intended allocation of project risks.

Construction disputes are rarely decided by the occurrence of an extraordinary event alone. More often, they are decided by the quality of the contract drafted long before the dispute began. In modern construction projects, force majeure is therefore not principally a doctrine of unforeseen events; it is a doctrine of contractual risk allocation.

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