

LIABILITY FOR BUILDING FAILURE – FURTHER CLARIFICATION NOW AVAILABLE¹²³⁴⁵

INTRODUCTION

The Government has substantially amended a 2020 regulation dealing with construction services and liability for building failure.

The 2021 amendments are particularly interesting because of the greater clarity they now provide as to (i) what constitutes building failure and (ii) the link between liability for building failure and non-compliance with the increasingly onerous security, safety, health and sustainability standards that both construction service providers and building owners/users are expected to meet. The role of the expert appraisers/assessors responsible for determining liability for building failure has also been amplified.

Poor quality construction services and resulting defective building/facility integrity can have very serious implications for energy, infrastructure, mining and oil & gas companies. As such, all companies operating in these industries should be taking careful note of the Government's continuing efforts to reform the liability regime for defective construction of buildings and other facilities.

In this article, the writer will review the 2021 amendments as they relate to building failure and the implications of the same for both construction services providers and building owners/users.

BACKGROUND

Government Regulation (“GR”) No. 22 of 2020 re Implementation of Law No. 2 of 2017 re Construction Services (“GR 22/2020”) was issued in April 2020 and revoked a number of previous regulations.

GR 22/2020 removed much of the previous uncertainty regarding liability for the collapse or malfunctioning of a building after final handover (“**Building Failure**”). In the process, GR 22/2020 made it far more likely, than was previously the case, that (i) contractors and sub-contractors performing construction consultancy services and construction work whether performed separately or in combination (i.e., integrated construction work) (“**Construction Services**”) (“**Service Providers**”) and (ii) owners and other parties (called “**work givers**”) which “use” construction services (“**Service Users**”) will be held liable for Building Failure

¹ Bill Sullivan, Senior Foreign Counsel with Christian Teo & Partners and Senior Adviser to Stephenson Harwood LLP.

² Bill Sullivan is the author of “*Mining Law & Regulatory Practice in Indonesia – A Primary Reference Source*” (Wiley, New York & Singapore 2013), the first internationally published, comprehensive book on Indonesia's 2009 Mining Law and its implementing regulations.

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where it is the result of non-compliance with required levels or standards of security, safety, health of construction worksites and social security for workers as well as local environmental management and environmental management technical guidelines in the implementation of construction services (together, “**Security, Safety, Health and Sustainability Standards**”).

Readers interested in knowing more about the history of liability for Building Failure in Indonesia and the changes to the liability regime for Building Failure introduced by GR 22/2020 are referred to the writer’s earlier article “*New Approach to Construction Failure Liability – Important Implications for Heavy Industry*”, December 2020 – January 2021 issue of Coal Asia Magazine, Petromindo.

Less than 12 months after the issuance of GR 22/2020, the Government has issued GR No. 14 of 2021, dated 2 February 2021, re Amendment of GR 22/2020 (“**GR 14/2021**”).

ANALYSIS AND DISCUSSION

1. Preliminary Remarks

This article is concerned with liability for Building Failure and, more particularly, the potential liability of Service Providers and Service Users for Building Failure rather than with the Security, Safety, Health and Sustainability Standards applicable to Service Providers and Service Users as such. Given, however, GR 14/2021 links the liability or otherwise of Service Providers and Service Users for Building Failure very closely to their compliance/non-compliance with the Security, Safety, Health and Sustainability Standards, it is essential to understand the scope of the Security, Safety, Health and Sustainability Standards. These Security, Safety, Health and Sustainability Standards have become increasingly onerous.

The role of the individuals, groups and institutions given the authority to carry out investigations and make determinations of the cause of Building Failure (“**Expert Assessors**”) is central to the determination of the cause of Building Failure and who should be held responsible for Building Failure.

The intended meaning of various provisions of GR 14/2021 is difficult to discern with any degree of certainty and attempts by the writer’s staff to obtain coherent explanations of these provisions, from the regulatory authorities, have been less than successful in some instances. Accordingly, achieving a full understanding of GR 14/2021 and its implications remains something of a “work in progress”.

2. Overview of GR 14/2021

GR 14/2021 sets out the Security, Safety, Health and Sustainability Standards that must be complied with by Service Providers and Service Users.

GR 14/2021 also provides much needed clarity on what constitutes Building Failure and the duties/responsibilities of Expert Assessors.

3. **Revamped Security, Safety, Health and Sustainability Standards**

- 3.1 **Principle of Sustainable Construction:** Construction Services must now be provided in a manner which ensures that the result of the Construction Services, whether it be a building or civil structure (“**Building**”), is consistent with the principle of sustainable construction (“**Sustainable Construction**”).

Sustainable Construction has 3 elements to it and requires the Service Provider and the Service User to ensure the Building:

- (a) is economically adequate and improves community welfare;
- (b) preserves the environment; and
- (c) reduces social disparities in society.

- 3.2 **Achieving Sustainable Construction:** A particular Building satisfies the elements of Sustainable Construction if it is consistent with and reflects:

- (a) uniformity of goals, understanding and action plans;
- (b) fulfillment of Security, Safety, Health and Sustainability Standards;
- (c) reduction of the use of resources, in the form of land, material, water, natural resources and human resources;
- (d) reduction of both physical and non-physical waste production;
- (e) reuse of resources that have been used previously;
- (f) usage of recycled resources;
- (g) protection and management of the environment through conservation efforts;
- (h) mitigation of safety, health, climate change and disaster risks;
- (i) orientation to the Building’s expected or intended “life cycle”;
- (j) orientation towards achieving the Building’s desired quality;
- (k) technological innovation for continuous improvement; and
- (l) institutional support, leadership and management in implementation.

A Building’s “life cycle” includes the discrete stages of (i) assessment, (ii) planning, (iii) design, (iv) development, (v) operation, (vi) maintenance, (vii) demolition and (viii) rebuilding.

3.3 **Implementation of Sustainable Construction:** Implementation of Sustainable Construction has a number of stages, being:

- (a) general planning - area-based planning that takes into account natural and spatial conditions, social and economic conditions as well as the supporting capacity and capacities of a region;
- (b) programming - initial planning to determine objectives, strategies, steps, schedules as well as resource requirements, especially funding for realizing a Building;
- (c) implementation of construction consultancy - assessment, planning, design, supervision and construction management of a Building; and
- (d) implementation of construction work - construction, operation, maintenance, demolition and rebuilding of a Building (Article 84 and Articles 84A to 84G of GR14/2021).

3.4 **Application of SMKK:** Both Service Providers and Service Users are obliged to ensure there is a suitable construction safety management system (“**SMKK**”) in carrying out or “implementing” Construction Services (Article 84I(1) of GR 14/2021).

3.5 **Additional Responsibilities of Service Users:** Service Users are also required to:

- (a) supervise the implementation of (i) a construction safety program (“**RKK**”), (ii) a construction work quality plan (“**RMPK**”) and (iii) an environmental management and monitoring work plan (“**RKKPL**”); and
- (b) evaluate the performance of SMKK implementation carried out by the Service Provider (Article 84U(3) of GR 14/2021).

3.6 **Assessment:** Sustainable Construction is certainly a fine idea and very definitely what Indonesia should be hoping to eventually achieve in connection with Buildings and Construction Services. The writer would question, however, whether Sustainable Construction is something that is realistic and currently achievable for Service Providers and Service Users given Indonesia’s present state of economic development. “Sustainable Construction” sounds very much like a North American, European or Australian concept that is being adopted in Indonesia with insufficient regard to the realities of the local construction industry.

Sustainable Construction, as a legal obligation that must be fulfilled by Service Providers and Service Users, is also problematic because of the way GR14/2021 “links” failure to fulfill the Sustainable Construction obligation, as part of more general compliance with the applicable Security, Safety, Health and Sustainability Standards, with liability for Building Failure. If Sustainable Construction is not realistic at this time in Indonesia, then imposing this unrealistic obligation on Service Providers and Service Users increases their risk of being held liable for Building Failure which, as will be explained in 4 below, is now given a very broad meaning which goes far beyond the collapse of Buildings.

4. **Clarifying what Constitutes Building Failure**

4.1 **Building Failure:** The definition of Building Failure has **not** changed and is expressed to include both:

- (a) Building collapse; and
- (b) **non-functioning/mal-functioning** of a Building (Article 85A(1) of GR 14/2021).

What has changed, however, is the detail that is now provided as to (i) just what constitutes Building collapse and the non-functioning/mal-functioning of a Building and (ii) how Building collapse and the non-functioning/mal-functioning of a Building is to be determined.

4.2 **Building collapse:** “Building collapse” is described as being a condition or situation where most or all of the Building’s “components” are damaged and cannot be operated (Article 85A(2) of GR 14/2021).

4.3 **Non-functioning of Building:** The “non-functioning” of a Building is described as a condition or situation which includes:

- (a) **the functioning of the Building is not as planned;** and/or
- (b) the security, safety, health and **sustainability** aspects of the Building have not been fulfilled (Article 85A(3) of GR 14/2021).

4.4 **Relevant Criteria and Benchmarks for Determining Building Failure:** The occurrence or otherwise of Building Failure is to be determined by reference to (i) the structural aspects of the relevant Building and (ii) the **functional** aspects of the relevant Building (Article 85B(1) of GR 14/2021).

Where Building Failure is found to have occurred, the degree/level/seriousness of the Building Failure is to be determined by reference to so-called “benchmarks” (Article 85B(2) of GR 14/2021).

Both the (i) relevant criteria for determining the occurrence or otherwise of Building Failure and (ii) the relevant benchmarks for determining the degree/level/seriousness of a Building Failure are **to reflect the applicable Security, Safety, Health and Sustainability Standards** (Article 85B(3) and (4) of GR 14/2021).

4.5 **Assessment:** Describing “Building collapse” in terms of “*most or all of the Building’s components being damaged and not being able to be operated*” very arguably goes beyond the common understanding of what a “Building collapse” involves. More particularly, it is now tolerably clear the Building in question can still be standing and otherwise physically in place but nevertheless meet the criteria for a “Building collapse”.

More interesting still is the increased focus on lack of Building “functionality”. While GR 22/2020 did refer to the “*malfunctioning*” of a Building, GR 14/2021 has now given both context and substance to this reference. In equating a lack of “functionality” or non-delivery of the degree of “functionality” originally intended for a Building with Building Failure, GR 14/2021 has greatly expanded the traditional understanding of what constitutes Building Failure in Indonesia and where most people would surely still understand Building Failure to be confined to the serious physical damage of if not the actual collapse of a Building.

GR 14/2021 may be seen as being very much in line with the contemporary focus on the importance of Building functionality and recognizes that failure to deliver the intended functionality of a Building can so reduce the usefulness of a Building to its owner and intended occupants/users as, in some extreme situations, to be equivalent to the physical collapse of a Building.

It is potentially concerning, however, that non-fulfilment of the “sustainability” aspects of a Building is expressly equated in Article 85A(3) of GR 14/2021 with a Building being “*non-functioning/mal-functioning*” (**i.e.**, lacking in “functionality”) and, therefore, the subject of Building Failure. As highlighted in 3.6 above, if Sustainable Construction is a “bridge too far” at this time in Indonesia, is it reasonable that Service Providers and Service Users be potentially held liable for Building Failure in the form of a lack of functionality and when that lack of “functionality” is evidenced by the non-fulfilment of the intended “sustainability” aspects of a Building?

5. **Procedural Mechanics of Dealing with Building Failures**

- 5.1 **Reporting of Building Failures:** Service Users, building owners/persons in charge of Buildings, as well as other parties who are harmed due to a Building Failure, may report the Building Failure.

Reporting of a Building Failure must be made not later than 3 calendar days after the Building Failure occurred (Article 85D(1) – (2) of GR 14/2021).

- 5.2 **Report Details:** The Building Failure incident report must contain the following information:

- (a) Building name;
- (b) owner and/or person in charge of the Building;
- (c) detailed location of Building;
- (d) nature of collapse and/or malfunctioning of the Building;
- (e) time of occurrence of Building Failure;
- (f) photos or evidence of Building Failure incident; and
- (g) identity of reporting party (Article 85D(3) of GR 14/2021).

- 5.3 **Submission Entity:** Building Failure incident reports are to be submitted to the Construction Services Development Board (*Lembaga Penyelenggara Jasa Konstruksi*) (“**LPJK**”) (Article 85D(4) of GR 14/2021).
- 5.4 **Assessment:** Requiring the reporting of Building Failures within 3 days of occurrence is surely unrealistic, especially when it is someone who has been injured by the Building Failure who needs or wants to report the Building Failure.

It is unclear what are the consequences of not reporting a Building Failure within 3 days. It would be most inequitable, however, if persons injured as a result of a Building Failure were to be disadvantaged in any way as a result of not reporting a Building Failure within 3 days. Most importantly, failure to report a Building Failure within 3 days should not preclude a full investigation of the Building Failure or prevent those parties responsible for the Building Failure being held liable for the same.

6. **Role of Expert Assessors in Investigating Building Failures**

- 6.1 **Investigation of Building Failures:** Investigation of Building Failure incidents is carried out by 1 or more Expert Assessors.

In carrying out their duties, Expert Assessors may be assisted by experts and/or other supporting staff (Article 85F of GR 14/2021).

- 6.2 **Appointment/Assignment of Expert Assessors:** LPJK appoints/assigns an Expert Assessor to investigate a Building Failure following:

- (a) submission of a Building Failure incident report by the Service User, Building owner/person in charge of the Building and/or other parties; and/or
- (b) a request to LPJK from the Minister of Public Works & Housing (“**Minister**”) (Article 85L of GR 14/2021).

LPJK must assign/appoint an Expert Assessor not later than 30 days from the date of receipt of the Building Failure incident report (Article 85L of GR 14/2021).

Following his appointment/assignment, an Expert Assessor is to enter into a services contract with the relevant Service User or the owner/person in charge of the relevant Building, which contract includes/sets out the (i) full names and addresses of the parties, (ii) scope of assignment, (iii) period of assignment, (iv) cost of carrying out the assignment, (v) **person responsible for payment of the cost of the assignment** and (vi) signatures of the parties (Article 85M of GR 14/2021).

- 6.3 **Duties of Expert Assessors:** The duties of Expert Assessors in investigating Building Failures are to:

- (a) **determine the level of compliance or otherwise with the applicable Security, Safety, Health and Sustainability Standards;**

- (b) determine the cause of the Building Failure;
- (c) determine degree/level/seriousness of the collapse and/or malfunction of the Building;
- (d) determine the party responsible for the Building Failure;
- (e) determine the amount of technical losses suffered and formulate a proposal for the amount of compensation to be paid by the party responsible for the Building Failure;
- (f) determine the time period for payment of compensation;
- (g) report the results of the investigation to (i) the person in charge of the relevant Building and (ii) LPJK not later than 90 days from the date of carrying out the Building Failure investigation; and
- (h) provide policy recommendations to the Minister in the context of preventing future Building Failures (Article 85G of GR 14/2021).

The determinations made by an Expert Assessor, in connection with its investigation of a Building Failure, are final and binding (Article 85N(3) of GR 14/2021).

6.4 **Obligations and Rights of Expert Assessors:** In performing their duties, Expert Assessors are obliged to work professionally and independently of any party interested in the Building Failure (Article 85H(1) of GR 14/2021).

As part of the investigation of a Building Failure, Expert Assessors have the right to:

- (a) coordinate with the relevant authorities;
- (b) receive compensation, protection and occupational security, safety and health facilities from LPJK;
- (c) stop investigations and immediately report to LPJK any threats received or disturbances encountered in respect of their security, safety and health during the investigation of a Building Failure;
- (d) explain both orally and in writing, to interested parties, all findings of the Building Failure investigation; and/or
- (e) enter the site of a Building Failure and receive protection (including an escort if necessary) from the relevant authorities (Article 85H(2) of GR 14/2021).

6.5 **Assessment:** GR 14/2021 certainly says the right things in terms of Expert Assessors having to carry out their duties professionally and independently.

Notwithstanding the above, the requirement that an Expert Assessor must enter into a services contract with the relevant Service User or the owner/person in charge of the

relevant Building is surprising to say the least. If nothing else, the existence of such a contract is surely inconsistent with the Expert Assessor being a truly independent party and, as such, is undesirable. It is also not clear to the writer why, if there is a need for such a contract at all, it should not be between LPJK (rather than the Expert Assessor) and the relevant Service User or the owner/person in charge of the relevant Building.

Given that the determinations made by an Expert Assessor (including the determination of which party is liable for the Building Failure and the amount of compensation payable in respect of the Building Failure) are final and binding, a contractual relationship between the Expert Assessor investigating the Building Failure and the relevant Service User might well raise questions, in many peoples' minds, as to whether or not the Expert Assessor is likely to be influenced by the Service User in making his determinations.

7. **Criteria for and Training of Expert Assessors**

7.1 **Criteria:** Expert Assessors must meet the following criteria:

- (a) be Indonesian citizens and domiciled in Indonesia;
- (b) have a Construction Work Competency Certificate at the level of expert in the field of building products failure and with sub-qualifications of at least that of an intermediate expert and/or intermediate professional engineer;
- (c) have a minimum of 10 years work experience as a planner, implementer and/or supervisor in the field of Construction Services and with a focus on Building Failure;
- (d) be able to work professionally, honestly, objectively and independently; and
- (e) be able and willing to comply with the code of ethics and code of conduct of Expert Assessors (Article 85J of GR 14/2021).

7.2 **Code of Ethics:** The Expert Assessors' code of ethics requires Expert Assessors to among other things:

- (a) prioritize construction safety and the implementation of Security, Safety, Health and Sustainability Standards;
- (b) work skillfully in accordance with their areas of competency;
- (c) **be independent and responsible for the objectivity and correctness of the results of Building Failure investigations carried out by them;**
- (d) carry out their work in accordance with scientific principles, propriety, and intellectual honesty;
- (e) **avoid conflicts of interest;** and

(f) **hold fast to professional honesty, integrity and dignity** (Article 85P of GR 14/2021).

7.3 **Training and Certification:** Persons meeting the criteria for and wanting to be Expert Assessors are obliged to undergo Expert Assessor training and be tested on their competency or otherwise as an Expert Assessor.

Expert Assessors are certified by LPJK and their details recorded in the integrated Construction Services Information System maintained by LPJK.

Certification as an Expert Assessor is valid for 5 years but may be revoked earlier for, among other things, (i) violating the code of ethics and code of conduct of Expert Assessors or (ii) conviction of a criminal act (Article 85K of GR 14/2021).

7.4 **Assessment:** Again, GR 14/2021 “ticks all the boxes” in terms of the Expert Assessors’ code of ethics. Codes of ethics are, however, much easier to draw up than they are to enforce in practice. Given the magnitude of potential liability for Building Failure, it would be very naïve to imagine that it will be easy for Expert Assessors to comply with their code of ethics or that Expert Assessors will not come under extra-ordinary pressure from Service Providers and Service Users to be less than independent and objective in investigating the cause of Building Failure. Recent examples of Building Failure in Jakarta and the outcome of investigation of the same provide an important lesson in this regard.

SUMMARY & CONCLUSIONS

Compliance with the Security, Safety, Health and Sustainability Standards is an obligation of both Service Providers and Service Users.

Building Failure is to be understood as including far more than just the physical collapse of a Building. Making lack of functionality a type of Building Failure is a very significant development as is equating the non-achievability of sustainability in a Building’s construction with lack of functionality.

Imposing a Sustainability Obligation on Service Providers and Service Users arguably exposes them to an inappropriately high risk of liability for Building Failure if sustainability is really only something that is an aspirational goal for the Indonesian construction industry at this time rather than something that is currently achievable.

Non-compliance with the Security, Safety, Health and Sustainability Standards is the critical consideration in determining who should be held liable for Building Failure.

GR14/2021 provides much need clarification and detail of what constitutes Building Failure and how investigations of Building Failure are to be carried out.

This article was written by Bill Sullivan, Senior Foreign Counsel with Christian Teo & Partners and Senior Adviser to Stephenson Harwood LLP. Christian Teo & Partners is a Jakarta based, Indonesian law firm and a leader in Indonesian energy, infrastructure and mining law and regulatory practice. Christian Teo & Partners operates in close association with international law firm Stephenson Harwood LLP which has ten offices across Asia, Europe and the Middle East: Beijing, Dubai, Hong Kong, London, Paris, Piraeus, Seoul, Shanghai, Singapore and Yangon.

Get in touch



Bill Sullivan

T: +62 21 5020 2789
M: +62 815 8506 0978
E: bsullivan@cteolaw.com



Christian Teo

T: +62 21 5020 2789
M: +62 818 124 747
E: cteo@cteolaw.com



Claudius Novabianto

T: +62 21 5020 2789
M: +62 818 0858 9235
E: cnbianto@cteolaw.com