

**MARCH:****CORONAVIRUS PANDEMIC AND ITS LEGAL  
IMPACT ON CONTRACTS IN MALAYSIA****Introduction**

In view of the global coronavirus disease (Covid-19) pandemic and the rapidly rising confirmed cases in Malaysia, the government of Malaysia had on 17 March 2020 announced the implementation of a nationwide movement control order from 18 to 31 March 2020 to curb the spread of Covid-19 cases. Essentially, the movement control order requires all government and private premises to cease operations, except for those involved in the provision of essential services, namely water, electricity, energy, telecommunications, postal, transportation, irrigation, oil, gas, fuel, lubricants, broadcasting, finance, banking, health, pharmacy, fire, prison, port, airport, safety, defence, cleaning, retail and food supply. The government had since announced that it may extend the 14-day movement control order if it fails to prevent the spread of Covid-19 cases.

The Covid-19 pandemic had resulted in closures of factories and offices in all continents and had severely affected the global supply chains of goods and services. In Malaysia, many companies may struggle to perform their contractual obligations and meet their contractual commitments. For instance, a local machinery manufacturer may fail to adhere to strict timelines to produce and deliver machines due to a delay or cancellation of shipment of essential parts from foreign countries, such as China and South Korea, two of the most affected countries in Asia.

The essential issue is whether the non-fulfilment of contractual obligations due to the global Covid-19 pandemic and the implementation of the movement control order in Malaysia would constitute a force majeure event under any existing contract or provide any legal basis for termination of the contract.

This article will examine 3 pertinent issues: (a) contractual rights under force majeure provisions in a contract; (b) statutory rights under the Contracts Act 1950; and (c) consequences of frustrating events, to deal with the impact of the global Covid-19 pandemic and the movement control order on contracts in Malaysia.

**Contractual rights under Force Majeure clauses**

It is a common practice for contracting parties to incorporate a force majeure clause in a commercial contract, which excuses them from a delay or failure to perform their contractual obligations due to the happening of some triggering events beyond their control, such as war, acts of god, explosion, riot, pandemics, etc

A typical force majeure clause may be worded as follows

“ A party to this contract shall not be liable for any losses and damages caused by any delay or for the consequences of any delay in performing any of its obligations under this contract if such delay is due to any acts of god, strikes, fire, pandemics, riot, strikes, lockouts or by any other causes which are beyond its reasonable control, and it shall be entitled to a reasonable extension of the time for performing such obligations. ”

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In the event of any triggering event occurs, the contracting party relying upon the force majeure clause must prove the occurrence of such event referred to in the clause and that such event has prevented, hindered or delayed the performance of the contract. Furthermore, the contracting party must prove that non-fulfilment of its contractual obligations was due to the circumstances which are beyond its control and that reasonable steps have been taken to avoid or mitigate such event or its consequence.<sup>1</sup>

In general, the court will look into the construction of the force majeure clause to determine whether such clause is wide enough to cover the triggering event and whether it has affected the performance of the parties' contractual obligations under the contract

Besides, the contracting party relying upon the force majeure clause must comply with the requirements provided in the force majeure clause to invoke the clause, such as issuance of notice to the other contracting party.

**Statutory rights under Contracts Act 1950**

In the absence of any force majeure clause in a commercial contract, what are the statutory rights available under the Contracts Act 1950 for the contracting parties to deal with the impact of the global Covid-19 pandemic and the movement control order on the contract?

In Malaysia, an agreement to do an act afterwards becoming impossible or unlawful could be deemed frustrated and void under section 57 (2) of the Contracts Act 1950, which provides that:

“ A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. ”

Generally speaking, the contracting party must not rely on section 57 (2) of the Contracts Act 1950 as a defence for non-fulfilment of contractual obligations, if the supervening event is due to his own conduct, i.e. self-induced frustration.

In order to rely on section 57 (2) of the Contracts Act 1950, the contracting party must fulfil the following requirements<sup>2</sup>

1. The event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made, then the parties must be taken to have allocated the risk between them.
2. The event relied upon by the promisor must be one for which he or she is not responsible. In other words, self-induced frustration is ineffective.
3. The event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise.

In **Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor** [2009] 6 CLJ 430, the Federal Court held, inter alia, that a contract does not become frustrated merely because it becomes difficult to perform. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into. A contract is frustrated when subsequent to its formation, a change of circumstances rendered the contract legally or physically impossible to be performed.

In the Hong Kong case of **Li Ching Wing v Xuan Yi Xiong** [2004] 1 HKLRD 754, it was argued by a tenant that his tenancy agreement was frustrated during the outbreak of SARS, as he was not allowed to stay in the premises for 10 days due to an isolation order issued by the Hong Kong Department of Health. The District Court held, inter alia, that the tenancy agreement was not frustrated because the isolation order was only for a short duration in the context of the lease at issue, i.e. a period of 10 days out of a 2-year tenancy, and such event did not significantly change the nature of the contractual rights and obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.

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As such, it should be noted that not all contracts would be deemed frustrated and void due to the global Covid-19 pandemic and the movement control order under section 57 (2) of the Contracts Act 1950. The contracting party must prove that it has struggled to perform its contractual obligations due to the staff shortage, failure of the suppliers to meet contractual commitments or a change of circumstances rendering the contract legally or physically impossible to be performed.

**Consequences of frustrating events**

If the contracting party is able to prove that the contract becomes void under section 57 (2) of the Contracts Act 1950, any person who has received any advantage under the contract is bound to restore it, or to make compensation for it, to the person from whom he received it.<sup>3</sup>

Furthermore, section 15 of the Civil Law Act 1956 provides for the following remedies when the contract has become impossible of performance or been otherwise frustrated.

1. All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged, shall, in the case of sums so paid, be recovered from him or cease to be payable.
2. If the party to whom the sums were so paid or payable incurred expenses before the time of discharge, the court may, if it considers it just, allow him to retain or recover the whole or any part of the sums so paid or payable.
3. Any party to the contract who has obtained a valuable benefit before the time of discharge, there shall be recoverable from him by the other party such sum, as the court considers just.

**Conclusion**

Despite the nationwide movement control order to curb the spread of Covid-19 cases, it is advisable for the contracting parties to scrutinise their existing contractual clauses, especially those in relation to the deadlines for performance of contractual obligations.

In the event of any delay or non-performance, the contracting parties should immediately seek legal assistance of lawyers to safeguard and protect their contractual and statutory rights and to ensure that they receive the best advice in a timely manner as to what should be done and how to seek remedies if they suffer any losses.

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<sup>1</sup> *Best Venue Sdn Bhd v Allianz General Insurance Company (M) Bhd* [2015] 4 CLJ 219

<sup>2</sup> *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 20

<sup>3</sup> Section 66 of the Contracts Act 1950.  
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Should you have any queries or require more information, please do not hesitate to contact us.



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