



## COVID-19: A FORCE TO INVOKE FORCE MAJEURE?

### Introduction

On 11 March 2020, coronavirus (“**COVID-19**”) was officially declared a pandemic by the World Health Organisation (“**WHO**”).[1] COVID-19 has, since December 2019, infected more than 167 countries and over 203,000 individuals worldwide. The wide spread of COVID-19 has caused global alarm and in the effort to minimize the threat of this pandemic, many countries have advocated and promoted social distancing. We have also witnessed a few countries announcing and imposing “lockdown” to impede the spreading of COVID-19.

As at 16 March 2020, the numbers of COVID-19 cases in Malaysia have increased significantly to a whopping 553 cases with 315 new cases confirmed in the span of two days. These numbers are expected to keep increasing. With the spike in the number of COVID-19 cases in the country, the Prime Minister of Malaysia had, on 16 March 2020, announced the implementation of a movement control order whereby effective 18 March 2020 to 31 March 2020, all government and private premises are ordered to be closed, save for premises and/or businesses falling within the ambit of essential services.[2] The spreading of COVID-19 has inevitably caused drawback to businesses. Many businesses are expected to be affected by the implementation of the movement restriction.

As a result, parties to commercial agreements may be unable to perform its obligations under their respective agreements. A question then arises as to whether the defence of force majeure may be invoked to relieve a party from performing its obligations amid COVID-19? The question is especially relevant to an innocent party who is unable to perform its obligations as a result of the COVID-19 pandemic. In this article, we will provide you with an insight on the laws pertaining to force majeure clauses and the impact of COVID-19 on commercial agreements.

### Establishing the Defence of Force Majeure

Force majeure means the occurrence of event(s) or circumstance(s) which could not have been foreseen at the time the contract was entered into, which prevents or impedes a party from performing one or more of its contractual obligations under the

contract.[3] There is no hard and fast rule in the drafting and construction of force majeure clauses, leaving the same to be negotiated between the parties. An effective force majeure clause generally consists of two main components, namely, the description of what constitutes a “force majeure event” and the consequences of the occurrence of a force majeure event. A well drafted force majeure clause may even contain provision as to the procedures to be complied with by the party relying on such force majeure clause upon the occurrence of a force majeure event.

There are a few aspects that must be taken into consideration prior to the invoking a force majeure clause. Among the considerations are:

- (a) whether there is a force majeure clause in the contract?;
- (b) whether the event falls within the scope of the force majeure clause?;
- (c) whether the occurrence of the force majeure event is foreseeable at the time of conclusion of the contract?;
- (d) whether performance is rendered impossible by the force majeure event?; and
- (e) whether the pre-requisites and/or procedures as set out in the contract have been fulfilled?

The above considerations are further discussed and elaborated in this article.

### **Can Force Majeure Clause be Implied into a Contract?**

The Contracts Act 1950 does not provide for implied terms. It is trite that where a contract is in writing, the intention of the parties must be found within the four walls of the contractual documents. The same was upheld by the Court of Appeal in the case of ***BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and Another Appeal***. [4] As such, force majeure clause can only be invoked and relied upon where it is explicitly set out in a contract. The law provides that non-performance due to the occurrence of any extraneous event obstructing the performance of a party having no control over such event cannot be excused in the absence of a force majeure clause. To put it simply, the defence of force majeure would be inapplicable where a contract makes no provision for it.

Where parties to a contract intend to excuse performance of obligations for reasons beyond the control of the parties, the same shall be set out in the contract. The absence of such clause would mean that the parties have no intention whatsoever of relieving any one of them from their obligations upon the occurrence of certain events. Therefore, the parties cannot plead force majeure when it is not available in the contract.

Further, Malaysian Courts have refused to imply force majeure clauses into a contract where the contract is silent on the same. In the case of ***Muhammad Radhieddeen bin***

***Abdul Khalid v Saujana Triangle Sdn Bhd***,<sup>[5]</sup> the High Court cited with approval the Singapore case of ***Magenta Resources (S) Pte. Ltd. v. China Resources (S) Pte. Ltd.***<sup>[6]</sup> which held that there can be no general rule as to what constitutes a situation of force majeure. Whether such force majeure situation arises, and where it does arise, the rights and obligations that follow, would all depend on what the parties have provided for in their contract.

### **Does COVID-19 qualify as a Force Majeure Event?**

The decisive point in determining whether COVID-19 qualifies as a force majeure event is the construction and language of the force majeure clause in the contract. Some force majeure clauses provide for an exhaustive definition which spells out all the categories of events that will trigger the application of the clause. Some provide for a broad definition covering all events or circumstances beyond the control of the party seeking to rely on the clause. Another approach is a hybrid of the exhaustive definition and the broad definition whereby the definition provides for a list of categories of events amounting to force majeure events, followed by a catch all provision and vice versa.

The law provides that an agreement must be construed by the words used in the agreement. This rule was upheld by the Federal Court in the case of ***CIMB Bank Bhd v Anthony Lawrence Bourke & Anor.***<sup>[7]</sup> The Federal Court further held that the court is not empowered to improve upon the instrument which it is called upon to construct. Further, it is an established principle of law that a party relying upon a force majeure clause must prove the facts bringing the case within the clause. In the case of ***Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd***,<sup>[8]</sup> the High Court cited ***Chitty on Contracts, 28th Edition Vol.1 Page 273 – 274*** which provides that, “*it is trite that a party relying upon a force majeure clause must prove the facts bringing the case within the clause. He must therefore prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed, as that case may be from performing the contract by reason of the event. He must further prove that his non performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence*”.

If the force majeure clause expressly lists “disease”, “outbreak” or “global health emergency” as force majeure events, the COVID-19 pandemic may fall within such category and may qualify as a force majeure event. Where the contract does not provide for such specific instances, COVID-19 may still be arguably fall within the scope of force majeure events where the force majeure clause covers “acts of God”, “acts of government”, “events beyond the control of the parties” or “events making it impossible for parties to fulfill their contractual obligations”.

At the very least, COVID-19 shall qualify as a force majeure event within the ambit of “events beyond the control of the parties” as the parties have no control whatsoever on the occurrence, spreading of COVID-19 and/or the government’s imposition of the movement control order. Further, the occurrence of a force majeure event must be unforeseeable at the time of conclusion and execution of the contract. Where the occurrence of an event is foreseeable, parties would be expected to mitigate the same and such an event would most likely fall outside of the ambit of a force majeure clause and the defence of force majeure will not be available. Considering that the COVID-19 pandemic was unforeseeable prior to its outbreak in December 2019, non-performance of contractual obligations for contracts entered into prior to the outbreak may be excused through the defence of force majeure, subject to the provisions of the contract.

### **Impossibility of Performance by the Occurrence of the Force Majeure Event**

In order to successfully rely on the defence of force majeure, a party relying on a force majeure clause must prove that the occurrence of one of the events referred to in the clause has prevented, hindered or delayed the party from performing its obligations under the contract. He must further prove that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence.

It would be right to say that a party invoking the defence of force majeure must demonstrate the link between the non-performance and the force majeure event. He must show that the performance of his obligation(s) as stipulated in the contract has been rendered impossible as a result of the occurrence of the force majeure event and that such non-performance would not have become impossible but for the occurrence of the force majeure event.

### **Fulfilment of Procedures Set Out in the Contract**

Some contracts may require for certain procedures to be followed upon the triggering of the force majeure event. The requirements to be fulfilled in the event of force majeure may differ from one contract to another. Typically, the party relying on such clause would be required to serve a notice notifying the other party of the occurrence of such event. Parties to a contract shall in good faith perform and fulfill all the requirements as set out in the contract to successfully plead force majeure. Failure to fulfill the pre-requisites and procedures set out in the contract for the purpose of reliance to a force majeure clause may deny a party from successfully invoking such clause.

## Conclusion

With the fulfilment of the procedures for invoking force majeure and the successful establishment of force majeure, a party relying on such clause may be relieved from performing its obligations under the contract, including having the right to exercise termination of the contract (subject to the terms of the contract) and may also be relieved from any claim for damages and/or liabilities.

Invoking force majeure clause is one of the ways by which parties to an agreement may relieve themselves from performing their obligations at the time of COVID-19. Parties to a contract which does not contain a force majeure clause or where the force majeure clause does not cover events such as COVID-19, may rely on alternative defences such as material adverse change/effect or the doctrine of frustration.

It may be worthwhile for affected businesses to consider seeking appropriate legal advisory on their existing contracts.

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1 WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020.

2 Special Message from the Prime Minister on COVID-19 dated 16 March 2020.

3 International Chamber of Commerce (2018), "Hardship and Force Majeure in International Commercial Contracts: Dealing with unforeseen events in a changing world".

4 [2018] 3 MLJ 326

5 [2017] MLJU 950

6 [1996] 3 SLR 62

7 [2019] 2 MLJ 1

8 [2004] 1 LNS 537

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We trust that we have provided an insight on the laws pertaining to force majeure and the applicability of the same amid COVID-19. If you have further inquiries relating to the above, or any other inquiries relating to commercial agreements, please feel free to get in touch with Azmi & Associates.

**Corporate Communication**

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