

## MALAYSIAN MOVEMENT CONTROL ORDER : CONTRACTUAL RIGHTS AND OBLIGATIONS

The Malaysian Government's Movement Control Order ("MCO") and its restrictions is now set to extend to 28th April 2020. This inevitably leads to much uncertainty in commercial transactions and their performance. Hence, clients are urged to review their contracts, particularly for a Force Majeure clause, so they may better understand the terms that guide their rights and obligations through the MCO period.

A Force Majeure clause typically entitles a party to be relieved from performance of a contract in the event of extraordinary events or circumstances beyond their control. However, each contract is unique, so the exact terms should be scrutinized to determine if the MCO qualifies as a Force Majeure under the specific contract. Key definitions to look out for include, "*epidemic*", "*pandemic*", "*act of God*" or a general catch-all provision.

In the event the contract does not expressly contain such a clause, Malaysian law will not imply the existence of one. However, should fundamental performance of the contract become physically impossible or unlawful due to the MCO, Section 57 (2) of the Contracts Act, 1950 provides that the contract is rendered void. Please note however that mere delay of performance due to the MCO will not necessarily invoke said section.

In the event the terms of the contract are unsatisfactory, it is encouraged that negotiations take place on how best to deal with the performance of any present and future obligations. A mutual agreement on such additional terms can then be recorded by a supplementary agreement. Parties may wish to mutually agree on a temporary suspension of any termination rights in the interim.

In the remainder of this article, we provide a more in-depth write up of force majeure clauses, Section 57 (2) frustrations, and limitation periods under the MCO, and how best to navigate the circumstances. Please note that this does not constitute legal advice and represents a general discussion. Kindly seek independent legal advice concerning these matters should you require it.

Feel free to contact any one of our partners should you have any further queries. We wish our clients and the general public the best in this turbulent period. Stay safe.

# FORCE MAJEURE

## (1) What is a force majeure clause?

A force majeure clause entitles a contracting party to terminate the contract, for the purpose of relieving parties from performing their contractual obligations and / or liability for contractual non-performance, when an extraordinary event or circumstance beyond the control of the parties (e.g. epidemic, pandemic, act of God) prevents, hinders or delays that party from fulfilling their obligations under the contract.

However, there are several prerequisites which must be satisfied before a party can successfully invoke a force majeure clause, all of which are dealt with in further detail below.

## (2) Does your contract contain an express force majeure clause?

A force majeure clause must be an express term of your contract. As such, the first step to take is to identify whether your contract contains such a clause.

No reliance can be placed by any party on a force majeure clause if it is not expressly stated in a contract.

## (3) Are the COVID-19 pandemic and MCO within the scope of the force majeure clause?

The next issue to consider is whether the COVID-19 pandemic crisis and MCO are covered by the force majeure clause, that is, whether they qualify as a "force majeure event".

The circumstances and effects of COVID-19 and the MCO may fall within such an event if definitions such as "pandemic", "epidemic", "outbreak of diseases", "Acts of God" or "Acts of Government" are provided for in the force majeure clause. They may also fall within the ambit of "events beyond the control of the parties".

## (4) How has the COVID-19 pandemic and MCO prevented, hindered, or delayed performance?

Assuming that either the COVID-19 pandemic or MCO constitutes a force majeure event within your contract, the next issue to consider is its effect on parties' ability to actually perform the contract. The Malaysian courts have held that the party relying on the clause is required to show how they have been affected to entitle reliance on the clause.

The extent to which a party would need to show that that they have been affected by the force majeure event(s) would, again, depend on the wording of the force majeure clause. Generally, the clauses fall under 3 distinct categories:-

- 1st Category: prevented from carrying out the contractual obligations;
- 2nd Category: hindered from carrying out contractual obligations; and
- 3rd Category: delayed in carrying out contractual obligations (especially for time sensitive contracts).

Under the **1st category (prevented)**, a party relying on force majeure would have to prove that:-

(a) the force majeure event was beyond that party's control;

(b) the force majeure event physically or legally prevents that party from performing the contract :-

- The event must have affected all possible modes of performance.
- Economic unprofitability and mere difficulty are insufficient.

- There must be a causal link between the pandemic / MCO and the inability to perform the contract. To this end, keep in mind that the prohibitive effects of the MCO; which are to (i) restrict movement; and (ii) exempt certain industries from its application.

(c) all reasonable mitigation steps have been taken.

The **2nd (hindered)** and **3rd (delayed)** categories are less strict on its requirements, especially in regards to requirement (b) above:-

(a) Under “*hindered*” clauses, the relying party need not show absolute prevention, and merely that the manner in which they had arranged to perform the contract is impeded, impaired, or interfered with.

- But note that a rise in price would not in itself constitute hindrance.

(b) Under “*delayed*” clauses, you only need to show that the pandemic / MCO has caused performance to be delayed.

Please also note that:-

- in determining the extent of your inability to perform contractual obligations caused by the force majeure event, only contractual obligations directly affected by the event can be taken into account; and
- the force majeure clause cannot be relied on if the contracting party seeking to invoke the said clause had contributed to their inability to perform.

Therefore, we advise that you seek further legal advice to determine whether you can invoke the operation of the force majeure clause contained in your contract.

## **(5) What are the consequences of invoking a force majeure clause?**

This depends largely on the wording of the clause. Whilst some provide for termination of the contract, a force majeure clause may also provide for a temporary suspension of performance, waiver of non-performance penalties, or a method for apportioning losses between parties.

A force majeure clause may also prescribe a notification procedure which needs to be complied with. Examples include the notification (within a certain time frame) to either party of the force majeure clause being invoked, or a particular method or address for notification. Failure to adhere to such procedures may be deemed a waiver of reliance on the force majeure clause.

## **(6) What if the COVID-19 pandemic and MCO were already in existence when the contract was made?**

If you had entered into a contract after COVID-19 was declared a pandemic and the MCO was issued, you may still rely on a force majeure clause if :-

- (i) both contracting parties were aware of COVID-19 and the MCO at the time the contract was made; and
  - (ii) it was not certain between parties whether COVID-19 and / or the MCO would still subsist at the time of the required performance of the contract.
- This is especially important for businesses who had entered into contracts with the impression that the MCO period would expire on the 31st March 2020 or 14th April 2020.
  - The same reasoning would also apply if the MCO period is extended yet again.

## FRUSTRATION OF CONTRACT

### **(1) What if there is no applicable force majeure clause in your contract?**

In the absence of an express or applicable force majeure clause, parties may terminate a contract on ground that the contract has been frustrated. This is prescribed under Section 57 (2) of the Malaysian Contracts Act, 1950, which states that a contract is void when it becomes impossible or unlawful to perform, due to some event which the promisor could not prevent.

### **(2) What are the requirements to be satisfied for a contract to be frustrated?**

There are 4 elements to be satisfied before the contract can be frustrated under Section 57 (2) :-

- (i) The event occurred subsequent to the formation of the contract;
- (ii) The event was not contemplated by the contract;
- (iii) The event rendered performance of the contract physically or legally impossible (as opposed to more difficult), or fundamentally alters the obligations of the contract; and
- (iv) The event occurred through no fault of either party (i.e. not self-induced.)

### **(3) What are the consequences of a frustrated contract?**

If the elements abovementioned are satisfied, the contract will be brought to an end, and the parties to the contract will no longer be bound to perform their future contractual obligations. Notwithstanding, any work already done by a party in performing their contracting obligations prior to the frustrating event ought to be paid for by the party who has received a benefit thereof.

However, do take note that the threshold for you to prove that the contract has been frustrated is higher than that for most force majeure clauses, as you would have to prove that the obligations affected by the frustrating event were so fundamental that they strike at the root of the contract.

An important distinction to keep in mind between a force majeure clause and frustration is that (depending on the wording of the clause) invoking a force majeure clause may not result in the termination of the contract, whereas frustration results in an automatic termination. Hence, if a contract contains long-term obligations that will not be rendered impossible by the temporary effects of COVID-19 and the MCO, you may not be able to terminate the contract on the ground of frustration.







## **EXPIRATION OF LIMITATION PERIOD DURING THE MCO**

### **(1) What is a limitation period?**

In non-criminal cases, a limitation period is the period of time within which a party must file a civil claim in court. In Malaysia, Section 6(1)(a) of the Limitation Act, 1953 provides that any contractual or tortious action must be brought within six years from the date on which the cause of action accrued.

### **(2) Is there an extension of the limitation period in light of the MCO?**

From our review, the limitation period prescribed by the Limitation Act, 1953 is not extended by the Act by the mere existence of the MCO.

Therefore, the period for calculating the date on which limitation period expires for your contractual / tortious claim(s) should not take into account the MCO period. Should your limitation period be expiring shortly, please immediately consult legal advice / appoint solicitors to file your claim.

## CONTACTS



**Alan Gomez**  
Managing Partner  
T +603 2632 9682  
alan@tommythomas.net



**Sitpah Selvaratnam**  
Consultant  
T +603 2632 9682  
sitpah@tommythomas.net



**Ganesan Nethi**  
Partner  
T +603 2632 9682  
ganesan@tommythomas.net



**Michael Yap Chih Hong**  
Partner  
T +603 2632 9682  
michael@tommythomas.net