

FAQ: Disruption in Contractual Performance

for LexisNexis Resource Hub – COVID-19



No.	Question	Answer
1	Given the COVID-19 outbreak and the Movement Control Order ('MCO') imposed by the Malaysian Government, how can affected parties excuse themselves from performing their contractual obligations?	Parties can either rely on force majeure clauses in a contract or the doctrine of frustration of contract.
2	What is a force majeure clause, and how does it apply to excuse an affected party from performing its contractual obligation?	<p>Firstly, 'force majeure' refers to a contractual term that contracting parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct the performance of the contract. A force majeure event refers to the occurrence of an event which is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract.</p> <p>Secondly, in Malaysia, there is no general concept of force majeure. A party's ability to claim relief for a force majeure event depends on the express terms and wording of the contract, and the force majeure provision in particular. Force majeure clauses are strictly construed by the courts who are generally reluctant to read into such clauses events that are not expressly provided for by the contract.</p> <p>Thirdly, a force majeure clause would generally suspend the performance of the contract for the period that the event subsists. However, some force majeure clauses do provide for the automatic termination or termination by the counterparty. This depends on the express wording of the clause.</p>
3	Would the COVID-19 outbreak and the imposition of the MCO by the Malaysian Government amount to force majeure events?	As stated above, a party's ability to claim relief for a force majeure event depends on the express terms of the contract and such clauses are strictly construed by the courts. As such, unless the force majeure clause provides specifically for 'diseases', 'epidemic', 'pandemic', 'medical outbreaks', or 'act of Government authority', it is rather difficult for a party

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		<p>to argue that the COVID-19 and the MCO are force majeure events.</p> <p>As an illustration of the court's strict approach in interpreting force majeure clauses, it should be highlighted that the court had even held that a 'depressed economy' does not fall within the category of 'other circumstances' in a force majeure clause.¹</p> <p>As such, even if a party's financial condition has been severely affected by the COVID-19 outbreak and the imposition of the MCO, it is still unlikely that the court would accept such events to be force majeure if they were not specifically provided for in the contract in question.</p>
4	Is it sufficient to merely show that the COVID-19 outbreak and/or MCO fall under the category of force majeure events under the contract?	Other than having to show that the COVID-19 outbreak and/or MCO fall under the category of force majeure events under the contract, there must also be a causal link between the COVID-19 and/or MCO and a party's inability to perform the contract. For example, if the only obligation under the contract is for the making of payment, it is unlikely that the party who is supposed to make such payment can rely on the force majeure clause. In this regard, there is nothing to stop said party from continuing to make payment as the banking sector is still operational during the MCO period.
5	What happens if a contract affected by the current COVID-19 outbreak and/or the imposition of the MCO does not contain a force majeure clause?	In cases where there is no force majeure clause, parties would have to then rely on the doctrine of frustration of contract.
6	What is the doctrine of frustration, and how does it apply?	<p>The doctrine of frustration of contract is recognised in Malaysia under section 57(2) of the Contracts Act 1950 (Act 136), which provides that:</p> <p><i>...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.</i></p> <p>It only applies upon the fulfilment of the following requirements:</p> <p>(a) the event must have been one for which no provision has been made in the contract;</p>

¹ [Global Destar \(M\) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd \[2007\] MLJU 91, \[2007\] 1 LNS 54.](#)

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		<p>(b) the event that occurred must not have been caused by either party; and</p> <p>(c) the event which is said to discharge the contractual obligation 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.</p> <p>Similar to a force majeure clause, the doctrine of frustration relieves a party from its contractual obligations in the event an intervening event has disrupted the continued performance of the contract.</p>
7	<p>Would the COVID-19 outbreak and/or the imposition of the MCO by the Malaysian Government render a contract frustrated?</p>	<p>Whether or not the COVID-19 outbreak and/or the imposition of the MCO by the Malaysian Government would render a contract frustrated is dependent on the contractual obligation in question.</p> <p>It must be noted that the courts would usually construe circumstances resulting in frustration narrowly. In this regard, a party cannot rely on frustration just because the obligation had been rendered more onerous, more expensive or more difficult to be performed. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed.</p>

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.

About the Author

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Janice is a commercial and corporate litigator with experiences and interest in company law and shareholders' disputes. She has also acted as lead counsel in various contested winding-up proceedings and has dealt with commercial disputes involving breaches of contracts, and breaches of officer and trustee duties. Janice is a member of the International Women's Insolvency & Restructuring Confederation. Janice is also an associate of the Malaysian Institute of Arbitrators, and has been involved in arbitral-related court proceedings such as applications to set aside and/or stay of court orders enforcing arbitral awards as well as applications for enforcement of foreign arbitral awards.

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