

**Force Majeure Clause in Employment Contracts: Its Relevance  
in Malaysian Industrial Jurisprudence**

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**FORCE MAJEURE CLAUSE — THE ROAD ONE LESS TRAVELLED<sup>1</sup>**

The stoic legal framework of employment relations in Malaysia has been almost etched in stone since the independence albeit with minor changes to the existing employment statutes.<sup>2</sup> The enactment of employment statute is based on the discussion involving the government, employers and the employees, they are nevertheless largely controlled by state and the employer.<sup>3</sup> This results in employee being subjugated by the unilateral management decision and hence, the employers take the upper hand and are now proposing the force majeure clause,<sup>4</sup> in as much as it is meant to be a clause to protect either party, it solely become a contract for the benefit of the employer.

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1 'Two roads diverged in a wood and I took the one less travelled by and that has made all the difference' — Robert Frost, 'Road Not Taken' accessed <https://www.poetryfoundation.org/poems/44272/the-road-not-taken>.

2 The employment statutes in Malaysia are the Employment Act 1955 (Act 265), the Trade Union Ordinance 1959, the Industrial Relations Act 1967 (Act 177), the Private Employment Agencies Act 1981 (Act 246) and the Labour Ordinances in Sabah (1950) and Sarawak (1952), among others.

3 Crinis, Vicki, and Balakrishnan Parasuraman, 'Employment relations and the state in Malaysia' (2016) 58 *Journal of Industrial Relations* 2 at pp 215–228.

4 *Black's Law Dictionary* defines 'force majeure' as 'an event or effect that can be neither anticipated nor controlled'. See Peter A Steinmeyer and Amy Bharj, 'You Are Excused: Force Majeure and the Workplace in the COVID-19 Era' (2020) X *National Law Review* 19 <https://www.natlawreview.com/> accessed 1 June 2020.

The emergence of pandemic viruses or Coronavirus ('Covid-19') has further exacerbated the socio and economic challenges to many countries. As a result of the Covid-19 pandemic, businesses are facing disruptions or even closures to some extents thereby causing major changes in most of the industries across the world. This unprecedented event brings about an economic downturn or recession. The fact is that no companies are immune to recession, hence when this occurs markets becomes volatile and forces the employers' to reduce their workforce. Most of the industries would consider triggering the force majeure clause in their employment contracts in retrenching the workers. At this juncture, the irony is that employers are allowed to invoke the force majeure clause in their employment contract to excuse their inability to perform their contractual obligations due to the outbreak of Covid-19 pandemic. Hence, this article discusses the applicability of majeure clause in employment contract in the context of Malaysian industrial jurisprudence.

It is noteworthy that the Malaysian industrial jurisprudence dictates that a workman's right and status under his employment contract are not to be decided solely on the basis of the law of contract, and neither is a workman's security of tenure to be dependent on the absolute discretion of his employer or on the terms and conditions of his contract of employment. His rights are to be determined on the basis of fair labour practice, equity and good conscience to ensure that the principle of security of tenure is not undermined and social justice is dispensed with.<sup>5</sup> Hence, the existence of a force majeure clause is no guarantee that the employer could absolved of liability by merely replying on the clause. Where there is a challenge of dismissal, the employer will still have to show on a balance of probability that the dismissal was with just cause or excuse.

It may be noted that with the implementation of the Movement Control Order<sup>6</sup> pursuant to the Prevention and Control of Infectious Diseases Act 1988 has impacted various business in almost all industries. The unprecedented impact of Covid-19 has effected businesses and the employers were forced to undertake drastic actions leading to retrenchments, lay off,

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5 See *Vincent Pillai Leelakanda Pillai v Subang Jaya Hotel Development* [2018] 2 ILR 158; [2018] 2 MELR 667.

6 Movement Control Order ('MCO') imposed under the Prevention and Control of the Spread of Infectious Diseases Act 1988 (Act 342) and the Police Act 1967 (Act 344). An employer who failed to comply with the MCO commit an offence under reg 7 of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 (PU(A) 91/2020) and if convicted, will be liable to a fine not exceeding RM1,000 or imprisonment not exceeding six months or both.

furlough and redundancy. This impact will change the legality of how companies will contract with their future employees and business trading partners. Certainly, there is now a demand to include a 'material adverse change' or 'force majeure' clause into the employment contract or collective agreement.<sup>7</sup> Hence, the issue arises as to whether the employer would be able to excuse themselves from their obligations under the contract if such performance is hindered, delayed or prevented by event of force majeure such as the Covid-19? This is subject to the issue whether force majeure clause is recognised in the industrial jurisprudence of the country. Whether it warrants the satisfaction of 'an event or effect that can be neither anticipated nor controlled?'<sup>8</sup> This article therefore addresses the legal nature of force majeure complexities and its applicability in the Malaysian industrial jurisprudence.

At this juncture, it is worthwhile to note that a contract of employment only comes into force after both parties have consented to the terms of the contract. The content of all employment contract adopted the legal word 'terms and conditions' where if breached, would entail damages. It must be added that in the sphere of employment, there is no actual freedom of contract because of the prevalent of the unequal bargaining power between the contracting parties. The doctrine of *laissez faire* had ignored the fact that the working class are generally on the weaker side of bargaining power except for a limited group of people such as those with high skill and expertise such as executives, information technologists and communication engineers, among others. In the words of Lord Wedderburn, it is an 'individual relationship, in its inception, is an act of submission, in its operation it is a condition of subordination may be cancelled by the indispensable figment of the legal mind known as the 'contract of employment'.<sup>9</sup> The doctrine has thus been described as 'a command under the guise of an agreement'<sup>10</sup> or in the words of John Stuart Mill, 'another name for freedom for coercion'.<sup>11</sup> In other words, the

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7 FocusM, 'Covid-19: Implications of MCO on deals and companies' (*Focus Malaysia*, 18 March 2020) <https://focusmalaysia.my/mainstream/covid-19-implications-of-mco-on-deals-and-companies/>.

8 *Black's Law Dictionary* defines 'force majeure' as 'an event or effect that can be neither anticipated nor controlled'.

9 Lord Wedderburn, *The Worker and the Law* (3rd Edn, 1986) at p 5.

10 Otto Kahn Freund, *Labour Relations and the Law: A Comparative Study* (1965) at p 18.

11 JS Mill. *Principles of Political Economy with Some of Their Applications to Social Philosophy* (1965) at p 11.

employment contracts creates an unequal bargaining power,<sup>12</sup> and hence, most post Covid-19 employment contracts with a force majeure clause may end up in litigation.

The term 'pandemic' 'epidemic' or 'outbreak of diseases' are relatively novel in Malaysia.<sup>13</sup> In *Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd and another Appeal*,<sup>14</sup> the outbreak of Japanese Encephalitis ('JE') in the State of Negeri Sembilan resulted in the State Government *gazetting* its state as one of the worst JE infected area. The farming, selling and culling of pigs were banned from the affected areas. Due to this unforeseen outbreak of JE virus, the tapping agreement and service agreements that was entered by the parties involved were void in effect due to the contract being frustrated. Reverting to the current Covid-19 situation, this may not be seen successful as frustration will only occur if the pandemic has rendered the contract legally and physically impossible to perform. Therefore, contracts that are considered to be burdensome due to the outbreak will not necessarily accord the contract being frustrated.

Nonetheless, if a pandemic such as Covid-19 is once again contemplated, the future contract of employment may be leading to the recognition of the force majeure clause. Current legal scenario to include the force majeure clause in contract of employment must examine the recognition and applicability of the clause by the legislature. Can an obligation be imposed on the both parties be just and equitable in that the party relying on the clause will have to give reasonable notice to the other party in event the contract becomes impossible to perform and what would be the compensation allowable to the other party?

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12 A Bacghi, 'The Myth of Equality in Employment Relations' (2009) Faculty Scholarship at Penn Law 256 <https://scholarship.law.upenn.edu/>.

13 The JE Virus can be argued to be the recent category of 'serious outbreak of disease' however this was considered not to be of serious public health problem warranting the government to impose a MCO as has been in the recent Covid-19 pandemic. Kumar, K et al, 'Japanese encephalitis in Malaysia: An overview and timeline' (2018) 185 Act Tropica <https://www.sciencedirect.com/science/article/pii/S0001706X18302407>.

14 [2014] 4 MLJ 413 (CA).

**DOCTRINE OF FORCE MAJEURE VS THE DOCTRINE OF FRUSTRATION – A TALE OF TWO DOCTRINES<sup>15</sup>**

From the outset, due to the colonial ties with the English that developed the Malaysian legal system it serves as a crucial point that English law does not recognise the doctrine of force majeure as it was considered to be vague<sup>16</sup> and any dispute between parties could be precarious<sup>17</sup> due to commercial and economic inability to perform. The English common law, considers force majeure not to be a stand-alone concept and this usually is covered in a wider set of situations that renders contract to be excused due to the difficulty in performance.<sup>18</sup> The contract will state the circumstances that warrants a force majeure clause, the implication of the force majeure happenings will be listed to ascertain if the contract will be delayed or terminated and the monetary terms relevant to performance and services may be agreed upon prior to the

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15 Adapted from the idea of the book a *Tale of Two Cities* by Charles Dickens a historical novel of a story taken place in France and England. The interesting idea behind this story was that Dickens wanted the reader to make the connected between the past and the present that begins with the French Revolution on the best and worst. An analogy to the force majeure clause and the doctrine of frustration. <https://www.gutenberg.org/files/98/98-h/98-h.htm>

16 Donaldson J remarked in the case of *Borthwick (Thomas) (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16 that '... the precise meaning of this term, if it has one, has eluded lawyers for years'.

17 *Tennants Lancashire Limited v Wilson CS & Co Ltd* [1917] AC 495, Lord Loriburn remarked (at p 510) that:

The argument that a man can be excused from performance of his contract when it becomes 'commercially impossible' seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect.

18 'Force Majeure/Hardship clauses in English Law contracts amid Covid 19' (*Norton Rose Fulbright*, March 2020) <https://www.nortonrosefulbright.com/en/knowledge/publications/b54cf723/force-majeure-hardship-clauses-and-frustration-in-english-law-contracts-amid-covid-19>.

happening of the event in the contract.<sup>19</sup> In other words, the force majeure clause must have been agreed upon by both parties to be incorporated into the contract, its proper application and the laws that is central to the contract.

The force majeure clause is commonly found in many commercial contracts including the sale and purchase agreement. For example, it is common for the developer or vendor to exclude liability to the purchaser for any loss or damage due to any failure or inability to perform any obligations on its part to be performed under the agreement if such performance is hindered, delayed or prevented by event of force majeure including but not limited to acts

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19 *Ibid.*

- Is this situation within the force majeure events covered by the clause? Does it expressly cover a pandemic, quarantine measures, travel restrictions, government action or other circumstance which is preventing performance?
- If not, is it within more general wording?
- Does the event have to be tied to a specific obligation or does it affect the contract generally?
- Does the clause cover events that hinder performance or only events that entirely prevent performance? English law tends to take a much stricter view of clauses that are restricted to events that prevent performance.
- Does the clause say what happens if the clause is engaged? For example, does it just suspend performance for a period of time, permit termination or cater for payments and other performance already made?
- Does the clause require a notice to be given to the other party before it can be relied upon? Care is needed here because some contracts require a notice to be given immediately and a failure to do so may mean that the ability to rely on the clause is lost.
- Is the person receiving the notice in an affected area? Assuming the notice needs to be physically sent, is it actually possible to send the notice?
- If the notice must be received on a business day, is it a business day in the relevant place?
- Are there ongoing information obligations with which you are required to comply once you have claimed force majeure?
- Does the clause require you to mitigate the effects of the force majeure event (e.g. by sourcing alternative goods)? Are you keeping proper records and evidence of the facts relied upon should a dispute arise?

Then, looking at how that interpretation is relevant to your circumstances, consider the following questions:

- How is your ability to perform the contract in fact being affected by COVID-19? Is performance completely prevented (e.g. your supplier is unable to make any deliveries) or is it merely hindered (eg your supplier makes reduced or delayed deliveries)?
- Can the contract be performed in a different way?
- Can the contract be performed in part?

of god, strikes, lockouts, riots, civil commotion, inclement weather and material shortage and any other causes or circumstances beyond the control of the developer. An example of the clause reads:

The vendor shall not be liable to purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by force majeure including but not limited to acts of God strikes lockouts riots civil commotion acts of war or the disability of contractors and subcontractors employed by the vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the vendor.

The force majeure clause however must not be confused with the narrow doctrine of frustration that render contractual performance void due to an unforeseen or impossibility of events as seen in the case of *Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Bhd*.<sup>20</sup> The doctrine of frustration in English law and Malaysian law<sup>21</sup> only applies to events that are unforeseen and occurs after the formation of contract.

The general rule to any forms of contract is that it binds the parties to the completion and performance of the contract even though an unexpected happening of an event has rendered the contract difficult and more expensive to perform,<sup>22</sup> the contract also was essentially unjust to enforce the original undertaking. This means that the contracting parties are not excused from performance just because there is financial difficulty or economic hardship suffered. This could further be justified due to the argument that in any business, both contracting parties are expected to have reasonable business acumen skill in that economic risk are calculated when contracting in line of the good governance of company for sustainable development. Inevitably, the

20 [2007] 4 MLJ 201 (CA). Gopal Sri Ram JCA opined that there must exist three criteria to be woven into the fabric of the doctrine of frustration: (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. Self-induced frustration is ineffective; and (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.

21 The doctrine of frustration is effected through the statutory provisions of Contracts Act (Act 136) 1950 s 57 — supervening impossibility and supervening illegality, Specific Relief Act 1950 (Act 137) s 12 — partial frustration, Civil Law Act 1956 (Act 67) ss 15 and 16 — the adjustment of rights and liabilities of parties to frustrated contracts, and Contract Acts 1950 s 66 of the — restitution of benefit received under a void contract.

22 *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93.

force majeure clause will be played up to the advantage of the employer at the expense of the employees in relation to redundancy and retrenchment.<sup>23</sup>

In fact, in most legal scenarios the force majeure clause also recognised as the doctrine of exemption or in existence when the contract is discharged by way of frustration. As noted earlier, the force majeure clause has its roots predominantly in the law of contract and commercial law. If equitably applied this doctrine provides a just and fair avenue for both contracting parties. This is conceivable only if the parties are able to show that there existed an unforeseeable circumstance that allows the parties to void the contract. This projects an impossibility of performance, thereby excluding the parties from performing their contractual obligations. Nonetheless, the practise and application of this doctrine can be nearly impossible.

Suppression in labour force has been in existence as far back as 1969 where the then Prime Minister, Almarhum Tun Abdul Razak, stressed the importance of being loyal, disciplined and dedicated in the employment sector<sup>24</sup> and this was further reinforced between 1981–2003, by the then Prime Minister, Tun Dr Mahathir Mohamad, who undisputedly agreed that discipline and loyalty are key factors in the Malaysian labour force.<sup>25</sup> Both Prime Ministers rejected and showed lack of support to the trade unions as they believed it would deter the economic progress for Malaysia. The lack of effectiveness in the state's functions through accumulation, pacification and legitimisation has resulted in a lopsided socio-equity commitment.<sup>26</sup>

In an ideal contract scenario, parties must be allowed to regulate their affairs on mutual accord and satisfaction. However, this may be ignored when a legal system chooses to wave the 'hand of god' in contractual situation and therefore contracts are avoided on the justification of 'impossibility', 'frustration' or the 'disappearance' of the foundation of the contract. This certainly shifts the element of 'promise' within the foundation of the contract that the parties have agreed upon. Perhaps the point of view of the employee and employer in relation to force majeure should be considered. The assumption that can be

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23 See Peter A Steinmeyer and Amy Bharj, 'You Are Excused: Force Majeure and the Workplace in the COVID-19 Era' (2020) X *National Law Review* 19 <https://www.natlawreview.com/article/you-are-excused-force-majeure-and-workplace-covid-19-era>.

24 KS Jomo and P Todd, *Trade Unionism and the State in Peninsular Malaysia* (Oxford University Press, 1994).

25 M Mahathir, *The Way Forward*. (Weidenfeld & Nicolson, 1998).

26 R Hyman, 'The State in Industrial Relations' in Paul Blyton, Nicolas Bacon, Jack Fiorito and Edmund Heery (eds), *the Sage Handbook of Industrial Relations* (Sage, 2008) at pp 258–283.



argued would be that an employee may understand force majeure as an external event that is unforeseeable, irresistible and impossible in the performance of the contract, however an employer may believe that the force majeure are events that brings about economic and commercial impracticability.

In a broader business environmental context, force majeure clause no doubt, requires a careful examination especially so for the perpetuity of business planning. This is because of the volatility of the unexpected events such as Covid-19 where important services were forced to take a hiatus. Therefore, in instance of contracts relating to impossibilities due to pandemic it should be warranted that only in extreme situations that the force majeure clause should be invoked.

#### **ALL ROADS LEADS FROM ROME: FORCE MAJEURE CLAUSE AND ITS HISTORICAL DEVELOPMENT**

The precise meaning of the force majeure term, 'if it has one, has eluded the lawyers for years'.<sup>27</sup> The starting points of the doctrine can be traced back to the Roman Law that is found in the classic '*rebus sic standibus*' that allows a contract to be terminated or amended due to a fundamental change in the circumstances.<sup>28</sup> In as much as it finds its foundation from the Roman legal system, *vis a vis* some great force (of nature), and therefore, for mere mortal men it is deemed impossible. However, the doctrine has been further developed in the European legal system namely, the German Code of 1896 known as *Bürgerliches Gesetzbuch*,<sup>29</sup> the Napoleonic code<sup>30</sup> and the Belgium code.<sup>31</sup> The repossession and innovation of this doctrine known in English as the doctrine of changed circumstance through a range of terms. In French it was known as

27 Per Donaldson J: 'the precise meaning of this term, if it has one, has eluded lawyers for years' (*Borthwick (Thomas) (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16).

28 *Contractus qui habent tractum successivum et dependentiam de futurum, rebus sic stantibus intelligentur* — 'Contracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same'. (Corpus Juris Civilis, Digest 4.4.8) — Basak Basoglu (ed), *The Effect of Financial Crisis on the binding force of contracts Renegotiation, Rescission Revision* (Springer 2016).

29 Is it worth noting that the earliest development of this FC clause can be derived from the Clausula Rebus Standibus that materialised in the 18th Century in the Bavarian Landrecht of 1756 and the Prussian Allegemienes Landrech.

30 By and large the origins of the force majeure clause was derived from 18th Century by Pothier, a French jurists in his *Traite Des Obligations* — 'The debtor corporis certi is free from his obligation when the thing has perished neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken upon himself the risk of the particular misfortune which has occurred'. — RE Barnett and NB Oman, *Contracts cases and doctrine* (Wolters Kluwer Law & Business 2016).

*theori de imprevision*<sup>32</sup> and Germans innovated the doctrine of *wegfall der geschäftsgrundlage*<sup>33</sup> as found in their legal systems.

Force Majeure is also recognised as the doctrine of excuse which is defined as ‘unexpected circumstances, such as war, that can be used as an excuse when they prevent somebody from doing something that is written in a contract’.<sup>34</sup> In England<sup>35</sup> and the European Union<sup>36</sup> the courts have tried to bring meaning to the force majeure. It has been defined as ‘natural causes directly and exclusively without human intervention and that could not have been prevented by any amount of foresight and pains and care reasonably to have been expected’ or ‘an event unusual, unforeseeable and beyond the trader’s control, the consequences of which could not have been avoided even if all due care had been exercised’.

The German doctrine of *wegfall der geschäftsgrundlage* is generally recognised as broad and flexible, the French doctrine of force majeure<sup>37</sup> albeit recognised but interpreted strictly and narrowly. English law probably stands in the middle. The German doctrine was developed by Professor Oertmann that resulted in the possible collapse of the foundation of a contract, *Wegfall der Geschäftsgrundlage*. Expectations can be said to be the key connecting between parties, in that these party’s expectations must be clearly communicated and the future performance of the contract cannot be unilateral. This was the very essence of the foundation of the contract called *Geschäftsgrundlage*.

The French legal system necessitates four conditions<sup>38</sup> to be present to enforce the force majeure clause namely unpredictable, uncontrollable,

31 Belgian Civil Code: Article 1147 BCC: ‘The debtor is, if there is a ground thereto, ordered to pay damages, either because of the non-performance of the obligation, or because of delay in performance, if he does not prove that the non-performance is the consequence of an extraneous event for which he cannot be held accountable (...)’. Article 1148 BCC: ‘No damages are due, if the debtor has become hampered through force majeure or fortuity to give or do that to what he had committed himself, or has done that which was prohibited’. T Heremans, ‘Coronavirus and force majeure in commercial contracts’ (*CMS Law Now*, 5 March 2020) <https://www.cms-lawnow.com/>.

32 M Kovac and C Poncibò, ‘Towards a Theory of Imprévision in the EU?’ (2018) 14 *European Review of Contract Law* 4 pp 344–373 <https://www.degruyter.com/view/journals/ercl/14/4/article-p344.xml>.

33 *Ibid.*

34 *Oxford Learner’s Dictionaries*, ‘force majeure’ <https://www.oxfordlearnersdictionaries.com/definition/english/force-majeure>.

35 *Nugent v Smith* (1876)1 CPD 423.

36 Case 266/84 (1987) 3 CMLR 202 at p 223 ((1986) ECR 149).

37 The elements of *force majeure* in French law (articles 1147 and 1148 in the Code Civil).

38 B Nicholas, *The French Law of Contract* (Oxford, 1992).

external,<sup>39</sup> and impossible.<sup>40</sup> The French law allows both contracting parties to be released from liability in damages.<sup>41</sup> On the other hand, there are also evidence that this doctrine has been recognised in the Americas, both North and South.<sup>42</sup> This was made possible due to the historical relationship that these countries would have had through influence of the development of the legal systems from Europe.<sup>43</sup> The olden method of the European and American courts were that this doctrine will only be recognised as applicable when performance of an obligation required in the contract due to unforeseen circumstances making it totally impossible to perform.<sup>44</sup>

It was not until 1914, the force majeure clause was recognised. This was to preserve the sacrosanctity of the contract. However, this was relaxed due to first World War where the courts in France allowed the termination of contracts

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39 F Azfar, 'The Force Majeure 'Excuse' (2012) 26 *Arab Law Quarterly* pp 249–253:

Unpredictability — If the event could be foreseen at the time of entering into the contract, it should have been provided for in the contract and the relying party is expected to have prepared for it or insert such event in the definition of *force majeure* under the contract. A party's failure to specify a foreseeable risk gives an assumption that the party intended to take such risk at the time of entering into the contract.

Externality — The event must not be attributable to the fault of the relying party and the relying party must have had nothing to do with its occurrence.

Uncontrollable — The event must be insurmountable and the relying party could not have done anything to mitigate it or avoid its occurrence.

40 B Nicholas, *The French Law of Contract* (Oxford, 1992): Impossible — impossibility: the event has to make performance impossible, not merely more onerous

41 *Ibid.*

42 Example the doctrine of force majeure which, with only slight departure from its French ancestor, article 1147 of the Code Napoleon, was received in article 1933(2) of the Louisiana Civil Code of 1870 — La Civ Code art 1933(2) (1870): 'Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do or is from the same causes compelled to do what the contract bound him not to do, no damages can be recovered for the in execution of the contract'. French Civil Code art 1147: 'A debtor is liable for damages arising either from non-performance or from delay in the performance of the obligation unless he can show that his failure to perform was caused by events beyond his control, and further that there was no bad faith on his part'.

43 French Civil Code (the Napoleonic Code) dating back to 1804 — articles 1148, 1348, 1631, 1730, 1733, 1754, 1784, 1929, 1934, and 1954.

44 M Plano and G Ripert, *Traité pratique de droit civil français* (2nd Ed, 1954) at pp 168–69. See also 6 R. Demogue, 'Traité des obligations en général' 573–74 (1931) found in Saul Litvinoff, 'Force Majeure, Failure of Cause and Théorie De L'imprévision: Louisiana Law and Beyond' (1985) 46 *La L Rev* <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4942&context=lalrev>.

thereby ending the obligations of both parties in a contract. This relaxation however has garnered reluctant support from the French Court Cassation<sup>45</sup> in the modern times.

The legal significance of the ancient maxim *pacta sunt servanda*<sup>46</sup> that replaced<sup>47</sup> *rebus sic standibus*, stated that all contracts that has been entered voluntarily with *consensus ad idem* is to be upheld and enforced with honour and integrity.<sup>48</sup> *Vinculum Juris*<sup>49</sup> forms the corner stone of every contract that agreements must be performed<sup>50</sup> as it emphasis on the sanctity of the contract.<sup>51</sup> Cases from every corner of the world have reaffirmed these maxims.<sup>52</sup> In the English case of *Paradine v Jane*,<sup>53</sup> the court stated that ‘where the law creates a duty or charge and the party is disabled to perform it and hath no remedy over, there the law will excuse him ... but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if

45 The Court of Cassation is the highest court in the French judicial system. The Court of Cassation controls the right application of the law by the inferior courts in civil and criminal matters. It aims at achieving unity in the application of the law. The Court reviews the legality of the contested decision and may annul it, but does not review the facts which form the basis of it. Since 1991, the Court of Cassation may also issue opinions on new and complex questions upon request from inferior courts — European Law Institute, ‘Cour de Cassation’ <https://www.europeanlawinstitute.eu/>.

46 ‘Pacta Sunt Servada’ (*The Free Dictionary*) <https://legal-dictionary.thefreedictionary.com/pacta+sunt+servanda>.

47 Literature shows that this was inevitable due to the evolution of ideology in economic namely capitalism and liberalism Saul Litvinoff, ‘Force Majeure, Failure of Cause and Théorie De L’imprévision: Louisiana Law and Beyond’ (1985) 46 La L. Rev <<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4942&context=lalrev>>.

48 Jan Van Dunne, ‘The change of the guards: Force majeure and frustration in construction contracts: The foreseeability requirement replaced by normative risk allocation’ (2002) 20 Int Constr Law Rev 2 pp 162–186 [https://www.eur.nl/sites/corporate/files/Website\\_JvD\\_Articles\\_English\\_Tab\\_1\\_\\_2002\\_0.pdf](https://www.eur.nl/sites/corporate/files/Website_JvD_Articles_English_Tab_1__2002_0.pdf).

49 ‘vinculum juris’ (*The Free Dictionary*) <https://legal-dictionary.thefreedictionary.com/vinculum+juris>.

50 It’s a general principal of law that is applicable to all legal systems — Anthony Aust, ‘Pacta Sunt Servanda’ (2007) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449>.

51 Travaux préparatoires — the founding fathers of the French Code.

52 English law in *Paradine v Jane* [1647] EWHC KB J5; French law in D 1876. 1. 193 Case *De Gallifet v Commune de Péliissanne* (Canal at Craponne); American law in *Dermott v Jones* 69 U.S. 2 Wall. 1 1 (1864) (found in <https://www.law.cornell.edu/supremecourt/text/69/1>), and Dutch law in *Sarong* case of 1926 found in AG Castermans, KJO Jansen, et al, *Foreseen and unforeseen circumstances* (Kluwer, 2012). [https://openaccess.leidenuniv.nl/bitstream/handle/1887/36687/2012\\_BWKJ\\_27.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/36687/2012_BWKJ_27.pdf?sequence=1).

53 In this case a tenant has sued for non-payment of rent, he pleaded that he had been evicted and kept out of possession by an alien army and thus refused to pay the rent.

he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'.<sup>54</sup>

The change in this strict rule came about 200 years later when the English Court developed the doctrine of frustration in the case of *Taylor v Caldwell*.<sup>55</sup> The court gave the judgement to the defendant on the grounds that contract contained an implied condition that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.<sup>56</sup> The case of *Krell v Henry* became the legal precedent for the general rule of the frustration doctrine that is the frustration of purpose. This shows that the French doctrine of force majeure is stricter and less flexible than the English doctrine of frustration. However, the hardship and financial loss in relation to performance of contract or delay due to commercial risk are not considered sufficient to frustrate the contract.<sup>57</sup>

In *Davis Contractors Ltd v Fareham Urban District Council*,<sup>58</sup> the House of Lord dismissed the claim on the ground that there was no frustration. Lord Radcliffe explained that 'it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted'. In the case of

54 HG Beale, *Chitty on Contracts*: (29th Ed, Vol I: General Principles) (Sweet & Maxwell, 2004) at pp 1312–1313.

55 [1861–73] All ER Rep 24. The facts of the case were that the defendants had entered into a contract with the plaintiff, where the plaintiff were allowed to use a music hall for concerts for four nights. The contract was concluded, and a day before performance of the first day concert, the hall was destroyed by fire through no fault of either parties. The plaintiff sued for damages to cover their incurred costs. See P D V Marsh, *Comparative Contract Law: England, France, Germany* (Gower, 1994) at p 318.

56 PDV Marsh, *Comparative Contract Law: England, France, Germany* (Gower, 1994) at p 318.

57 *Ibid* at pp 1322–1323

58 [1955] 1 All ER 275. The facts of the case were that the plaintiff contracted to build 78 houses for the defendants at a fixed price, the work to be completed in eight months. Due to unforeseen lack of labour, bad weather and other reasons the work took 22 months to complete and cost was £17,000 higher than initially calculated. The contractors claimed that shortage of labour had frustrated the contract and thus sought additional compensation on the basis of unjust enrichment — H Beale, H et al, *Cases, Materials and Text on Contract Law* (Hart Publishing, 2002) at pp 617–619.

*Tsakiroglou v Nobhlee Thorl*,<sup>59</sup> the court held that seller would need to look at an alternative even though it could be too expensive to perform or time consuming due to the obstruction of the canal did not make the situation fundamentally different. Again, in *Staffordshire Area Health Authority v Staffordshire Staffs Waterworks Co*<sup>60</sup> the court held that ‘the situation has changed so radically since the contract was made 50 years ago that the term ‘at all times hereafter’ ceases to bind: and it is open to the court to hold that the contract is determined by reasonable notice’. The above English cases can be said to be similar to the French case as discussed below where the court consented to the parties to be released from the contract and a contract with renewed provision were later concluded.

The French case of *Canal at Capone*<sup>61</sup> where in quoting art 1134 of the French Civil Code that the contractual obligations must be followed and court’s power should not include changing the agreement of the parties no matter how equitable it may seem to be.<sup>62</sup> Although, the French *Cour de Cassation* showed a lesser degree of flexibility compared to the English Court of Appeal in refusing to release the parties from their contractual duties. In the English Case of *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)*,<sup>63</sup> the courts have held that a force majeure clause is to be interpreted not by their general meaning but by reference to the words used by the parties.

If a force majeure clause has been vaguely worded, the question that often arises is whether it includes a situation or scenario that causes serious economic consequences that make the contract difficult to be performed. In the case of

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59 The doctrine of frustration was rejected by the English courts in the *Suez Canal* case, where the closure of the *Suez Canal* because of war led to arguing that contracts for the sale of goods had been frustrated. Note: Only in two *Suez Canal* cases frustration was successfully applied, however, these decisions were later subject to appeals and have been quashed in the higher judicial instances. See: GH Treitel, *Frustration and force majeure* (Sweet & Maxwell, 1994) at p 50.

60 [1978] 3 All ER 769 The facts of the case were that there was no provision in the agreement, made in 1929, to supply water at all times hereafter, between the parties for a variation of the charges payable under the agreement, which had between 1929 and 1978 become derisory, being 1/20 of the current proper price.

61 D. 1876. 1. 193 *Case De Gallifet v Commune de Pélissanne (Canal at Craponne)* BS Marquesinis (translated by Tony Weir) <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1186>.

62 *Ibid.*

63 [1996] 2 Lloyd’s Rep 383.

*Thames Valley Power Limited v Total Gas and Power Limited*,<sup>64</sup> the court questioned the commercial viability in the performance of the contract as it was uneconomical to perform. Clarke J stressed that '[t]he force majeure event has to have caused Total to be unable to carry out its obligations under the contract. Allowing force majeure to apply where performance is commercially impracticable would add a highly uncertain and open-ended qualification which would be inconsistent with the rest of the agreement. If Total had wanted to deal with the issue, it should have made express provision in the contract'. The court went further to establish that if there does appear an express provision to the contrary in the force majeure clause then such situations or scenarios cannot be included. The company was unsuccessful in the attempt to enforce the force majeure clause and the judgment also considered the factual background and surrounding circumstances<sup>65</sup> and whether it was foreseeable in that given scenario.

Reliance on reasonable steps to avoid its operation or mitigate its effect by the affected party was discussed in the case of *Channel Island Ferries Ltd v Sealink UK Ltd*,<sup>66</sup> where the Court of Appeal stated that words in any clause relating to situations 'beyond the control of the relevant party'. These cases clearly shows that the English courts are reluctant to recognise the force majeure clause under the standard 'boilerplate template'.<sup>67</sup> The changed circumstances are far more important and that too is dependent on the range and the length of the transaction. Hence, it is crucial for both parties in the contract to clearly define the terms of force majeure along with the express

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64 [2005] EWHC 2208 (Comm). The facts of the case were that Total Gas and Power has tried to push for a force majeure clause as their radical change in the price of gas. Due to the spike in the prices of gas, the company argues that it was uneconomical to continue supplying Thames Valley Power at the price that was previously agreed on in the contract. The attempt failed.

65 It was a long term contract that contained a complex pricing mechanism and Total Gas and Power was aware of the uncertainties in the fluctuation of the gas prices and also had huge resources.

66 [1988] 1 Lloyd's Rep 323.

67 "Boilerplate" is the term used to describe the clauses that are included in an agreement to deal with the mechanics of how it works and those legal points that are relevant to most transactions. Boilerplate clauses are generally found at the beginning and the end of an agreement. Such clauses are often thought of as standard, miscellaneous provisions, but this is a very dangerous view to adopt. It is not unusual for a boilerplate clause to be the cause of litigation. Since a boilerplate clause will deal with issues such as the interpretation, validity and enforcement of an agreement, it can have a significant impact on the other clauses in an agreement and on an agreement as a whole. It is important that any such impact is intentional and not the result of a boilerplate clause being included in an agreement with little thought — 'Boilerplate clause' (*Lexis PSL*) <https://www.lexisnexis.com/>.

intention of the rights and obligations in the contract. This is to ensure that both parties recognise the effect and the situations that will be construed as force majeure.

However, this doctrine of absolute contractual obligation has been dodged like a bullet due to defence of *non-est factum*<sup>68</sup> in circumstances of mistake. The unequal economic bargaining power and impossibility to performance of a contract has allowed the force majeure clauses to be argued and applied successfully. It must be added that at common law, the employer and employee relationship is based on a contractual basis and thus, consists of rights and responsibilities. These rights and responsibilities are continuous in nature unless one of the parties terminates the contract as agreed upon based on the terms of the contract. Therefore, it becomes apparent that the basic elements of a contract have to be present. This is further entrenched in the principal of '*non haec in foedera veni*'<sup>69</sup> where retrospective the parties may not plead with the benefit of hindsight or upon the occurrence of supervening event that is external to what was agreed.

Clearly, consent is a vital part of a contract. This means that parties to a contract must faithfully perform the obligations in the contract, with the exception to the maxim *nemo tenetur ad impossibilia*<sup>70</sup> that means the parties cannot be held responsible to perform the impossible. Hence, to recognise the validity of force majeure clause, the consideration of 'risk allocation' is important. Most contracts in the negotiation of force majeure clauses will consider 'risk should follow control'. Further, it should also consider any disaster recovery and business continuity obligations, in order not to be inadvertently cancelled.

The other consideration that is important in allocation of risk would be the defining scenarios and situations of force majeure, what is the impact in relation to rights and duties of both parties if a force majeure situation occurs and which party had a clearer grasp of the situation. This is pertinent as the force majeure clause prevents one party from performing and completing what is set out in the contract, for the simple reason that it is beyond the parties reasonable control of the situation. The best solution would be to incorporate

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68 'non est factum' (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100237457>.

69 'Non Haec in Foedera Veni' — Black, *Black's Law Dictionary* (2nd Ed, 1910) <https://openjurist.org/law-dictionary-blacks/non-haec-in-foedera-veni>.

70 'Nemoteneturadimpossibile' (*TheFreeDictionary*) <https://legal-dictionary.thefreedictionary.com/Nemo+tenetur+ad+impossibile>.



a sophisticated clause of the specific events contemplated by the contracting parties as within the scope of force majeure. The justification of this is due to the fact that the doctrine of frustration is a recognised common law doctrine whilst the force majeure clause has no real legal meaning in the English law. The best solution is to bring it contractually.

Since English law albeit reluctantly and vaguely recognises legal and physical limitations on the performance of the contract that can be due to unforeseen and irresistible. Force majeure does not consider the issue of human interference, through a purposive or negligent act that could also include omission or evasion of the party. The wisdom of enforcing a force majeure clause would be at the express agreement of either or both parties and it should be free from any burden or liability for a failure to perform due to an external event that is beyond the control and contemplation of the parties existing obligations to perform.

#### **FORCE MAJEURE CLAUSE IN EMPLOYMENT CONTRACTS**

Generally, the employment contracts and collective bargaining agreements seldom have a 'force majeure' clause that would excuse the performance of the contract by either party due to the occurrence of certain events. Albeit there is no golden rule in drafting such a clause in a contract, the standard 'force majeure' clause would normally contain the following wordings:

A party shall not be liable for any failure of or delay in the performance of this agreement for the period that such failure or delay is,

- (a) beyond the reasonable control of a party;
- (b) materially affects the performance of any of its obligations under this agreement; and
- (c) could not reasonably have been foreseen or provided against, but will not be excused for failure or delay resulting from only general economic conditions or other general market effects.<sup>71</sup>

It can also be drafted in simple manner as follows: 'Neither party will be liable for performance delays nor for non-performance due to causes beyond its reasonable control, except for payment obligations'.<sup>72</sup> The degree of force majeure clauses would vary from one industry to another and these clauses may

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71 'Force Majeure' (*contract standards*, 23 January 2018) <https://www.contractstandards.com/public/clauses/force-majeure> accessed 1 June 2020.

72 *Ibid.*

have different consequences depending on the jurisdiction. Having said the above, the 'force majeure' clause in employment contracts is discussed below with reference to the selected jurisdictions.

- (a) *the United Kingdom (UK)*: Under English law, the notion of force majeure is not derived from the common law but is introduced by the contract concluded by the respective parties. Although the phrase force majeure is well used in most of the contracts, surprisingly, there is no technical legal meaning of it under English law. Accordingly, it is crucial to read the precise wordings of the 'force majeure' clause in the employment contract carefully to interpret it and decide whether the contractual party seeking to invoke such a clause can relieve itself from the contractual liability. The burden of proof rests with the party that relies on the force majeure clause.
- The employer who is seeking to terminate an employee by invoking the force majeure clause also has to comply, if any, with others procedural requirements under the employment contract. One of these requirements might include giving notice of intention to rely on such a clause to the employee within a particular timeframe. By invoking the force majeure clause, if it satisfies all the requirements mentioned in the employment contract, the employer would be able to layoff the employees without any liability such as payment retrenchment benefits or compensation for unfair dismissal. If there is no force majeure clause in the contract, neither party will be able to seek relieve from their contractual obligations under this doctrine as it is purely a creature of the contract rather than a rule imposed by law.<sup>73</sup> They may look for other options available at common law such as frustration of purpose and impossibility to carry out the obligation under the contract.
- (b) *the United States (US)*: In the US, laws differ to some extent from one State to another. Similar to the UK, the doctrine of force majeure is a derivative of the contract and not the creation of any specific law under any of the States in the US. Normally, courts in the US will apply and enforce the terms of the agreement between the parties even if it brings harsh or difficult outcomes for either party of the contract. Therefore, it is vital to cover as much as unforeseen and uncontrollable situations possible in a force majeure clause in an employment contract to

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73 Faye Moore, 'Will Covid-19 trigger a force majeure clause?' (*Pinsent Masons*, 26 March 2020) <https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause> accessed 1 June 2020.

safeguard the interest of the employers in case those circumstances occur in the future.<sup>74</sup>

- (c) *Germany*: In Germany, despite being one of the jurisdictions that follows the civil law traditions, there is no statutory provision governing the concept of force majeure. Generally, the court will look first into the terms of the contract between the parties. A thorough examination of the contractual provisions will be carried out in order to determine whether the party seeking to invoke a force majeure clause is entitled to discharge the contractual performance. If the invoking party could not prove the event as force majeure, he can still apply to the courts to determine the intention of the parties at the time of drafting such clause. In this case, he needs to fulfil the two main criteria for force majeure under German law namely, the event was really unavoidable and beyond his control.

The employer would also be able to argue that it was impossible for him to perform his contractual obligations due to strict government intervention in circumstances like the lockdown period during Covid-19 pandemic. More remarkably, even in the absence of a force majeure clause, German's statutory law allows the contractual amendment or termination if the circumstances have changed significantly due to unforeseeable events that render performance of the contract unreasonable, impossible or excessively onerous. Accordingly, the employer could also argue that the circumstances have drastically changed compared to the time when the employment contract was concluded with the employee.<sup>75</sup>

- (d) *China*: The Chinese law generally identifies unforeseeable, unavoidable and insurmountable events as force majeure. The party relying on the force majeure clause must prove that an unforeseeable, unavoidable or insurmountable event caused his contractual non-performance. Hence, the employer has to show that there is a causal link between the occurrence of the force majeure event and the non-performance of his contractual obligation in terminating contract with the employee.<sup>76</sup>

Although a layman would easily identify the Covid-19 pandemic as one of the events that can be counted as force majeure, the answer would be different depending on the jurisdiction. In most common law jurisdictions, especially in the US and the UK, the court would give great importance to the wordings of

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74 Laurent Gouiffès and Robert Wolinsky, 'How Force Majeure Differs In The US, Europe And China' (*Law360*, 29 April 2020) <https://www.law360.com/articles/1266508?scroll=1&related=1> accessed 1 June 2020.

75 *Ibid.*

76 *Ibid.*

the force majeure clause in the employment contract in determining whether Covid-19 pandemic is likely to cover expressly or impliedly. If the clause contains wordings such as ‘pandemic’, ‘epidemic’, ‘outbreaks of diseases’ or ‘health crisis’, it is likely that the Covid-19 pandemic is covered to be the force majeure event in accordance with that employment contract. Even if those specific terms are not articulated in the force majeure clause, one can still look into the other wordings and phrases that might trigger the Covid-19 circumstances such as ‘acts of God’, ‘occurrence of events beyond the reasonable control of a party’, or ‘due to unforeseen circumstances’, to name but a few.<sup>77</sup> If there is no clue at all of the force majeure clause to cover such a situation or no mention of such a clause in the employment contract, then the party seeks to invoke would not be able to rely on it anymore and would need to look for other accessible options under common law such as frustration.

Nevertheless, the situation would be different in civil law jurisdictions, especially in Germany, where the statutory provisions make it possible to make changes to the terms of the contract or even to terminate it completely depending on the changing circumstances and unforeseeable events which render impossible to perform the contractual obligations. Likewise, in China, the employer can terminate the contract with the employee on the basis of force majeure which is defined as unforeseeable, unavoidable and insurmountable events if he can prove that the Covid-19 pandemic causes the non-performance his contractual obligation.

#### **MARGINAL MORALITY: WHETHER FORCE MAJEURE CLAUSE COMPATIBLE TO MALAYSIAN INDUSTRIAL JURISPRUDENCE?<sup>78</sup>**

In Malaysia, a private sector worker is accorded job security pursuant to s 20 of the Industrial Relations Act 1967 (‘IRA’) with the employer’s prerogative to dismiss or terminate the workers recognised on grounds of misconduct or due to redundancy in the organisation. However, the substantive and procedural requirements must be strictly complied by the employer. A person aggrieved of his dismissal may have his grievance litigated in the Industrial Court and the burden is on the employer to prove that the dismissal on grounds such as

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<sup>77</sup> *Ibid.*

<sup>78</sup> P Rotengruber, ‘The marginal morality (die Grenzen der Moral) as an ethical challenge and as the knowledge on how to gain competitive advantage’ (2017) 20 *Ethics in Economic Life* (5) <https://www.ceeol.com/search/article-detail?id=743110>.

misconduct, negligence or poor performance, among others. If the employer fails to discharge the burden, the court will declare that the claimant's dismissal was without just cause or excuse.

Having said the above, it is noteworthy that a worker has an economic interest in retaining the job for as long as he capable of doing so or until the age of retirement. In fact, a vast majority of workers build their lives around their jobs where they might have made a substantial contribution, achieved a high rank in the organisation, may have enjoyed various benefits from being a long time in service and have definitely planned their future in the expectation that they will continue in employment. Loss of employment due to no fault of the worker can be a distressing experience that inflicts severe economic hardship on the affected worker, which has both financial repercussion and psychological effects. The aggrieved worker will be deprived of his major source of wealth and will possibly suffer long term as a result of the unemployment. It will become even more devastating during a period of economic recession where there would be a rise in unemployment, as there would be a decline in the number of jobs available, which in turn would force a person to sway from the existing routine and establish new behavioural patterns.

The worker can anticipate the expense of searching for new employment, including the possibility of having to accept employment at a distance or with less remuneration. Even during a period when there is a steep increase in the economy of a country with the labour market being buoyant, a dismissed worker may not necessarily be able to secure new employment without much difficulty because of various factors, such as nature of the job, age and seniority, among others. More often than not a labour market would be flooded with other job seekers who would possess very similar job skills and work experience.

Coping with all of these problems in turn can create an enormous amount of physical and mental stress, which may contribute to social and psychological disorders. There will be feelings of life dissatisfaction, lack of self-esteem, lack of personal control and general psychological depression, which increases with continued unemployment. Besides the economic loss, any termination from employment is likely to affect the reputation and standing of a person, and the higher the status and responsibility of the employee, the greater the effect of his termination. Thus, the worker may also suffer non-pecuniary harm, such as serious trauma from being terminated, the discredit of being an unemployed person with real prospects of humiliation and embarrassment. The affected worker may also suffer from deteriorating psychological health and have stress related illness such as hypertension, cardiac disorders, and gastric ulcers, among others.

Considering the above, it is submitted that an impending termination from employment must be carried out with just cause or excuse where the employer must show valid reasons for such termination which is connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Further, where the retrenchment was on grounds of redundancy the employer must, before laying off the workers, explore all possible alternatives to retrenchment. This include taking the necessary interim measures such as cutting down working hours, overtime and the number of shifts; extending time off without pay; freezing bonuses and increase in salaries; reducing wages (by agreement); ceasing all new recruitment except for critical areas; decreasing the number of contractors or casual labourers; rationalising costs and expenditure; temporary lay-off; early retirement offers; gradual reduction of workforce by way of natural turnover; and conducting retraining programmes for skill development so as to enable employees to move into different positions, among others. The decision to retrench should only be made when the job is redundant and that the employer had exhausted all the above available options to avert retrenchment. It is important that the retrenched workers are paid retrenchment benefits based on the length of his service with his former employer. The aim of this benefit is to help them to cope with the difficulties of job loss and to reward him for his loyalty and service to the company. Besides the above, the retrenchment benefits could provide the retrenched employee with the necessary means to sustain himself and his dependents until he finds another suitable employment. The Employment Insurance System Act 2017<sup>79</sup> was introduced along the said line with the view of helping the retrenched employees with temporary financial assistances besides assisting them in job search.

It may be added that the courts have recognised workers job security to the extent that the right to 'life' in art 5(1) of the Federal Constitution has been given a liberal interpretation to include the right to livelihood.<sup>80</sup> The above equation is merely to stress the importance of security of tenure in employment, an assurance that no employer can dismiss or even contractually terminate the services of his employee save and except with just cause and excuse. Further, the IRA was enacted to elevate the status of the workers by regulating working conditions, providing various benefits to the workers apart

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79 (Act 800).

80 See for example *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

from prohibiting arbitrary dismissal from employment.<sup>81</sup> The IRA provides that a workman cannot be dismissed save with just cause and excuse.<sup>82</sup> This is also in line with the International Labour Conference's Termination of Employment Convention (No 158 of 1982) that requires justification for termination from employment. It provides, inter alia, that an employee cannot be terminated unless there is a valid reason for such termination, and this include on the operational requirement of the undertaking, establishment or service. It further provides that when an employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' concerned or their representatives as early as possible.

Unfortunately, however, the utilitarian philosophy of Bentham<sup>83</sup> which introduced the doctrine of *laissez faire* and enforced by courts including in employment contract cases such as in the English case of *Printing and Numerical Registering Co v Sampson*,<sup>84</sup> have been subject to severe criticism as it ignored the considerable difference that may well exists between the relative

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81 The following employment statutes enforced in Malaysia defines minimum requirements in the fields of working and employment conditions in the workplace: the Employment Act 1955 (Act 265) (the law applicable in the States of Sabah and Sarawak are the Labour Ordinance Chapter 67 and Chapter 76); the Employment (Termination and Lay-Off Benefits) Regulations 1980 (PU(A) 338/83); the Employees Provident Fund Act 1991 (Act 452); the Employees' Social Security Act 1969 (Act 4); the Industrial Relations Act 1967; the Trade Unions Act 1959 (Act 262); the Factories and Machinery Act 1967 (Act 139); the Occupational Safety and Health Act 1994 (Act 514) and the Workmen's Compensation Act 1952 (Act 273).

82 In *Chan Soon Lee v YB Menteri Sumber Manusia Malaysia & Anor* [1998] 5 CLJ 133, it was stated that the objective and policy of the IRA was to strike a balance between the right of a workman to livelihood as against the right of the employer to dismiss his workman upon just cause or excuse.

83 'The age of Law Reforms and the age of Jeremy Bentham are one and the same', per Lord Broughams speech (1838), cited in Leon Radzinowicz *A History of English Criminal Law and its Administration from 1750* (Vol 1, 1948) at p 355. The doctrine implied that parties voluntarily assumed legal contractual obligations, such that the employer was vested with ownership of capital, whereas the employee had control over his labour. The parties were free to design their own relationship through contract and the law would give effect to their design. A contract entered into freely and voluntarily was held sacred and could be enforced by the courts if it was broken, subject to the limitations such as undue influence, fraud, duress and misrepresentation, or that the contract was designed to violate the criminal law or was contrary to public policy.

84 (1875) LR Eq 462. In this case, Sir George Jessel MR stated that, 'if there is one thing which more than another public policy required it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice'.

economic strength of the parties involved. It is a fact that the more one is given the freedom, the more inequality this begets, for the rich would enjoy an unrestricted licence to victimise the poor. Lord Hanley LC in *Vernon v Bethell*,<sup>85</sup> had acknowledged the above when his Lordship stated: ‘necessitous men are not, truly speaking free man, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them’.

The freedom of contract principle is still prevalent at common law where the employee has no job security and that his services may be terminated with appropriate notice of termination as per the employment contract or the implied reasonable notice.<sup>86</sup> Once the notice is properly communicated, the employer is free to terminate the employee on any ground with no obligation to reveal the reason for the dismissal.<sup>87</sup> The rationale of giving notice is to offer the affected parties’ time either to search for alternative employment or for the replacement of an employee, respectively.<sup>88</sup> In fact, a worker exposed to the ‘harsh termination provision’ cannot be relieved by equity on grounds such as inequality of bargaining power, absence of consensus *ad idem*, unconscionability, and change of circumstances removing the substructure.<sup>89</sup> The outcome of the contract more often than not is tipped against worker due to the lack of legal experience and comprehension that results in the poor negotiation of the employment contract. Recognising this the International Chamber of Commerce (‘ICC’) of which Malaysia is a member, attempted to introduce a more balance and equitable terms related to the Force Majeure

85 (1762) 2 Eden 110, 113; 28 ER 838, 839.

86 The common law wrongful dismissal arises when the employer breach the contract by failing to give the dismissed employee appropriate notice, expressed or implied. See, for example *Wallace v United Grain Growers Ltd* (1998) 152 DLR (4th) 1, 39 (SC) (Canada).

87 In *Re African Association Ltd and Allen* [1910] 1 KB 396 at p 400, the contract of employment for a term of two years provided that the employers might at any time at their absolute discretion terminate the engagement at any earlier date than specified. This according to Bray J. ‘that seems to me to give an option in favour of the employers, which option can, however, only be exercised by them on the usual and implied term of giving reasonable notice of their intention to exercise it’. See, also *Ridge v Baldwin* [1964] AC 40 at p 65; *Vasudevan Pillai v Singapore City Council* [1968] 1 WLR 1278 at p 1284; *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 at p 1581 (HL).

88 See *Morrison v Abernethy School Board* (1876) 3 Sess Cas R 945 at p 950; *Matthews v Coles Myes Ltd* (1993) 47 IR 229; *Grout v Gunnedah Shire Council* [1995] 125 ALR 335 at p 364.

89 In *O’Connor v Hart* [1985] 1 NZLR 159 at p 166, the Privy Council hearing appeal from the Court of Appeal of New Zealand, observed that: ‘equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing’.



Clause<sup>90</sup> albeit no reference was made to the word 'force majeure' itself.<sup>91</sup> ICC's task force further laid down conditions to invoke the clause<sup>92</sup> and the most relevant is labour disturbances.<sup>93</sup> If the invocation is successful the effect would be 'suspension of performance duties and of remedies in damages for the duration of the impediment or event'.<sup>94</sup>

It was the drawback at common law that moved the enactment of employment statute such as the IRA which does not condone arbitrary dismissal of an employee irrespective whether he is engaged on a permanent basis or on probation. The employer is required to furnish justifiable reasons for dismissal such as unsatisfactory or poor work performance, absenteeism, insubordination, assault, bullying, drunkenness, serious violation of employer's policies and practices, damaging employer's property or using employer's property for personal business, among others. In *Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)*,<sup>95</sup> the Court of Appeal held,

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90 (a) that its failure to perform was caused by an impediment beyond its reasonable control; (b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and (c) that it could not reasonably have avoided or overcome the effects of the impediment. ICC Force Majeure Clause 2003 <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>.

91 ICC Force Majeure Clause 2003 <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>.

92 (a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation; (b) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience; (c) act of terrorism, sabotage or piracy; (d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation; (e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought; (f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current; and (g) general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises. ICC Force Majeure Clause 2003 <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>.

93 *Ibid* see para (g).

94 *Ibid* see 'The consequences of Force Majeure: paragraphs 4 and 5' at p 13.

95 [2019] 1 MLJ 326.

inter alia, that the Malaysian industrial jurisprudence does not permit 'termination simpliciter'.<sup>96</sup> Hamid Sultan JCA (delivering judgment of the court), stated:

Whether it is a permanent employee or one on probation, industrial jurisprudence does not permit arbitrary reasons for dismissal. The reasons for dismissal must be bona fide. The bona fide test need not be objective. It all depends on the facts and circumstances of the case. An honest reason as well as mutual agreement may be sufficient. A mutual agreement of termination based on lack of bona fide may not suffice to say there was indeed a just cause and excuse for dismissal. Industrial jurisprudence generally leans towards the employee as opposed to the employer. This biasness is one related to common sense as the employer and employee are not often seen to have equal bargaining powers.

It is noteworthy that under the Malaysia industrial jurisprudence there is no distinction between a termination and a dismissal as either must be with just cause or excuse. In *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd*,<sup>97</sup> the Federal Court stated:

Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

Central to the industrial disputes adjudication in Malaysia is the Industrial Court, whose role in a reference under s 20(1) of the IRA is twofold, first, to determine whether the reasons advanced by the employer to terminate the services of the employee have been established and secondly, whether the proven reasons for the termination constitute just cause or excuse for the termination. The most significant aspect of the industrial adjudication is in accordance with social justice and not the legal justice. Unlike an ordinary court of law, which is bound by contractual rights, duties or obligations with no

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<sup>96</sup> Termination simpliciter relates to the absolute common law right of an employer to terminate the employee pursuant to the terms of the contract. See *Omar bin Othman v Kulim Advanced Technologies Sdn Bhd (previously known as KTPC Technologies Sdn Bhd)* [2019] 1 MLJ 625.

<sup>97</sup> [1981] 2 MLJ 129 at p 136.

authority to transform, alter or even create rights when justice of the matter demands, the Industrial Court is not purely judicial — it is not confined to the administration of justice in accordance with law.<sup>98</sup> Its scope of enquiry is not only restricted to the law, but also has a broader aspect of equity and good conscience with the view of promoting social justice. It must be added that social justice aims at resolving the competing claims between employer and employee and/or their trade union by finding a just, fair and equitable solution of their problems so that industrial harmony would prevail amongst them, hence, further the growth and progress of the nation. In the interest of industrial peace, the prevention of unfair labour practice or victimisation, the court may confer rights and privileges on either party, which it considers reasonable or proper, irrespective of whether it is within the express contract between the parties.

In *Dr A Dutt v Assunta Hospital*,<sup>99</sup> Justice Chan Min Tat FJ cited with approval the observations by Gajendragadkar J (as he then was) in *RB Diwan Badri Dass & Ors v Industrial Tribunal, Punjab, Patiala & Ors*,<sup>100</sup> namely that ‘the doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice ... Industrial adjudication does not recognise the employer’s right to employ labour on terms below the terms of minimum basic wages. This, no doubt, is an interference with the employer’s right to hire labour; but social justice requires that the right should be controlled. Similarly the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to industrial employees’.

Again, in *Harris Solid State (M) Sdn Bhd & Anor v Bruno Gentil Pereira & Ors*,<sup>101</sup> Justice Gopal Sri Ram JCA stated: ‘[s]ection 30(5) of the Act imposes a duty upon the Industrial Court to have regard to the substantial merits of the case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience. Parliament has imposed these solemn duties upon the Industrial Court in order to give effect to the policy of a democratically elected government to dispense social justice to the nation’s workforce. It is therefore, our bounden duty to ensure that the Industrial court applies the Act in a manner that best suits the declared policy of the elected government’. Hence, the concept of social justice provides the bed rock of industrial law to reduce the harshness of the common law.

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98 See *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (PC).

99 [1981] 1 MLJ 304 (FC).

100 [1963] AIR 630 (SC).

101 [1996] 3 MLJ 489 at p 510; [1996] 4 CLJ 747 (CA) at p 776.

Reverting to the concept of social justice, the Industrial Court is entitled to free parties from any unfair terms of their contracts entered into by reason of the inequality. It may override contracts incompatible with justice or create rights which exist independently from the contract.

It is reiterated that the law recognised employer's prerogative to terminate or dismiss an employee on justifiable grounds such as gross misconduct or redundancy in the organisation, the Industrial Court would not normally interfere with the bona fide exercise of power by the management. However, any form of victimisation to the employee, arbitrary, perverse, baseless action by the management that are unnecessarily harsh or was not just or fair, or other mala fide action on the part of the management, may warrant the courts interference. In *Chartered Bank, Kuching v Kuching Bank Employees Union*,<sup>102</sup> the Industrial Arbitration Tribunal held that, '[d]ismissal is a managerial function with the bona fide exercise of which a tribunal will not interfere; where, however, the dismissal is challenged, it is well settled that the tribunal could always intervene if it is shown that there has been want of good faith, victimization, unfair labour practice, a violation of the principles of natural justice or where the decision to dismiss is baseless or perverse'. Again, in *Radha Krishnan Kandiah v GBH Ceramics Sdn Bhd*,<sup>103</sup> Fredrick Indran XA Nicholas, Chairman of the Industrial Court, stated: '[t]he Company must show that it had exercised its managerial prerogative to dismiss upon a reasonable balance between its interest and that of the Claimant, as an employee earning a livelihood. A capricious and/or arbitrary action that displaces this balance introduces error and can vitiate the Company's decision to dismiss. This balance has to be maintained with the utmost of care to preserve that noble notion of industrial harmony, the very bedrock and salutary basis of the Industrial Relations Act 1967'.

Given the above, there is no necessity of a force majeure clause in employment contract. While the employer's business need for labour is recognised, the court will not interfere with their prerogative, 'unless it is shown that, upon the substantial merits of the case, the action taken by the Management was unnecessarily harsh or unjust or mala fide or where the management has resorted to unfair labour practice to victimisation'.<sup>104</sup> In other words, the managerial prerogative is subject to the rule that the company must act *bona fide* in the interest of the company as a whole and not capriciously or

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102 [1965–1967] MLLR 287.

103 [2011] 2 LNS 1633.

104 *Metal Industry Employees Union v Steel Pipe Industry of Malaysia Sdn Bhd* Industrial Court Award No 67 of 1976.

with motives of victimisation or unfair labour practice. In *William Jacks Co (M) Sdn Bhd v S Balasingam*,<sup>105</sup> the court noted; 'so long as that managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court'. The emphasis is that the employer is to ensure that retrenchment was carried out in a fair manner.

### CONCLUSION: JUSTICE MUST BE SEEN TO BE DONE<sup>106</sup>

It is least of all not a surprise that force majeure clause is still somewhat obscure in the history of employment contract and its related laws. Although interestingly, it can obviously be observed from the above discussions on force majeure as well as its application in some selected jurisdictions, the trend seemed to draw attention to the phrases, terms and wordings of force majeure clauses in a contract in determining whether the invoking party has the opportunity to relive himself from the contractual obligation. It is argued that while the parties to the contract may define clearly the unforeseen circumstances that will cover under the force majeure clauses thereby avoiding future disputes, the industrial jurisprudence however lean in favour of protecting workers with the Industrial Court being able to free parties from any unfair terms of their contracts entered into by reason of the inequality. In fact, the most significant aspect of the industrial adjudication is in accordance with social justice and not the legal justice. Unlike an ordinary court of law, which is bound by contractual rights, duties or obligations with no authority to transform, alter or even create rights when justice of the matter demands, the Industrial Court is not purely judicial — it is not confined to the administration of justice in accordance with law. In the interest of industrial peace, the prevention of unfair labour practice or victimisation, the court may confer rights and privileges on either party, which it considers reasonable or proper, irrespective of whether it is within the express contract between the parties. Courts in making the hard decision on whether or not to enforce the force majeure clause must be reminded by St Thomas Aquinas's commutative justice<sup>107</sup> 'that one who makes a promise and does not keep it because of changing conditions cannot be blamed for any unfaithfulness'.<sup>108</sup>

105 [1997] 3 CLJ 235 at p 241, per Gopal Sri Ram JCA. See also *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil/s/o Pereira & Ors* [1996] 3 MLJ 489; [1996] 4 CLJ 747 at p 766 (CA).

106 Lord Chief Justice Hewart in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at p 259.

107 Peter Koslowski, 'Commutative Justice' (2001) *Principles of Ethical Economy* (Vol 17).

108 Saint Thomas of Aquinas in his *Somme théologique*, IIa-IIae p 110, arts 3 to 5 in D Philippe, 'France and Belgium' *BW-krant Jaarboek 27* (2012) at p 16 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/36876/074.pdf?sequence=1>.