

***FORCE MAJEURE* AND FRUSTRATION OF
CONTRACT FROM MALAYSIAN CIVIL LAW
AND SHARIAH LAW PERSPECTIVE**

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Outline

- Introduction
- Objective
- Force majeure & frustration under Malaysian Law (Contracts Act 1950)
- Similar concept under Islamic Law (Civil Codes of some Arab states)
- Observation, comparison & conclusion

Introduction

- Covid-19 outbreak – impact on contractual obligations
- Force majeure – doctrine of frustration
- commercial disputes arising from non-performance or impossibility of performance

Objectives

- To examine the current legislation governing *force majeure* and the doctrine of frustration in Malaysia by special reference to Contracts Act 1950 and case-law
- To examine relevant principle under Shariah (by referring to the current Civil Codes of some Arab states)
- To make some observation & comparison of the above

Force majeure & frustration under Malaysian Law (Contracts Act 1950)

- The origin of *force majeure* → could be traced back to one of the oldest codifications that still exists today, ie the French Civil Code of 1804.
- The Code describes *force majeure* to denote circumstances outside one's control.
- Literally, *force majeure* (or its Latin equivalent, *vis major*) is defined as 'superior force'; basically, it covers a wide range supervening or unforeseeable events

- Msian Law?
- Force majeure?
- Case-law: indicate that there is nothing in Malaysian law that prevents contracting parties from providing for *force majeure* events in their contractual agreements.

Force majeure & frustration under Malaysian Law (Contracts Act 1950)

- the main governing provision that relates to the concept of *force majeure* is section 57(2) which provides for the doctrine of frustration of contract. Nevertheless, the section does not use the word 'frustration', rather it mentions about the impossibility of performance of a contract
- The much clearer construction and application of the provision can be seen from a number of decided cases
- Court of Appeal in *Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Ltd* [2007] 4 MLJ 201
- if the provisions include the events of *force majeure*, the parties are then not allowed to claim for the frustration of the contract.
- In the context of commercial dealings, it is not uncommon to find a force majeure clause to be incorporated in contractual agreements signed between contracting parties.

whether MCO (due to COVID-19), qualifies as a ground of frustration that absolves contracting parties from performance of contract?

- Applying the provisions of S. 57(2) to the MCO scenario, for the parties to succeed in their claim of frustration, they must prove that the MCO caused them the impossibility of performing the act - not merely the difficulty in performing the contractual obligations

Force majeure clauses – its application and effect

- a force majeure clause in the context of contractual agreements is primarily aimed to cater for instances of delays, temporary discharge of obligations or other hindrances that enables the contract to be continued without automatically being terminated or rescinded.
- Typically, *force majeure* clauses would include acts of God, riots, lockdowns, delays, prolonged shortage of supplies, haze or government prohibitions

The impact of the COVID-19 outbreak on the performance of contract

- it can be seen from two perspectives;
- The first one, where the contract itself incorporates a *force majeure* clause;
- while for the second situation, where the contract does not contain any clause relating to *force majeure*.
- If the force majeure clause is specified to have the effect of frustrating a contract, the doctrine of frustration will come into play.
- Similarly, if the event (for example COVID-19 pandemic) is held to be one of force majeure grounds, the rule on frustration of contract is also applicable.
- The doctrine results in the contract being terminated automatically.

SHARIAH LAW PERSPECTIVE ON *FORCE MAJEURE*

- comes under the broad concept of excused non-performance.
- Under the concept of *faskh al uqud* ie termination of contract due to breach of a contractual obligation, there are some reasons for termination such as:
- first, breach of term, leading to transfer of property without consent, inadequacy of consideration or inequality of consideration (*mu'awadah*) or lack of consideration especially if performance is difficult or impossible;
- second, impossibility or difficulty of delivering the subject matter; and
- third, force majeure.
- These reasons are generally based on the loss to a party or parties rather error of the party or foreseeability of supervening event by parties in drafting the contract