

FORCE MAJEURE AND FRUSTRATION OF CONTRACTS DURING PANDEMIC COVID-19

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Abstract: *The COVID-19 pandemic and resulting government and business response has caused disruption and consequences that many were unprepared to deal with. In an employment law context, one of the issues that emerged from these uncertainties relates to the performance of contractual obligations. Herewith, more and more businesses and organisations are now inevitably looking at their contracts to see what impact the coronavirus outbreak will have and how they can mitigate and navigate the challenges brought by the pandemic. In this alert, this paper will briefly discuss the impact of pandemic Covid-19 outbreak on the performances of contract, in two situations, one where the contract contains a forces majeure clause and the other is frustration of contracts*

Keywords: *Force Majeure, Frustration Of Contracts, Pandemic Covid-19*

Introduction

The world that we lived in is full of uncertainties and unpredictable events that is brought by the Almighty God to teach us a lesson for a lifetime for those who reflect. The year 2020 has shown us on how much an unforeseen event may cause lots of damage to the whole wide world and how helpless we are to the act of god. For example, the rapid spread of disease caused by Coronavirus to a large group of people within a short period of time has indeed causes many countries to suffer from various kind of form. As of 19th November 2020, the total number of Coronaviruses cases across the globe has now reached more than 54 million and had took 1.3 million lives (Matteo Chinazzi et al, 2020). As for that, the World Health Organization has characterized Covid-19 as a global pandemic on 11 March 2020 (Wijerathna & Jayasekera, 2020). For our country Malaysia, the loss and far-reaching effects caused by this global pandemic is undeniable same goes to the rest of the world. This includes the bankruptcy in many businesses, the spike rises in unemployment, emergency alert in the healthcare sector, loss of income to lots of individual, state of emergency in several countries, long period of lockdown, and many more (Casady & Baxter, 2020).

As our country is now dealing with the third wave of coronavirus that indeed make some of our country's economy sector to be held back which indeed slow down a lot of things especially for a developing country like Malaysia. The fact that lots of people are now facing a harsh time, most individuals find it hard to fulfil their obligation and roles in respect of their contractual agreement. This is when the term force majeure and frustration of contract come into surface to help us to better understanding the option available when natural disaster such as this pandemic may help individual dealing with their legal agreement. As much important it is for us to fulfil our obligation due to some agreement, there are things that just unavoidable and deem hard for us to fully fulfil the responsibilities due to certain circumstances for example like this global pandemic.

Generally, when unforeseeable events occur, there are some provisions under the law that provides some sort of contractual relief to the parties affected such as the force majeure and frustration of contracts. There are differences between both provision that we need to fully understand. The first type of provision to be discussed is the force majeure which generally refers to the unforeseeable events that render or make it impossible for the parties to perform to their contractual obligation. According to Rauh (2020), the circumstances of this regime were beyond the control of the party to execute the standard care of reasonable activity. The outcome of this force majeure event is usually lead to the contractual discharge of the party affected from their obligation. Moreover, Jack Yong, Jisoo Vis (2020) stated that the purposes of this clause it to protect the parties from events outside of the business risk such as natural disaster and others. However, to invoke force majeure, it must be expressly provided for in the contract. This is because, the regime depends on what the parties have agreed to in their agreements. Thus, to clearly state the clauses of force majeure is essential to make it possible for invocation.

Other than force majeure, the frustration of contract is another option regime when there is an absence of the force majeure clauses in the contract for the parties involved to discharge their contractual obligation due to certain circumstances that hinders them (Schalkwyk, 2018). According to the Contract Act 1950, section 57(2), "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". From this provision of the act, we can understand that this "doctrines of frustration" help parties to discharge their contractual obligation when it becomes impossible for them to perform to as what originally being undertaken in their contractual agreement and obligation.

There are some distinctions between force of majeure and frustration of contract that we need to fully understand when such unforeseen event like global pandemic strikes and how it can be placed into a good use for the parties affected especially relating to some legal agreement between the parties involved. For us to fully understand the distinction and the concept of both legal terms, the writing of this paper is put in place to address such issue through the discussion of the main differences, the study of related cases or events, impact and benefits, and the process needed that will be explained further in this report. It is hoped that through this writing, it will enlighten us more and make us aware on how we can deal with the inability to perform the legal agreement through different contractual relief regimes and how we can seek for the most advantageous solution when unforeseen and unpredictable event occurs.

The Differences Between Force Majeure And Frustration of Contract

Despite that both regimes provide benefits as in contractual relief to the affecting parties to perform their obligation, there are clear differences between force majeure and frustration that we need to fully understand before it being place into practice. First and foremost, the frustration of contracts can be invoked by any party involved in the contract without having the needs to refer to the contract. This is different in comparison to force majeure where having clearly stated and included in the contract is one of the essential criteria for it to be invoked.

Besides, to invoke frustration, the party must be able to meet a higher threshold to rely in compare to force of majeure as the consequences from the invocation of frustration is automatic. Frustration is a narrow doctrine which being applied strictly by the courts to prevent parties from using it to escape their obligation to their contractual agreements. Accordingly, affected party should review their contract carefully for any force of majeure provisions before seeking for frustration of contracts which often being viewed as the last remedies in solving the non-performance obligation of the party due the circumstances of the events.

Finally, while a finding of frustration automatically results in the discharge of all parties from their obligations, force majeure offers the flexibility for parties to fashion the responses as they see fit (Tai & Eric, 2018). Most contracts contain a force majeure clause that relieves one or both sides of their obligations if they are unable to perform due to some massive and unforeseen event beyond their control. Nevertheless, it is beneficial for the impacted individuals and businesses to know their legal options, which, if for nothing else, may at least aid them in their negotiation over contractual modifications.

Related case study and events

In Malaysia, there has been an instance where a contract is held to be frustrated as stated in section 57. For example, the case of *Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd* and another appeal [2014] 4 MLJ 413 (Court of Appeal) where there was an outbreak of Japanese Encephalitis (JE) where Bukit Pelandok was one of the worst hit area. The State Government on 20 March 1999 gazetted the State of Negeri Sembilan to be a JE infected area and banned the rearing and sale of pigs in the affected areas. The High Court found that by virtue of the JE outbreak, the tapping agreement and service agreements entered between the parties are void on the ground of frustration of contract.

Other than this, the outbreak of a war, destruction of subject matter, death or incapacity for personal service and statutory prohibition are among the examples for frustration (Haack & Esplin, 2020). There are a lot of examples that can be used to better represent and illustrate on how these contractual relief provisions being placed into practice. According to Hong, Jeyakuhan, & Jeyasingam (2020), COVID-19 as a global pandemic has massively strained public health services, disrupted global supply chains and business activities, and crashed stock markets worldwide. This is one of the best recent events that we can used as an example on how unforeseeable event may lead some businesses or parties seek for contractual discharge through force majeure or frustration of contract.

From here, we can understand that COVID-19 pandemic has the potential to be considered as one of the events for force majeure or frustration. This is because, there are a lot of issue arises from this pandemic that had causes the non-performance of contract that is obstructed due to

consequential order, law policy and statutory prohibition being implemented by the State of Government of Malaysia. However, for business or parties affected from the global pandemic and seeking for contractual relief, it is important for them to prove that the global pandemic has indeed hindered the contract legally and physically which make it impossible for them to fully execute their responsibilities and obligation in relation to the contractual agreement.

Impact and benefits

The contractual relief from the invocation of force of majeure or frustration of contract indeed will obstruct the original agreement between parties involved and hinder the initial intention of why the contract is being made in the first place. However, as we are living in a world that full of uncertainties, providing solution through these regimes helps businesses to avoid the situation as in breach of contract which indeed will cost and lead more damage to the parties affected. According to Hansen (2020), as the industry is full of risks and uncertainties, the introduction of these contractual relief gives businesses the option on how to solve any force majeure events which indeed something that is hard to foresee during the process of establishing the contract.

Besides, the benefits that comes from a successful claim to force majeure or frustration of contract is that the parties involved will be automatically discharged from any further obligation. This situation is indeed beneficial to the party affected especially during crucial time where everyone is facing difficulties to perform their upmost to their obligations. However, any obligations incurred prior to the discharge of the contract will survive (Schwartz, 2020).

However, to invoke these contractual relief regimes, a careful considerations and thoughts must be applied and taking legal advice is important when considering discharging the contract before simply rely on force of majeure. To fully understand the best and the most advantageous solution in respond to certain circumstances that hinder their ability to perform is crucial to avoid any wrong steps. The impact that happens when a party declares force majeure but is not contractually entitled to do so, is that they may expose themselves for repudiatory breach of contract and the other party in the contract may be able to claim damages as consequences which will only make things worse than the problem they had.

Step and process required for force majeure and Frustration of Contracts.

To invoke either one regime, there are several processes that businesses or parties must considered and consider for. The first step is to determine whether the force majeure clauses is stated or not in the written contract. If the force majeure clause is stated, the party must evaluate whether the event that hinder their performance considered as force majeure event or not. According to Rauh (2020), among the essential criteria for an event to be considered as force majeure are; (1) the event must be from external sources, (2) it must render the performance of the parties radically different from what the originally is, (3) something unforeseeable, and (4) it is beyond the control of the party affected. For example, if the COVID-19 pandemic has led the party to be unable to fully compromise to their legal agreement and obligation, they can contemplate to use this form of contractual relief as an option. However, Hansen (2020) stated that those who considered to invoke this regime must first determine whether there is other alternative to mitigate and avoid the non-performance issue in relation to the obligation. And if there is no possible way for them to mitigate the non-performance, the parties involved may

invoke the force majeure in which the parties will be entitled to suspend the performance of the contractual obligation.

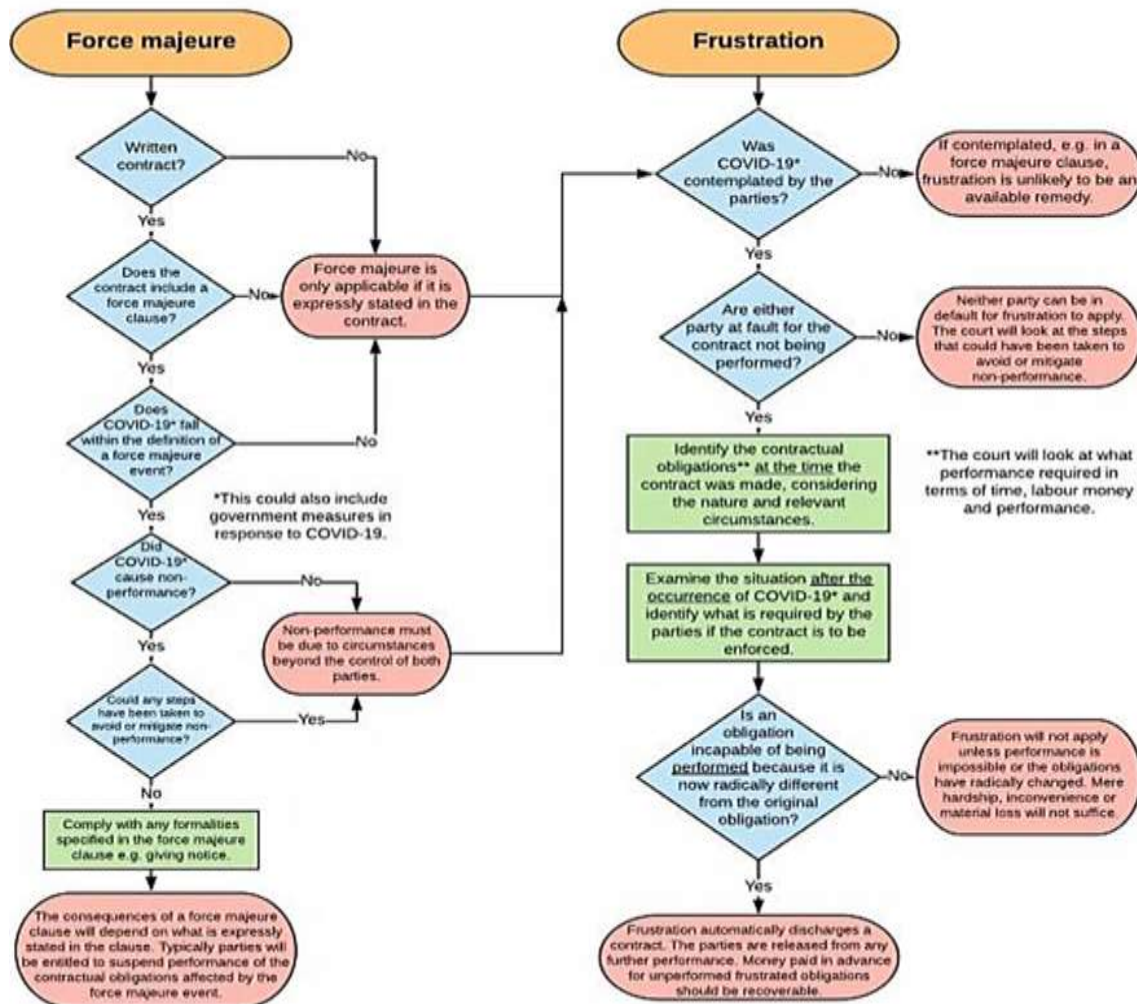


Diagram: Force majeure and frustration flowchart

However, in a situation where the force majeure is not expressly stated in the contract, the parties involved may consider the frustration as another option for the contractual relief due to certain circumstances (Zin, Rahmat, Mu, Fathi, & Budiarta, 2021). According to Padil, Razak, & Ahmad (2020), the doctrine of frustration is stated in section 57(2) of the Contracts Act 1950 and the factor to discharge the contract by way of frustration is difficult to be determined if it involves sudden situation such as the pandemic COVID-19. According to Jayabalan (2020), force majeure clause should be used as a protective tool to prevent losses to the contracting parties. Thus, it is important for the parties involved to determine whether the supervening events are contemplated and whether both parties are at fault for their non-performance activities to their contractual agreement. It is important for the parties to identify the obligations during the contract is being made and after the occurrence of the unforeseeable or supervening events occurs with what is required if the contract is to be enforced. If the

situation or circumstances made it impossible for the party affected to perform or the situation has been radically different to what the originally is, only then the frustration can be invoked which will automatically discharges the obligation of the parties affected (Haack & Esplin, 2020). The summarisation of the process and flow required to invoke force majeure and frustration of contract is illustrated as in the diagram to fully depicts the process required to invoke these contractual relief provisions.

Conclusion

From this study, we are now understood in depth regarding the availabilities of different relief regimes such as force majeure and frustration of contracts when it comes to unforeseen events that hinder one's responsibility towards their contractual agreement. The establishment of such acts to provide contractual relief to either or both parties when certain circumstances such as natural disaster, war, global pandemic, or others which generally prevents the party to execute their best performance towards their contract. Despite that both type of regimes seeks for some contractual relief, there are distinctions and differences that we need to fully understand and there are steps to be followed before it can be invoked into action.

As suggestions for any individuals, parties, or businesses who which to develop their contractual agreement, it is important for them to evaluate and carefully analyse the various legal regimes. Taking the case of COVID-19 pandemic or any large-scale disaster that may hinder the ability of one is to fully perform their obligation to their contract, the ability to foresee any unpredictable event and how they can deal with it is essential for them to be included in their agreement so that possible remedies able to be executed when unexpected scenario happens. Besides, in respect of force majeure, it is important for businesses or person involved in the contract to determine which circumstances or situation will be covered in their force majeure in their contract agreement. By doing so, both parties will be cleared and able to opt for best solution when unpredictable event occurs. Therefore, for us who may have few knowledges in respect of contractual agreement and various legal regimes, it is important for us to seek for the best help and advice from expert before making any contractual agreement for the sake of benefits and avoid unfavourable situation to occur.

In nutshell, the study of the contractual relief as in force majeure and frustration of contracts is indeed an important topic for us to fully understand especially during this crucial time where the consequences of COVID-19 are indeed undeniable large and huge. In fact, the pandemic has increased the cost of contractual performance to a level that most businesses or individual cannot fully afford for (Singh, 2021). The effect that this pandemic brings to businesses across the globe has hinder and costs lot of damages to various sectors which may bring difficulties for them to fully obligate to their existing contractual agreement and execute their upmost best performance. However, it is important for us to seek for legal advice before making any invocation through force majeure or frustration of contracts as a wrongful decision may lead to more problems such as breach of contract and others. It is hope that through this writing will help to further clarify the different regimes available in facing unforeseen events and will help businesses to find and pursue for the best and most advantageous results in responds to the problem they had especially when dealing event like COVID-19 where there is no clear lining when this global pandemic will come to an end. In fact, businesses are bound to face hardship, and it is important for them to stay calm, vigilant, and prepared especially when facing

unpredictable events and always seek for legal advice to develop constructive solution rather than ending the contract.

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