

ISSUES RELATING TO CONTRACT

INTRODUCTION

- ▶ No doubt that Covid-19 and MCO have affected many SMEs.
- ▶ Many contracts are being breached and cannot be executed.
- ▶ There is severe repercussion that can result in claims/suits in Court.

FORCE MAJEURE

DEFINITION

- ▶ “superior force” in French.
- ▶ an event beyond the control of the parties which impedes the performance of the contract.

Force Majeure Clause

- ▶ A force majeure clause is “normally used to describe a contractual terms by which one (or both) of the parties is entitled to ...[be] excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specific event or events beyond his control [...]”

[Refer to: Chitty on Contracts 32nd Edition.)

- ▶ Force Majeure depends solely on what parties have intended to provide for in the contract.
- ▶ Force Majeure cannot be implied into a contract.
- ▶ Force Majeure cannot be relied on if there is no such clause.

Activate the Force Majeure Clause

- ▶ Must prove facts that apply to the Force Majeure clause.
 - ▶ i.e:–
 - ▶ 1) event referred to in the clause;
 - ▶ 2) prevented his performance;
 - ▶ 3) beyond his control; and
 - ▶ 4) cannot avoid it.

Refer: Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd [2004] 1 LNS 537

Key points:–

- ▶ Is there a force majeure clause?
- ▶ What is the scope of the force majeure clause?
- ▶ Was the force majeure event foreseeable when contract was entered?
- ▶ Would force majeure event rendered performance impossible?
- ▶ Was there procedure/requisite in the force majeure clause?

Covid 19 & MCO

- ▶ “**epidemic**” – a disease affecting many persons at the same time, and spreading from person to person in a locality where the disease is not permanently prevalent. {Refer: *Google*}
- ▶ “**pandemic**” – a disease prevalent throughout an entire country, continent, or the whole world; epidemic over a large area. {Refer: *Google*}
- ▶ “**MCO**” – Movement Control Order pursuant to Prevention and Control of Infection Diseases Act 1988 (PCIDA 1988) & Police Act 1967 (PA 1967).

Effect of Force Majeure

- ▶ 1) Moratorium, suspension : EOT
- ▶ 2) Termination : Prolong & Substantial

Examples of Force Majeure Clause

Example (1):– PAM CONTRACT 2006

- ▶ Article 7(ad) defines Force Majeure as:–

“any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters.”

Example (2): AIAC Standard Form of Building Contract

▶ *Article 9.34 states that:–*

“Force Majeure means an exceptional event or circumstances which:–

- a. Beyond a party’s control;*
- b. Party could not reasonably have provided against before entering into the Contract;*
- c. Party could not reasonably have avoided or overcome; and*
- d. Is not substantially attributable to the other Party.*

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions in Article 9.34(a) to (d) above are satisfied:...”

▶ Example (3) [oil and gas industry]:–

“Neither party shall be in breach of this Agreement if there is any total or partial failure of performance by it of its duties and obligations under this Agreement occasioned by any event beyond the control of either party including act of God, fire, typhoon, tempest at sea, earthquake, floods, act of government or state, war, civil commotion, insurrection, embargo, prevention from or hindrance in obtaining raw materials or energy, destruction of port receiving facilities, partial or total interruption or loss of transportation facilities, or shortage of supplies, or shortage of products.

► Example (4) [Sale and Purchase Agreement]:–

Clause – Time for Delivery of Vacant Possession

“Vacant possession of the said Property shall be delivered to the Purchaser within Thirty Six (36) calendar months from the date of this Agreement provided that if in the opinion of the Vendor's Architect/Engineer completion of the Building or delivery of vacant possession of the said Property is delayed by reason of exceptionally inclement weather, civil commotion, riots, strikes, lock outs, the act of God, fire, flood, national disaster or other accidents or force majeure, labour shortage, shortage of any materials or any other cause beyond the Vendor's control affecting the development and the construction of the said Property, the Vendor's Architect/Engineer shall make a fair and reasonable extension of time for completion of the Building and delivery of vacant possession of the said Property in any of such cases.”

Liquidated and Ascertained Damages (LAD)

- ▶ How Force Majeure works as a defence against LAD is confined to the wording of the Force Majeure clause.
- ▶ Example :- SPA
- ▶ When force majeure clause is applicable, no LAD will become payable.

IMPACT ON CONSTRUCTION CONTRACT – EOT

- ▶ In most of the standard form of construction contracts (**PAM** and **AIAC**), force majeure event allows the affected party to apply for extension of time (**EOT**) to complete the works.

Contractors are entitled for EOT ? (PAM)

- ▶ As per Clause 23.1 of the PAM Contract 2006, the contractor can claim for EOT if he is in the opinion that the completion of works will be delayed by any of the Relevant Events stated in Clause 23.8.
- ▶ **Example of Relevant Events:-**
- ▶ Clause 23.8(a) : Force Majeure;
- ▶ Clause 23.8(w): suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence, omission, default and/or breach of contract by the contractor...

Contractors are entitled for EOT ? (AIAC)

- ▶ As per Clause 23.8(b)(i), the contractor can claim for EOT on the ground of *force majeure*.
- ▶ Alternatively, contractor may rely on clause 23.8(c)(xiv) which states that the suspension of the whole or part of the works by order of an Appropriate Authority.

Claim for loss and expense due to Force Majeure event (PAM)

- ▶ Clause 24 of the PAM Form provides for the right to claim for costs if the progress of the works is affected by the events listed therein. But, the list does not include force majeure.
- ▶ PAM Form is silent as to whether the affected party is entitled to claim for costs incurred due to force majeure event (Covid-19) or MCO.

Claim for loss and expense due to Force Majeure event (AIAC)

- ▶ Some of the standard forms does not give right to the affected party to claim for any loss and expense incurred.
- ▶ E.g **AIAC form** (Clause 24.1(a)), the contractor is not entitled to claim for any loss or expenses arising from force majeure.
- ▶ (Note: if the claim for EOT was based on Clause 23.8(c)(xiv) [suspension of work by order of Appropriate Authority], then claim for loss and expense may be possible.

DOCTRINE OF FRUSTRATION

Section 57(2) –Contracts Act 1950

Contract to do act afterwards becoming impossible or unlawful

- ▶ (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.

- ▶ A contract is frustrated when a change of circumstances renders the contract legally or physically impossible to be performed.
- ▶ In the case of *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201*, it states that there are three elements woven into the fabric of 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;
 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.

- ▶ *Court of Appeal* case of *Sentul Raya Sdn Bhd v Hariram Jayaram & Ors* [2008] 4 MLJ 852:–
- ▶ “the principle is that a contract is frustrated when an event occurs which renders performance of the contract ‘a thing radically different from that which was undertaken by the contract’”
- ▶ “the fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely onerous or more expensive.”

Would Covid-19 or MCO gives rise to Frustration

IT DEPENDS ON THE INTERPRETATION OF THE TERMS OF THE CONTRACT AND THE FACTS OF EACH CASE.

EXAMPLE (Goods sold delivered)

- ▶ MCO has caused disruptions in supply chains which lead to delay in delivery. Customers may then refuse to accept the goods on ground of failure to deliver at the contracted time.
- 1) We assume that the contract in question does not provide for MCO; the first element is satisfied;
- 2) No party to the contract was responsible for the MCO; the second element is satisfied;
- 3) The third element is not easily satisfied. It would depends whether the delivery can only be done on one date and no other. If yes, the contract has been frustrated (which means both parties are discharged from performance of the contract)

▶ Effect: –

- ▶ Contract will be rendered void (See Section 57(2) of Contracts Act 1950); and
- ▶ Parties will be discharged from the further performance of the contract.
(See Section 15 (1) of Civil Law Act 1956)

Section 15 of the Civil Law Act 1956)

- ▶ S. 15(2): –
- ▶ All sums paid or payable to any party in pursuance of the contract before the time of discharge shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

- ▶ S.15(3):–
- ▶ Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the Court considers just, having regard to all the circumstances of the case and, in particular–
- ▶ (a) the amount of any expenses incurred before the time of discharge by the party benefited in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under subsection (2); and
- ▶ (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

Conclusion

- ▶ Do you have a contract/agreement?
- ▶ Read the contract/agreement in detail.
- ▶ Be quick and early to give the appropriate notice to the other party.
- ▶ Attempt to resolve the issue amicably and reasonably.