

4 QUESTIONS ON
THE IMPACT OF COVID 19 ON CONTRACTS & ARBITRATION

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(1) Whether Covid 19 and the consequent action taken by States amounts to frustration of a contract?

1. The question of whether a contract is frustrated in Malaysia is governed by section 57 of the Malaysian Contracts Act 1950, which is identical to section 56 of the Indian Contract Act 1872.
2. Essentially, section 57 provides that an agreement to do an act that is impossible, or which becomes impossible, is void.
3. Section 57 has been interpreted in Malaysia in accordance with the common law doctrine of frustration. The principles of frustration applicable in Hong Kong and Singapore, which are also common law jurisdictions, are similar.
4. In Malaysia, a contract will be frustrated if the following conditions are satisfied:²
 - (1) first, 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) second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective; and
 - (3) third, 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. The court must find it practically unjust to enforce the original promise.

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² See *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 4 MLJ 201, CA.

5. A party will need to examine the terms of the contract to see if the first condition is satisfied. Some contracts may include a force majeure clause that expressly provides for a pandemic. In this situation, the parties should act in accordance with the force majeure clause. We will consider this in more detail later. In the absence of such a clause, this condition is likely to be satisfied, as the parties would not have provided for Covid 19 in their contract.
6. The second condition is likely to be satisfied, as neither party to the contract would be responsible for Covid 19.
7. The third condition is the one likely to give rise to the most disputes. The question is whether Covid 19 renders performance of the contract radically different from what was originally envisaged?
8. The focus here will not only be on Covid 19, but perhaps more significantly on the action taken by States to deal with the pandemic. Such action varies from a complete lockdown, as in India, Malaysia and now Singapore, or simply advisory guidelines. The more stringent such action the more likely the contract may be frustrated.
9. For example, a State Government in Malaysia's complete ban of the rearing and sale of pigs due to the outbreak of the Japanese Encephalitis disease in 1998-99, was found to have frustrated an agreement to tap into the sewerage system of a pig farm.³
10. The other focus will be the nature of the contract itself. A short term transactional contract is more likely to become impossible to perform, as compared to a long terms relationship contract.
11. For example, a two year tenancy agreement was found not to have been frustrated by the Hong Kong Department of Health's order that the tenanted premises be isolated for 10 days due to the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003. The court found that the isolation period of 10 days was quite insignificant in terms of the overall use of the premises. The court also found that the isolation order did not significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.⁴

³ See *Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd and another appeal* [2014] 4 MLJ 413 at paragraphs 3 and 15, CA.

⁴ See *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353 at paragraph 11, HK District Court.

- (2) Whether Covid 19 and consequent action taken by States amounts to force majeure?
12. The question of whether any particular event amounts to force majeure depends on the terms of the contract, as force majeure, at least in common law jurisdictions, is a creature of contract.
13. A force majeure clause is usually drafted in two parts. First, there are provisions that set out the general conditions for a force majeure event, for example, that the event is beyond the control of the parties, could not have been foreseen, and is not attributable to either party. Second, the force majeure clause usually sets out a non-exhaustive list of specific force majeure events. By way of example, we may look at clause 18.1 of the International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction (the Red Book) (2nd edn, FIDIC 2017).
14. If the second part of the clause provides specifically for a pandemic as a force majeure event, this will of course apply to Covid 19. In the absence of such an express provision, reliance may need to be placed on other specific events, like State action, which may arguably cover the consequences of Covid 19.
15. If there is no specific event that applies to Covid 19, reliance will need to be placed on the first part of the majeure clause, which sets out the general conditions for a force majeure event. These conditions are likely to be satisfied by Covid 19 and subsequent action taken by States, as they are beyond the parties' control, could not have been foreseen and are not attributable to either party.
16. The force majeure clause in a contract will also provide for notice and other procedural requirements. The parties must strictly comply with these requirements, as some contracts may bar any form of relief if such procedure is not complied with. In this context, by way of example, reference may be made to clause 18.2 of the Red Book, which requires notice 14 days after the affected party became aware or should have become aware of an event. If notice is given later, the affected party will only be excused from performance from the date notice is received by the other party.
17. It should also be borne in mind that the relief provided by a force majeure event, will differ according to the terms of a contract. Generally, short term transactional contracts may

provide for the complete discharge of a contract, as a result of a force majeure event. On the other hand, long term contracts, may only provide for an extension of time for a force majeure event, with the option of termination, if the force majeure event is prolonged. Again, reference may be made to clauses 18.4 and 18.5 of the Red Book.

- (3) Assuming the contract is discharged by frustration and/or force majeure, would the arbitration clause in the contract survive?
18. The arbitration clause, which is regarded in law as an agreement independent of the underlying contract, will survive.
19. This is expressly provided for in Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration. Article 16(1) provides that
- ...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
20. This provision has been adopted in most Model Law jurisdictions, including India, Hong Kong, Malaysia and Singapore. *See* the Indian Arbitration and Conciliation Act, section 16(1); the Malaysian Arbitration Act 2005, section 18(1); the Hong Kong Arbitration Ordinance, section 34; and the Singapore International Arbitration Act, section 3.
21. The independence of the arbitration agreement, which survives the discharge of the underlying contract by force majeure or frustration is recognized by the courts in Malaysia and Singapore.⁵
- (4) If the arbitration agreement survives, how will it be performed?

⁵ . *See Standard Chartered Bank Malaysia Berhad v City Properties Sdn Bhd and Anor* [2007] MLJU 581, HC; and *China Resources (s) Pte Ltd v Magenta Resources (s) Pte Ltd* [1997] 1 SLR 707, CA Singapore.

22. As a result of the Covid 19 outbreak, many States have ordered some form of physical distancing regulations, including a lockdown in India, Malaysia and Singapore.
23. This gives rise to two challenges in relation to arbitral proceedings, first, in relation to the service of documents, second, in relation to hearing of evidence and legal submissions.
24. The first of these challenges can be met by electronic communication, primarily email. Arbitration legislation in many jurisdictions expressly allows for effective communication by way of email, for example, section 10 of the Hong Kong Arbitration Ordinance, and section 6 of the Malaysian Arbitration Act 2005.
25. Apart from legislation, most rules also allow for effective service by electronic means. For example, Article 2 of the 2018 AIAC Arbitration Rules, Articles 2.15, 2.16 and 3 of the 2018 HKIAC Administered Arbitration Rules, and Rule 2 of the 2016 SIAC Arbitration Rules.
26. This means that all notices, pleadings, bundles of documents, and submissions may be served by email, avoiding any limitation imposed by social distancing regulations.
27. The second challenge is posed by the hearing of evidence and legal submissions. The hearing of legal submissions may be dispensed with, as is commonly done. Legal submissions in writing may be served by email on the arbitral tribunal and the parties.
28. Can the hearing of evidence be similarly dispensed with? In terms of procedure, the parties may agree to a documents-only arbitration which would effectively dispense with a hearing for the evidence.
29. The rules of arbitration of several institutions allow for document-only proceedings for expedited arbitration. For example, Rule 16 of the 2018 AIAC Fast Track Arbitration Rules, Article 42.2(e) of the 2018 HKIAC Administered Arbitration Rules, and Rule 5.2(c) of the 2016 SIAC Arbitration Rules.
30. These documents-only proceedings are intended for lower value disputes under these rules, for example, for disputes under USD75,000.00 under the 2018 AIAC Fast Track Arbitration Rules and HKD25 million, which is over USD3 million, under the 2018 HKIAC Administered Arbitration Rules.
31. However, there is no reason the parties may not agree to adopt a documents-only procedure for higher value disputes, where the facts are substantially not in dispute.

32. In this context, parties in Malaysia and Singapore are increasingly comfortable with a documents-only procedure with the advent of statutory adjudication to resolve construction disputes. Most of these adjudications are determined solely based on documents without a hearing and with the parties seldom even meeting.
33. In the event a hearing is required, a virtual hearing may be held. The AIAC, HKIAC and SIAC all provide virtual hearing facilities, which parties are free to use.
34. Arbitration centres now offer comprehensive virtual solutions. These include dedicated operators participating remotely to manage the video link. This ensures that technology glitches are addressed promptly and efficiently.
35. The arbitration centre's remote operators may also project documents from electronic bundles of documents on screen. This can make the documents on which the witness is being examined or to which Counsel is referring available to the participants in the hearing more efficiently than the traditional process of asking everyone to thumb through the bundles.
36. Along with the display of the documents in the electronic bundle on the screen, real-time transcripts may also be displayed on the screen to aid comprehension.
37. Rotating cameras may also assist in assessing the physical environment in which the witness is located. All this is a significant advance on conventional video conferencing.
38. Further, applications, such as Zoom and BlueJeans are improving the functionality of virtual hearings. These applications permit up to 25 or 49 participants to be displayed in a grid of images with options for expanding the image of individual participants, like the speakers. This facilitates a key feature of an in-person hearing with many participants – the opportunity to scan the room, and to observe several participants in rapid succession.
39. In conclusion, with the technology we have today, a virtual hearing, if it is necessary, can be as effective as an in-person hearing.