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**CONTRACT LAW FAQs ON  
MOVEMENT CONTROL ORDER  
VOL. 1**



## COVID-19 VS MOVEMENT CONTROL ORDER

### CONTRACT FAQS ON MOVEMENT CONTROL ORDER

In light of the recent Movement Control Order ("MCO") announced by the Malaysian government on 18 March 2020, many businesses particularly, those that do not fall under the "Essential Services" category find themselves in a quandary not only in terms of their daily operations but more importantly, in regard to their contractual obligations towards various other companies across the supply chains.

In the first part of this publication, we shall address several frequently asked questions (FAQs) which would hopefully assist business owners in Malaysia specifically in treading through these challenging times.

**FOR MORE INSIGHT INTO  
THIS AREA OF LAW,  
PLEASE CONTACT OUR  
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## Q1: MY BUSINESS HAS TO SHUT DOWN TEMPORARILY DURING THE MCO, WHAT DO I DO?

Firstly, ascertain the actual part of your business that really needs to be "shut down". In most cases, this would involve the production part of the business whereas other parts such as the administrative or operations (other than physical operations) may still be continued either remotely or "from home" as the case may be.

As for your contractual obligations, review your existing contracts or purchase orders or work orders etc with the various clients or suppliers to ascertain if they contain any force majeure clause.

## Q2 : WHAT IS A FORCE MAJEURE CLAUSE?

A *force majeure* clause is a contractual provision which allows party to temporarily suspend its obligation/performance under a contract when facing a *force majeure* event.

A *force majeure* event generally refers to unforeseen events beyond the control of both parties that makes the performance of the contractual obligation impractical and/or impossible. Typical examples of *force majeure* include natural disasters, epidemic and wars etc.

## Q3 : IF WE HAVE A FORCE MAJEURE CLAUSE THEN CAN COVID-19 BE AUTOMATICALLY CONSTRUED AS A FORCE MAJEURE EVENT?

No, unless the contract provides for it.

The scope and effect of a force majeure clause depends on the wordings of the same and has to be determined on a case-by-case

basis. For instance, *force majeure* clause which uses wordings such as "pandemics", "epidemic" or "disease" would apply to the current COVID-19 outbreak.

Further, given the Malaysian Government's recent imposition of the MCO, any *force majeure* clause which covers "governmental action" may likely be applicable as well.

## Q4 : MY CONTRACT HAS A FORCE MAJEURE CLAUSE WHICH APPEARS TO INCLUDE THE COVID-19 OUTBREAK. WHAT DO I DO NEXT?

First, ascertain if the contract sets out specific steps to be taken in such circumstance as much would depend on the wordings in the respective contracts.

As a general rule or in the absence of any specific requirements, it would be prudent to notify your counterparty on the following in a timely manner:-

- A detailed explanation substantiated by evidence as to why the performance of the contract is physically and/or legally impossible;
- Steps that you are taking to mitigate/reduce the effects of the *force majeure* event; and
- Regular updates as to your effort to resume the performance of the contract if it can still be performed.

## Q5: HOW TO ESTABLISH THAT A CONTRACT HAS BECOME PHYSICALLY OR LEGALLY IMPOSSIBLE TO PERFORM?

This is usually the challenging part and again differs on a case by case basis. The mere fact that performance of a contract has become more difficult, more...

...expensive, or less profitable does not satisfy the physically or legally impossible to perform threshold.

**Physically impossible** - has been interpreted by the Courts to include the occurrence of supply chain disruptions, closure of supplier offices and cancellation of orders by suppliers.

**Legally impossible** - includes but are not limited to the implementation of certain temporary laws such as a declaration of emergency that lead to the inability to make deliveries of products, the inability to continue production of goods and the inability to provide certain services and/or implementation of new laws such as criminalizing certain products that leads to the inability to produce them.

In the current circumstance, with the enforcement of the MCO, movement has become limited and companies are forced to cease certain operations. Therefore, many companies would be in a position where they are unable to fulfill their contractual obligations as they have become legally impossible.

## Q6 : WHAT IF THE CONTRACT DOES NOT HAVE A *FORCE MAJEURE* CLAUSE OR THE *FORCE MAJEURE* CLAUSE DOES NOT SPECIFICALLY MENTION "COVID-19" OR "EPIDEMIC" OR "PANDEMIC", CAN COVID-19 STILL BE CONSTRUED AS A *FORCE MAJEURE* EVENT?

In the absence of *force majeure* clause, a party may rely on the common law doctrine of frustration in very limited circumstances. Doctrine of frustration operates to bring a contract to an end when there is an intervening post-contract event without any fault of parties which radically transform the contractual obligations into something different.

Similar to the threshold requirement for physical or legal impossibility to perform a contract, the fact that it has become more onerous or more expensive for one party to perform the contract is not sufficient to bring about frustration of the contract.

Please keep a look out for our next publication which will address the remedies or options available where a *force majeure* event is established and other COVID-19 and contract related issues.

