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Contract of Sale: Can Parties Terminate the Contract due to Movement Control Order?

Muhammad Asyraf Azni[1] and Suria Fadhillah Md Pauzi[2]
1 Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia, asyrafazni@gmail.com
2 Faculty of Law, Universiti Teknologi MARA, Cawangan Pahang, Kampus Raub, 27600 Raub, Pahang, Malaysia, suriapauzi@uitm.edu.my

Abstract

Covid-19 pandemic has caused the government of Malaysia to declare Movement Control Order (MCO). Due to the MCO, some contracts of sale were interrupted and this has caused legal issues on whether the parties can terminate the contracts to avoid further losses. The researchers examine how doctrine of frustration and force majeure can be applied in these contracts. This paper studies various law cases from jurisdictions like Malaysia, Singapore, and the United Kingdom and/or their legal provisions. The researchers discover that contract of sale most likely cannot be terminated by using the force majeure clause, if the contract has one. If the contract does not have the force majeure clause, parties may still rely on doctrine of frustration in order to terminate the contract. The court, nonetheless, will decide based on what the parties have agreed. In conclusion, it is safe for all contracts of sales to include a force majeure clause to better protect both parties from any unforeseen circumstances.

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INTRODUCTION

Government of Malaysia has declared a Movement Control Order (MCO) under the Prevention and Control of Infectious Diseases Act 1988 effective from 18th March 2020 in response to the Covid-19 pandemic throughout the world. Following the implementation of MCO, all government and private sectors were ordered to be closed, except for essential businesses and servicse. However, on 4th May 2020, the Government of Malaysia had eased lockdown restrictions under a conditional MCO and thus certain business sectors were allowed to be opened and operated. As the number of daily cases and also active cases of Covid-19 reduced, the government declared Recovery Movement Control Order (RMCO) phase starting from 10 June to 31 August 2020. This recovery phase showed more business sectors to be opened and resume their business operation. This unprecedented measure has directly disrupted the business operations and indirectly the issue of legal consequences due to failure to perform contractual obligations has arisen. General principle of law of contract provides that performance of a contract must be exact and precise and should be in accordance with what the parties had promised (section 41, Contracts Act 1950). In addition, the Contracts Act 1950 also stipulates that if one party fails to perform its contractual obligation as set out in the contract, it would constitute a breach of contract and thus entitles the other party to terminate the contract (section 40, Contracts Act 1950). Besides that, Section 38(1) of the Contracts Act 1950 provides that the parties to a contract must either perform or offer to perform their respective promises, unless such performance has been dispensed with by any law. It is worth to note that where the performance was not done within the stipulated time as agreed in the contract and time is the essence of a contract, the contract becomes voidable at the option of the promisee (section 56(1), Contracts Act 1950) whereas if the time is not an essence to the contract and the defaulting party fails to perform his obligations within the stipulated

time, the contract does not become voidable but the promisee may claim a compensation from the promisor for any loss occasioned to him due to the failure (section 56(2), Contracts Act 1950).

This position of law is further emphasized by the ruling of court in which among others held a view that if the term is regarded as essential to the undertaking, the aggrieved party may treat the contract as at end or he has the option to continue to treat the contract as still binding and be compensated, whereas if the term is collateral to the undertaking, the breach of it will entitle him to claim for damages and the breach cannot be treated as discharged (Tan Ah Kian v. Haji Hasnan [1962] 1 MLJ 400). However, there are certain circumstances in which the defaulting party is held not to be liable for the failure to observe their obligations due to impossibility of performance or the circumstances of the breach fall under the scope of force majeure. Doctrine of frustration provides a relief to a defaulting party in circumstances where a performance of obligation under a contract may be hindered and impossible to be performed. The impossibility of performance by the parties to the contract is due to an unexpected supervening event and thus it happened without any fault of the parties in contract (Krell v. Henry [1903] 2 KB 740). Its origin can be traced back to 1863 in the UK by virtue of the case Taylor v. Caldwell (1863) 3 B&S 826 and is incorporated under Contracts Act 1950, section 57(2). Therefore, if the contracting parties are unable to perform their obligations under the contract due to supervening or unprecedented events without their fault, the contract is likely to be frustrated. As a result, the contract comes to an end automatically and thus both parties are excused from further performance of contract. On the other hand, force majeure clause is a common contractual provision which can be found in commercial contracts. The clause discharges and removes the liabilities of contractual parties from fulfilling their obligation due to some supervening events, exceptional and extraordinary circumstances which were beyond the control of either party. The objective of this study is to explore the impact of MCO due to Covid-19 in fulfilling the contractual obligations with reference to doctrine of frustration and force majeure clause. The study will examine whether

Covid-19 pandemic falls within the ambit of force majeure clause given to the severity and unusual nature of the situation. It will also observe whether MCO has affected the performance of the contract and such event is beyond the control of contracting parties that doctrine of frustration will be triggered and applied in such circumstances. This study is crucial as it provides an insight to all parties in the business world who are in a limbo; whether or not their contract can be terminated or has been terminated due to MCO and most importantly what they can do to protect themselves from the claim of damages for non-performance of contract due to MCO. This study is also important for the entrepreneurs in continuing their businesses as without them, the economic growth and job creation market will be affected (Sharifah Zannierah Syed Marzuki, Mohd. Ali Bahari Abdul Kadir, Siti Zahrah Buyong, & Junainah Junid, 2016). This study could also benefit the small and medium enterprises since they can be said to be the crucial players in the country's economy (Azlin Shafinaz Arshad, Zahariah Mohd Zain, Afiza Azura Arshad, & Norliani Md Kamil, 2017).

2.0 METHODOLOGY

This legal research used qualitative method. Critical analysis of the current situation and position of law is adopted. For this legal study, data collection relied on primary data namely legislation dan court cases for Malaysia and other court cases from other countries in which their law are in *pari materia* with Malaysian law. The data are then analysed using legal content analysis method. It aims to identify the elements that constitute the legal issues and try to resolve them.

3.0 FINDINGS

3.1 Legal position of the doctrine of frustration in Malaysia and the UK

Doctrine of frustration has been embodied in Section 57(2) of Malaysia's Contracts Act. Here, it provides that a contract that becomes impossible to be performed due to some supervening event which the promisor could not prevent, becomes void. The provision was drafted based on the position in the UK's case of Taylor v. Caldwell (1863) 3 B&S 826.

In order to see the legal position of doctrine of frustration in Malaysia, the researchers referred to the case of JRI Resources Sdn Bhd v Varia Tenggara Sdn Bhd [2016] 6 MLJcon 11 ("the JRI Resources case"), where the High Court held that the doctrine of frustration is to give justice, achieve a just and equitable result, and to do what is reasonable and fair, to the parties of the contract from

the strict enforcement of the terms of the contract after significant changes in the circumstances. This is because,

to compel the parties to fulfil their obligation under the terms of the contract, would be unjust and even might cause unreasonable burden, after the happening of some supervening events, which are not within the control of both parties. Thus, the doctrine of frustration, once successfully invoked, will absolve both parties from further obligations of the contract.

The JRI Resources case refers to the UK Court of Appeal's case of Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1 at page 8, where the court held that the doctrine of frustration cannot be lightly invoked and must be kept in a very narrow limit and ought not to be extended. This is because, the effect of doctrine of frustration can be said as very 'cruel' in the sense that it will kill the contract and discharge the parties from further obligations under the contract.

In order to determine whether a contract has been frustrated due to supervening events or not, the JRI Resources case also referred to the test laid down by the UK's Court of Appeal in Davis Contractors Ltd v Fareham UDC [1956] AC 696. This test was approved in Malaysian case of Dato Yap Peng & Ors v Public Bank Bhd & Ors [1997] 3 MLJ 484 at page 493, where the Court of Appeal held that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

In order to determine whether the supervening event falls under 'a thing radically different from that which was undertaken by the contract', the JRI Resources case referred to Lord Denning MR's judgment in Ocean Tramp Tankers Corporation v V/O Sovfracht [1964] 1 All ER 161 and again cited with approval of the Malaysian Court of Appeal in Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201 at page 207, where the court held that in order to see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about frustration. It must be positively unjust to hold the parties bound. From this test, it is worth to note that the change in circumstances must be something which is more than just mere additional cost than what the party had expected. It must be something burdensome and unjust to hold the parties to the terms of the contract. As such, there cannot be one rule to say what is unjust and what is not. The court must examine the facts of each case individually and decide based on those facts and evidence presented before it.

The JRI Resources case further referred to the case of Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201, where the Court of Appeal, after examining the English Court of Appeal's decision and its own earlier decision in Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699; held that "there are three elements in the doctrine embodied in section 57 . First, the event upon which the promisor relies on 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. 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. 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. If any of these elements are not present on the facts of a given case, then section 57 does not bite."

Apart from the law cases cited in multiple Malaysian cases above, the researchers refer to the UK's case of Edwinton Commercial Corp and Another v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The "Sea Angel") [2007] EWCA Civ 547, where the Court of Appeal in this case referred to the statement of Lord Radcliffe in the case of Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at page 729, which is the same as being stated in the JRI Resources case, which the researchers do not intend to repeat.

From the line of authorities cited above, the position of law on the doctrine of frustration for Malaysia and the UK are the same. This is evident by the reference made by Malaysian courts to the UK's cases.

3.2 Legal position of the force majeure clause in Malaysia, Singapore and the UK

Next, to see the legal position of force majeure clause in Malaysia, the researchers refer to the case of Crest

Worldwide Resources Sdn Bhd lwn. Mohammad Amin Abdul Sattar dan satu lagi guaman sivil [2019] MLJU 511, where the High Court has made reference to the Singapore's case of RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and Another Appeal [2007] SGCA 39 on the issue of force majeure. Here, the Singapore Court of Appeal stated that the purpose of having force majeure clause is for the parties to contractually allocate the risks with regards to the occurrence of future events in specific circumstances which are stipulated within the clause itself. From this statement, it shows the difference between force majeure clause and the doctrine of frustration, where force majeure clause allocated the risks with regards to some supervening events so that the contract will still survive after the occurrence of those supervening event. Meanwhile, doctrine of frustration on the other hand is like a 'blanket' position where it will end the contract automatically once successfully invoked.

The Singapore Court of Appeal further stated that the precise construction of the clause is paramount as it would define the precise scope and ambit of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned. Thus, unlike the doctrine of frustration which is wider in the sense that it can cover more supervening events, force majeure clause is much more limited in a way that the court will only interpret the applicability of the force majeure clause based on what the parties have agreed in the contract.

By having the force majeure clause, the SingaporeCourt of Appeal held that, based on the observation of Prof Sir Guenter Treitel, one of the leading academic commentators on contract law in the Commonwealth, (see Sir Guenter Treitel, Frustration and Force Majeure (*Sweet & Maxwell, 2nd Ed*, 2004) at para 12-001), firstly it can exclude the doctrine of discharge where the parties have contracted on terms which indicate that the contract is to remain in being in spite of the occurrence of an event which would have discharged it. Secondly, it can enable the parties to provide for discharge, or some other form of relief, on the occurrence of any event which would have had no effect on their legal rights and duties because the change of circumstances brought about by the event was not sufficiently serious or fundamental to discharge the contract under the general common law doctrine. Thus, force majeure clause actually allows the parties to be more flexible in determining how the contract should be if any supervening events happened.

It is also worth to note that, the reason for incorporating force majeure clause, as held by the Singapore Court of Appeal is that "the prevalent practice of incorporating force majeure clauses into commercial contracts today stems largely from the blunt nature of the doctrine of frustration as a tool to allocate loss. It has often been said that the juridical basis for the doctrine of frustration is unclear, the doctrine is difficult to invoke and the consequences of its operation are drastic, in the sense that the contract is automatically brought to an end. Parties therefore often include force majeure clauses in their contracts to avoid the uncertainty and hardship that might otherwise result from relying on the common law doctrine of frustration. Uncertainty and inconvenience are avoided by incorporating a well-drafted clause that clearly defines the events or circumstances that constitute force majeure. Hardship is also minimised in so far as a force majeure clause can be crafted to provide a more nuanced response to events of force majeure. For example, it may be provided that, in circumstances constituting force majeure, an extension of time may be granted to the party in default, there may be cancellation of the contract at the option of one party, or the defaulting party's duty to perform the contract will be suspended. The contract is thus not automatically brought to an end." Here, the court also explains how the force majeure clause is different from common law doctrine of frustration.

On the issue of how the force majeure clause should be construed, the Singapore Court of Appeal held that it should be noted, however, that the case law suggests that courts will construe force majeure clauses strictly (see: Metropolitan Water Board v Dick, Kerr and Company, Limited [1918] AC 119 ("Metropolitan Water Board") and Bank Line, Limited v Arthur Capel and Company [1919] AC 435.)

On another important point on what the party who relied on force majeure clause need to fulfill, the Singapore Court of Appeal held that a party who relies on the force majeure clause must show not only that it has brought itself within the clause concerned but also that it has taken all reasonable steps to avoid its operation, or mitigate its results (see: Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323 ("Channel Island Ferries") at 327).

And lastly, on who should bear the burden when relying on force majeure clause, the Singapore Court of Appeal held that a party who relies on a force majeure clause has the burden of bringing himself squarely within that clause (see: Channel Island Ferries(at 327); Magenta

Resources([57]; supra at 86, [98]); and Chitty on Contracts (Sweet & Maxwell, 29th Ed, 2004) vol 1 at para 14-140).

Based on the above cases, it is shown that Malaysia followed the decision in the case in Singapore and Singapore followed the decision in the case in the UK . Thus, the position of law on the application of force majeure clause is the same for all three countries.

In another case in the UK, Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2019] 1 All ER (Comm) 34, the court held that when a party seeks to rely on force majeure clause, he must show that the situation and the consequences are beyond his reasonable control. This is the same position of law taken by Malaysia and Singapore.

3.3 The application of doctrine of frustration and force majeure clause in contract of sales

Contract is an agreement enforceable by law (Section 2(h) of Contracts Act 1950). Among the most common form of contract is contract of sale or also known as contract of sale of goods. Contract of sale is a contract between seller and buyer. Under this contract, the seller transfers, or agrees to transfer, the property in goods to the buyer with an agreed price (Section 4(1) of Sale of Goods Act 1957). This type of contract is among the most common contract because every day, people buys something. Be it individual buyer or business entity buying stocks from manufacturers. Here, 'the property in goods' is referring to the ownership of the goods.

It is to be noted, in contract of sale it can happen either (1) buyer gets the goods immediately, usually happen in the face to face transaction, or (2) buyer gets the goods by delivery. This paper would focus on the implication of MCO on the contract of sale which involved the delivery of goods by transportation, where time is the essence of the contract. The reason being is that, for goods that is immediately obtained by buyer, there will be no issue with regards to MCO because MCO only put restriction on movement. That being said, it will affect only those contracts of sale where goods are to be delivered by mode of transportation.

When MCO was enforced, the movement of people were restricted. Businesses were also asked to close. Only businesses that falls under the category of 'essential services' are allowed to operate. Thus, a lot of business owners are effected. In order to anylse the effect of MCO to the contract of sale, the researchers provide the following example. This is a situation where seller makes a contract of sale of logs with buyer and seller is to deliver the logs in one (1) week time from the date of the contract. It has to be noted, in this contract, time is of the essence of the contract. When the MCO was enforced, the seller, which is a logging company, cannot operate to produce the logs and thus failed to deliver the goods as promise in the contract of sale.

The above example of contracts of sale are common and they are the most effected by the MCO. Now, the seller is in breach of the contract for his failure to deliver

the goods as agreed based on the terms of the contract. What can the seller do? It is not his fault for its company to be ordered to close. What can the buyer do? Can the buyer terminate the contract as he does not want to wait further?

This is where the doctrine of frustration can come into picture. Any party can bring this matter to court to get a declaration that the contract is frustrated due to the MCO. If the court orders that the contract is terminated under the doctrine of frustration due to MCO, the parties are then absolved from further obligation of the contract. In order to determine whether MCO can be used in an attempt to trigger the application of doctrine of frustration, let us refer to the test highlighted by the JRI Resources case. First, the supervening event upon which the seller or buyer relies as having frustrated the contract must have been one for which no provision has been made in the contract. Thus, if the contract of sale did not make any provision to cater for situation like MCO or government intervention, then the first test is likely to be fulfilled. Second, the supervening event relied by the seller or buyer must be one for which he is not responsible. In this situation, MCO is an order from the government. The seller or buyer got nothing to do with the establishment and enforcement of the MCO. As such, based on this fact, the second test is most likely to be fulfilled. The third and the last test is the supervening event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. For the third test, this can be said as the most difficult one to fulfil as the parties must satisfy the court that MCO renders the contract different from what has been agreed.

As has been highlighted in the Section 3.1 of this paper, the court would not invoke this doctrine lightly as the effect of this doctrine will kill the contract as a whole and discharge the parties from further obligation of the contract. The position of law also highlighted that in order for doctrine of frustration to be applied, it must not be mere additional cost to the parties, instead it must be

something that is really unjust to hold the parties to the strict performance of the terms of the contract. Thus, using the same example given earlier, the contract to deliver the good in one week time from the date of the contract, can be argued as has been radically different from what has been agreed due to the happening of MCO. For example, in Malaysia, the MCO was in force for around 3 months. After 3 months, the government only allows for some businesses to operate but with strict conditions, among others, shorter operating time and limited number of workers to be allowed in the office or space of work. Thus, if the contract provided for delivery to be done in one week, but due to MCO it has been delayed for 3 months. This long period delayed can be argued as the 'radical

different' that has altered the contract from what has been originally agreed. It can also be argued, with the long period of delayed in the contract, it is unjust and unreasonable to hold the parties to the strict compliance of the terms of the contract anymore. It has to be noted, the result might be different if for example, the duration of the MCO was shorter or the MCO only results in the additional of cost which is not substantial to the parties. Therefore, there is no straight answer to all contracts of sale. Each contract of sales must be determine based on its own facts.

Next, the application of force majeure clause. It has to be noted that, if the contract provides for force majeure clause, the parties would usually try to bring the supervening event with the ambit of the force majeure clause as using the clause that has been incorporated as the terms of the contract is much more easier to invoke rather than relying on the common law doctrine of frustration. This is because, if the supervening event has been spelled out clearly in the force majeure clause as terms of the contract, the court can easily declare the application of force majeure clause. This makes the application of force majeure clause easier than the doctrine of frustration.

It has to be noted also, based on Section 3.2 of this paper, the position of the law with regards to the application of force majeure clause is that, the party relying on the clause, must bring itself within the ambit of the force majeure clause. Otherwise, he will fail to invoke the application of force majeure clause. As has been highlighted in the position of law also, force majeure clause can exist in either (1) it discharges the parties from further performance of the contract, or (2) it can provides how the contract should operate should the supervening event happened. This is not surprising as, at the end of the day, the insertion of force majeure clause is the process of forming a contract. Thus, the court will always respect the wishes of the parties in a contract and enforce the contract as per what has been agreed in the contract.

Using the same example above, in order to determine whether the contract of sale can be terminated by triggering the application of force majeure clause, the first requirement is, the contract must have the force majeure clause. Without force majeure clause, the parties cannot rely on the force majeure clause instead the parties have to rely on the common law doctrine of frustration. Secondly, the force majeure clause must be wide enough to cover the supervening event in question. Of course there is no contract that specifically put MCO as one of the supervening event as (1) before this, no one ever thought that the government would declare the

MCO, and (2) it would not be a good strategy put the exact word like 'MCO' because this type of force majeure clause will not bite if the government use a different words next time. Based on the researchers' research, there are some force majeure clause that use the term 'government intervention'. In our opinion, this term is wide and good coverage to cover situation like MCO because MCO was established and enforced by the government. Thus, having the term 'government intervention' as one of the events in the force majeure clause, might successfully make the MCO falls under the force majeure clause. The third and last test, the supervening must not be one for which the parties are responsible and the parties must mitigate its result, as decided in the case of RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and Another Appeal [2007] SGCA 39. If the 3 requirements have been fulfilled, then the force majeure clause can be invoked by the court. Then, the next steps the court would do is to see what have the parties agreed in contract, should the force majeure clause comes into operation. If the force majeure clause provides for the termination of contract, then the court will declare the contract is thereby terminated. If the force majeure clause provides for the extension of time, then the court will declare that the contract is still in force with the extension of time. And so on and so forth. To put simply, whether or not the parties can terminate the contract of sale based on the force majeure clause will depends on the terms of the contract that has been agreed by both parties when making the contract. As in the case of doctrine of frustration, there is also no straightforward answer to all contract of sale which contains force majeure clause. The court will

determine the case individually and make the decision based on each contract.

4.0 CONCLUSION

It is common practice for contracting party to incorporate a force majeure clause in a commercial contract as it confers the right on the party to terminate the contract if the force majeure event subsists as construed by the contract. Similarly, the doctrine of frustration relieves the party from the liability if without the fault of either party, supervening event has caused the impossibility of performance. While the force majeure event suspends the performance of contract in many cases, the doctrine of frustration operates to terminate the contract. Unfortunately, the result of frustration doctrine might not be favourable to commercial entity as they may still want to continue the contract, but they just do not want to be liable for certain obligations. Whether or not the contract of sale is terminated will depends on the incorporation of force majeure clause under the contract. In the absence of

such clause, parties may still rely on doctrine of frustration in order to put the contract to an end. It may be worthwhile for the respective parties to compromise and seek other appropriate measure in order to lessen the burden of another party. In conclusion, it is safe for all contract of sales to include a force majeure clause to better protect both parties from any unforeseen circumstances.

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