



COVID-19: Force Majeure Clause in Sale and Purchase Agreement - Malaysian Perspective

Coronavirus Disease 2019 (COVID-19) was declared by the World Health Organization (WHO) as a worldwide pandemic on 11th March 2020. In order to curb the spread of the COVID-19, the Government of Malaysia has announced a Movement Control Order (MCO) starting from 18th March 2020 until 14th April 2020 pursuant to the Police Act 1967 and the Prevention and Control of Infectious Diseases Act 1988, as a part of a social distancing measure. As a result, the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 was subsequently published to give effect on the announcement made.

This MCO generally bans mass gatherings as well as overseas travel. All businesses, educational institutions and premises will be closed temporarily except for those involved in essential services. Malaysians are not allowed to leave homes, even within states, unless they need to perform an official duty, or visiting a premise that is considered an 'essential service', purchasing, supplying or delivering food or daily necessities, and seeking healthcare or medical services.¹ This pandemic very likely will affect small and big businesses, families, the society and economy as a whole. However, regardless of this fear, we as Malaysian must show an altruistic response in preparing our country to combat the crisis.

Furthermore, this movement restriction has led to the closure of law practice premises as well. The lawyers are hassling and worrying on their contractual liabilities in regards to the completion of tasks and the provision of legal services, as well as the adherence to strict timelines. Hence, the Malaysian Bar has already called upon Bank Negara Malaysia and all financial institutions to suspend or temporarily reduce the standard operating procedures which require strict compliance with timelines, while the regulations remain in force². Nevertheless, the conveyancers should be prepared and specifically know which way the wind blows and come out with possible solutions.

Example of a sub-sale case during MCO: Mr. Ali, the vendor and Mr. Chong, the purchaser have entered into a sale and purchase agreement (SPA) on 14th January 2020. The completion date for the SPA is 3 months from the date of the SPA; the MCO starts on 18th March 2020 and the completion date will be 13th April 2020. The issue(s) at hand is whether Mr. Chong can request for an extension of completion date pursuant to force majeure event OR whether Mr. Ali can opt to terminate the contract.

¹ Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 [P.U.(A) 91/2020]

² Malaysian Bar President Press Release "Banks and Other Financial Institutions Not to Impose Unrealistic and Unreasonable Demands" on 18th March 2020

Step 1: The First Step Is To Check Whether The SPA Has Any 'Force Majeure' Clause or Not.

Force majeure is a situation where performance of a party under any agreement or contract is rendered impossible due to unexpected circumstances which is beyond the reasonable control of any contracting parties and the clause will relieve the parties from performing contractual obligations for a period of time or allows the parties to terminate the contract when certain circumstances beyond their control arise. Notwithstanding of the definition, the concept of force majeure in Malaysia is dependent on the wordings of the force majeure clause and every word matters that it can change the impact of the clause's applicability.

Supposing the SPA has the 'force majeure' clause, then it is best to consider if the said clause covers the current COVID-19 pandemic or the said 'force majeure' clause specifically refers to "epidemics", "pandemics" or "contagious diseases" or there is a phrase that such as an event happens that leads to an act of "beyond the reasonable control of the parties". As decided by the Federal Court in the case of **Finmark Consultants Pte Ltd v Development & Commercial Bank Berhad**³, if any party intends to invoke the force majeure clause, the said party must exhibit that the force majeure clause is one of the terms in such agreement.

Even though there is a force majeure clause inside the SPA, this does not mean that one has the right to invoke relief as a result of impacts from the COVID-19 pandemic. Before invoking the 'force majeure' clause, there are several factors that need to be considered:

- i) Whether the event **qualifies as force majeure** under the agreement;
- ii) Whether any party has **taken reasonable steps to avoid** such force majeure and **able to be mitigated**;
The one who is relying on the force majeure event needs to show that reasonable steps have been taken to mitigate the effect of force majeure to the agreement.
The High Court in the case of **Sunway Quarry Industries Sdn Bhd v Pearl Island Vista Sdn Bhd & Anor**⁴ held that if the parties concerned do not take reasonable steps to avoid such events (ie: force majeure), it cannot be said that the occurrence of the event was beyond control of the parties concerned. The party requesting for force majeure is usually under a duty to show that it has taken all reasonable endeavours to avoid the event and its effects.
- iii) Whether the **performance is truly impossible**;
Even if the party complies with other requirements, if performance is merely impracticable or economically difficult rather than truly impossible, the party cannot invoke the said clause.

In reference to the recent COVID-19 pandemic, Mr. Chong may be able to argue that the outbreak constitutes one of the specified force majeure events and it is obviously beyond the control of both of them, so that the event is qualified as a force majeure. By referring to the Circular No 069/2020 issued by Malaysian Bar on

³ [1994] 3 CLJ 519

⁴ [2019] 1 LNS 1052

“Notifications of Closure from State Offices of Director of Land and Mines and District Land Offices”, it can be seen that it leads to all tasks namely; generation of private and official land search for certain states, execution of transfer (in form 14A) in front of District Officer (for Malay Reserve Land), adjudication of transfer (in form 14A), application of consent to transfer and charge, registration of private caveat, transfer (in form 14A), charge (in form 16A) and all other kind of registrations under National Land Code that need to be done at the respective land office, collection of consent letter, original title deed or any documents at the respective land office; will be put on hold until further notice. Therefore, all the performances are truly impossible to be completed by 13th April 2020.

Step 2: The Second Step is to Check Whether These Clauses Provide for Specific Timelines, Notification or Procedures to Suspend Your Contractual Obligations.

The effect of this force majeure clause will depend on what has been provided in the contract between both contracting parties. This means that it may differ depending on how it was drafted. Some may provide for an extension of time for performance of contract. Some may provide that the contract will be put on hold until the force majeure event is resolved or renegotiation of the terms of the contract. Some may provide for a limitation in time after which either party may terminate the agreement with written notice to the other if the event is prolonged and lastly, some may provide for only one option, and that is for a party to terminate a transaction instead of allowing for an extension of time. Therefore, it is vital to see how the force majeure clause is being drafted and to understand the agreement as a whole.

Example:

“Under the circumstances of force majeure event herein, neither Party shall be in breach of its obligations under this Agreement. Thus the **Completion Date** is automatically **extended for a period of six (6) months** from the date of the Force Majeure Event (hereinafter referred to as the ‘Extended Period’). In the event of **Force Majeure continues from the Extended Period** and either party reasonably considers such event of Force Majeure applicable to it to be of such severity or to be continuing for such period of time that it effectively frustrates the original intention of this Agreement, **either party may opt to suspend their contractual obligation** until force majeure event is resolved or over and upon such option both parties shall renegotiate the terms of the contract and certain liabilities that are capable of being excluded in the event that there is either non-performance or delay of obligations **OR either party may opt to terminate this Agreement** by giving notice to the other Party. Upon such termination the Vendor shall refund the deposit and all monies paid by the Purchaser to the Vendor free of interest within fourteen (14) days from the date of the said notice of termination and upon such refund this Agreement shall thereafter become null and void and of no further effect whatsoever.”

Tips: **Drafting New Agreement With Force Majeure Clause: What To Consider?**

- ✚ Extension of time to perform obligation
- ✚ Suspension of specific obligations
- ✚ Renegotiation or reduction in scope of work
- ✚ Exclusion of certain liabilities not capable of being performed
- ✚ Option of termination of contract if the event prolonged
- ✚ Waiver or reduction of late interest penalties or agreed damages

Question: **What if the SPA is Silent or does not have a ‘Force Majeure’ Clause?**

If the SPA does not contain specific clause on force majeure, alternatively, pursuant to the guideline and suggestion of the Bar Council Conveyancing Practice Committee (Bar Council CPC), the contracting parties may resolve or negotiate within the ambits of the contract⁵.

Example:

i) “Computation Of Time” Clause

“For the purpose of computing the time for payment of the Balance Purchase Price, the Purchaser shall be entitled to such extension of time, which corresponds with any delay in time on the part of the Vendor and/or its agents in delivery of the relevant documents discharging of the Vendor’s obligation hereunder. For the avoidance of doubt, delay is defined as fourteen (14) days from the date of request by the Purchaser’s Solicitors of the relevant documents to the date of receipt by the Purchaser’s Solicitors of the same. In such event, the delay shall but be taken into account in the computation of the Completion Date and the Completion Date shall be automatically extended for a period equivalent to such period of delay”

ii) “Suspension Of Time” Clause

“Notwithstanding anything stated to the contrary neither party shall be liable for any failure or delay on its part in performing any of its obligations or for any loss or damage caused, charges or expenses incurred or suffered by reason of such failure or delay in so far as such failure or delay shall be occasioned by any cause beyond the control of the party in default including that of workmen, riot or civil commotion, administrative action, rules, regulations or legislation of the Government, refusal of the Relevant Authority to give the permission, compulsory acquisition of the said Property or any part thereof, Acts of God, enemy action or any inevitable accident and in the event of any such cause intervening, this Agreement shall stand suspended until such time as the cause giving rise to such suspension shall no longer prevail.”

iii) “Variation” Clause

“The provisions of this Agreement may be varied or changed only by mutual agreement evidenced in writing specifying such amendment(s) referring to

⁵ Bar Council Circular No 084/2020 dated 1st April 2020

this Agreement and executed by the parties hereto or by their duly authorized agents.”

iv) Or any other relevant clause

Based on the variation clause, if both parties mutually agree to change the terms; ie; to freeze the transaction or performance, they can vary the agreement by **a letter of variation**. This means that both parties will need to execute a variation letter to extend the completion date to another decided date.

On the other hand, if there is no force majeure clause or the force majeure clause cannot be invoked, the contract could be discharged on the grounds of ‘frustration’, upon which the contract will become void⁶. Based on **Section 57 of the Contracts Act 1950**, a contract is said to be ‘frustrated’ where there is a change in the circumstances supervening or subsequent to the formation of the contract which renders a contract legally or physically impossible to perform. However, this option is only if the parties intend to bring the agreement to an end. The doctrine of frustration can only be applied within very narrow limits. As stated in the case of **Pacific Forest Industries Sdn Bhd v Lin Wen-Chih & Anor**⁷, the court upheld that the frustration of a contract is when the change of circumstances occurs only after the contract is made and it will not be considered frustrated merely because it becomes difficult to perform.

For instant, in the case of **Chinaya a/l Ganggaya v Sentul Raya Sdn Bhd**⁸, the plaintiff who is the purchaser of one condominium unit sued the defendant (developer) for late delivery of vacant possession and claimed damages. The defendant then invoked frustration on the ground of delay due to dire financial position caused by the 1997-1998 economic crisis which was beyond their control. The court held that it was not impossible to complete condominium because the said condominium was eventually completed. Hence, the contract could be discharged on the ground of frustration as it was not sufficient for the defendant to purely refer to the national economic crisis. There has to be a radical change in circumstances.

As a conclusion, if there is a force majeure clause in the SPA, it is crucial to look into the clause as a whole and each force majeure clause differs from one agreement to another and it depends on the contracting terms of each agreement. If there is no force majeure clause in your agreement, there are other alternatives to choose as elaborated above. Moreover, the Bar Council CPC further urges that each and every solicitor to do his/her utmost to communicate to the client on the delay in the transaction caused by the MCO period and to request for the client to consider granting the appropriate extension to the SPA transaction and/or to consider waiving any late payment interest, caused by the MCO period⁹. This COVID-19 pandemic puts our nation to a big test and we as the citizens must stand together taking on the responsibility to tackle this challenge and unprecedented catastrophe. Let’s do our part!

⁶ Section 57(1) of the Contract Act 1950

⁷ [2009] 6 MLJ 293

⁸ [2008] 2 MLJ 468

⁹ Bar Council Circular No 084/2020 dated 1st April 2020

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