



## COVID-19 Movement Control Order: The Impact on Business Contracts

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### COVID-19 MOVEMENT CONTROL ORDER

The COVID-19 pandemic has disrupted the global market and businesses. The governments across the world have taken measures to curb the spread of the COVID-19 virus and the impact on the global economy would certainly be significant.

At the time of writing this article, the Movement Control Order (“**MCO**”) in Malaysia which is in effect from 18 March 2020 to 14 April 2020 has caused severe impact to various industries from construction to tourism, amongst other. Many businesses in Malaysia are starting to feel the pinch of not being able to perform their existing contractual obligations for the sale/supply of goods and/or services.

In this article, we will provide some practical steps that Malaysian businesses may take to safeguard their position in light of the rapidly evolving and challenging situation due to the COVID-19 pandemic.



## 1. WHAT SHOULD YOU DO IF YOU ARE UNABLE TO PERFORM YOUR EXISTING CONTRACTUAL OBLIGATIONS DUE TO THE COVID-19 PANDEMIC?

Firstly, it is important for you to identify which contracts are likely to be affected by the COVID-19 Pandemic.

Next is to go through your contract and identify whether there is any of the following provisions:-

- a) “*force majeure*” clause; or
- b) any clauses which would be sufficient to include COVID-19 and its consequences; or
- c) any clauses which account for “*an event beyond the parties’ reasonable control*”.

Briefly, a “*force majeure*” clause (French for “superior force”) is a provision in a contract which excuses a party from not performing its contractual obligations upon the occurrence of an extraordinary circumstance or event beyond the party’s control.

If such clause exists in your contract, you would then need to carefully review and examine how a “*force majeure*” event is being defined in your contract as not all *force majeure* clauses are drafted in the same manner. In this regard, it is pertinent to note that each contract would have different objectives or obligations that may affect a party in different aspects. In view of this, each *force majeure* provision ought to be considered in detail its precise terms/wording and also, its specific context.

Determining whether the non-performance of your contractual obligations is excusable under a *force majeure* provision could be a difficult task. Hence, it would be highly advisable to seek legal advice, if there is any doubt.

Also, when you seek to rely upon a *force majeure* clause, do comply with the specific procedural requirements set forth in the contract. Usually, a contract would require you to provide a notice as soon as the non-performing party became aware of the *force majeure* event. Particular attention must be paid to these timelines as a party’s right to rely on the *force majeure* clause may be barred if a party fails to comply with the specified timelines provided under the contract.

In addition to the above, do also consider whether there is any other provisions in your contract which may excuse a party’s non-performance of the contract. You may also consider other routes through agreeing binding variation to the contracts with the contracting party citing COVID-19 as a ground.

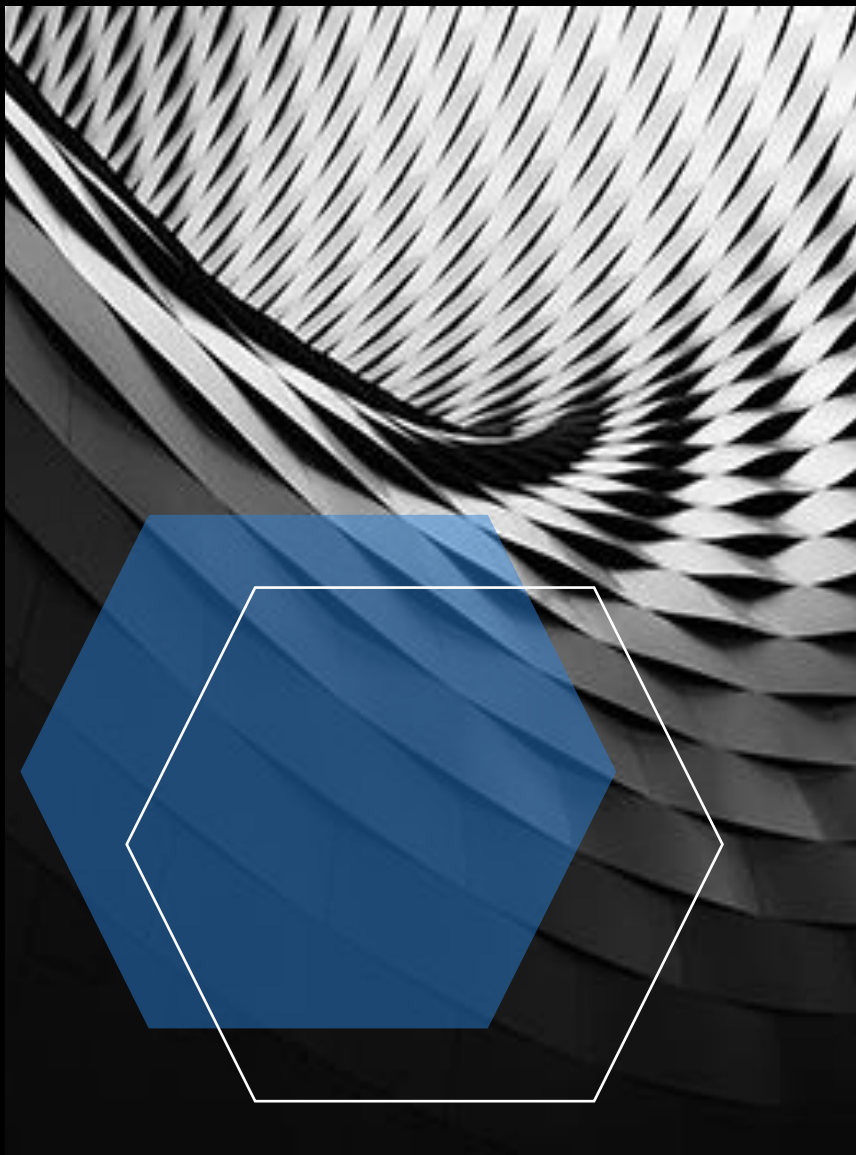


## 2. WHAT WOULD BE THE COMMON TYPE OF REMEDIES AND/OR RELIEFS IF SUCH CLAUSE EXISTS?

As mentioned above, each contract would have drafted the *force majeure* provision in different manner.

Nonetheless, below are some of the common type of remedies and/or reliefs to most *force majeure* provisions:-

- a) Suspension of contractual obligations;
- b) Extension of time to perform the obligation;
- c) Exclusion from certain liabilities for the delay or non-performance of the contractual obligations;
- d) Waiver of interest and/or liquidated damages; and/or
- e) Termination of the contract if such event continues for a time as specified under the contract.



### 3. WHAT IF THERE IS AN ABSENCE OF AN EXPRESS AND UNAMBIGUOUS FORCE MAJEURE CLAUSE IN THE CONTRACT?

In the event your contract does not include any express *force majeure* clause or if the *force majeure* clause is not well drafted, a party could possibly discharge its contractual obligations by relying on the doctrine of “frustration”.

Essentially, frustration is said to occur when a contract, after its formation, becomes impossible to perform, without default of either party, the doctrine is often called subsequent or supervening impossibility and its effect is that the parties are released from their contractual obligations (Section 57 of the Contracts Act 1950).

Much like in the *force majeure* context, the performance of the contract must become **impossible**. At the outset, a contract may be frustrated by the COVID-19 pandemic where it becomes impossible to perform as the party’s contractual obligations become radically different from what was envisaged.

If frustration applies, the contract would be deemed to be void and the parties would be discharged from further performance of its obligations under the contract.

# PRACTICAL SUGGESTIONS FOR AFFECTED BUSINESSES

AFFECTED BUSINESSES ARE ADVISED TO CONSIDER THE FOLLOWING :-

## A) PERFORMANCE OF SERVICES OR SALE/SUPPLY OF GOODS

a) Review your contract and identify the *force majeure* clause

b) Consider whether there is any other contractual provisions which you may rely upon

c) Check whether there is any timeline to invoke the *force majeure* clauses

d) Consider the steps to minimize the damages and/or mitigate the impact of COVID-19 on performance of the contract

e) Communicate with the other parties regarding the difficulties in fulfilling the contractual obligations and also, to discuss with the other party the possible solutions to resolve the issues

e) To re-negotiate the terms with the other parties on a good will basis premised on '*force majeure event*' or '*event beyond your reasonable control*'

**P/S: To also consider the remedies/reliefs raised in Q&A No. 2 above in your negotiation with the other parties**

## B) RENT RELIEF FROM LANDLORDS

Even when business stops, the rent for the business premises still go on. Businesses should also discuss and request for rent relief from their respective landlords such as:-

Rent Reduction

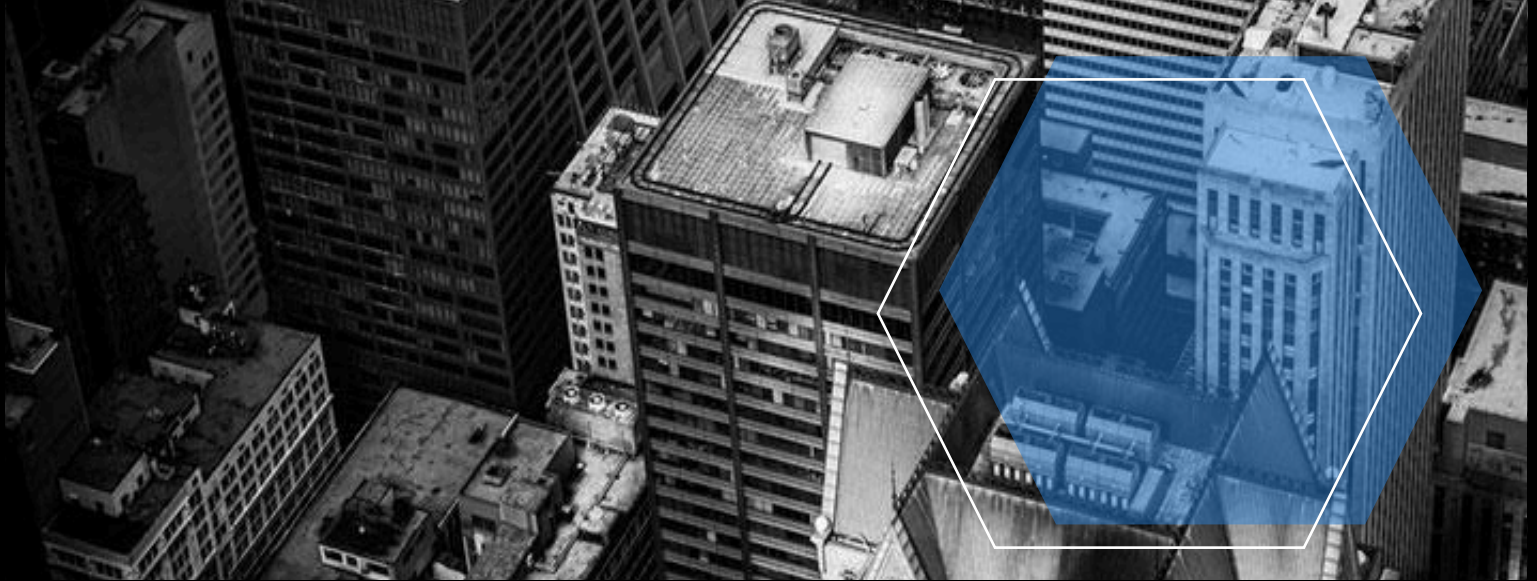
Rent Deferral

Suspension of rental

Assurance from the landlord not to terminate the tenancy agreement due to payment default

Waiver of late payment interest and/or forfeiture of deposits

**NOTE:** This article does not constitute legal advice on any of the issues addressed above. It merely sets out views on common issues faced by businesses by reason of the recent implementation of the MCO. Please however feel free to contact us should you have any queries or require any clarification.



## About this Author



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Lynn practices arbitration/litigation, focusing primarily in the areas of Infrastructure, Construction & Energy law. As a complement to her litigation background, her portfolio also includes front end (non-contentious) construction works, which involve drafting and vetting the consultancy, building and other construction related contracts such as pre-bid agreements, concessions agreements, joint venture agreements, power purchase agreements, EPC contracts, etc.

Lynn is also one of the main liaison partners for HLP's China Desk. She has represented large Chinese corporations in building and power plant projects in Malaysia.

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