Can Employers Invoke *Force Majeure* in Employment Contracts During the MCO?

by Shariffullah Majeed and Arissa Ahrom

As countries worldwide wage war against the COVID-19 pandemic, many, including Malaysia, have had to implement measures such as a Movement Control Order (**MCO**) in an effort to contain the outbreak. The MCO in Malaysia has also negatively impacted many companies, causing employers to consider whether they can opt out of paying salaries or even if they can retrench staff during the MCO period[1] as they struggle to stay afloat. Essentially, the question is whether the MCO falls under any *force majeure* clause in an employment contract which would effectively suspend contractual obligations or terminate an employment relationship.

What is a *force majeure* clause?

Force majeure can be defined as "unforeseeable circumstances that prevent someone from fulfilling a contract". *Force majeure* clauses are most commonly found in well-drafted commercial contracts as an agreed term between the parties to the contract to deal with situations over which the parties have little or no control and that might impede or obstruct performance of the contract.[2] As the scope of *force majeure* provisions is dependent upon the exact wording of the clause, it is imperative that the *force majeure* clause explicitly provides for *force majeure* events and the consequences of such events.

However, parties cannot invoke the doctrine of *force majeure* when no such clause is provided under a contract. They may instead seek to rely on the doctrine of frustration.[3] This would be the case for most employment contracts in Malaysia, as a *force majeure* provision is rarely included in such contracts. For example, the Industrial Court held that a contract of employment was terminated by operation of law (i.e. the doctrine of frustration) as the supervening event. This was due to the employee's medical condition (with all its concomitant consequences upon him that was not reasonably foreseeable) had rendered the due performance of his employment contract unattainable, and neither party could be blamed for it.[4]

When does a *force majeure* provision come into effect?

The term "*force majeure*" is not intended for parties to renege on a contract, but rather to protect them from matters beyond their control that affect their ability to perform their part of the bargain.[5] The general provision or understanding of any *force majeure* clause would include events such as war, strikes, lockouts, breakdowns and any other circumstances beyond the control of the parties. Thus, if a *force majeure* clause is provided under the employment contract, the next question to consider is whether this unprecedented COVID-19 pandemic and the MCO would be sufficient to invoke the *force majeure* clause.

1 Beginning 18-31 March 2020, then extended from 1-14 April 2020, 15-28 April 2020, 29 April 2020-12 May 2020, 13 May 2020-9 June 2020, 10 June 2020-31 August 2020, 1 September-31 December 2020
2 *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 3 SLR 62
3 Contracts Act 1950 [*Act 136*], s 57
4 *Ramanazan a/l Kathmuthu v Southern Latex Products Sdn Bhd* [2016] ILJU 54.
5 *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] MLJU 91; [2007] 1 LNS 54

Employers would therefore have to assess whether the language and scope of the *force majeure* clause cover any aspect of a global pandemic such as COVID-19. The premise of a *force majeure* clause is where a situation arises that goes beyond the control of the parties involved. Therefore, in determining whether the scope of a *force majeure* provision covers the COVID-19 pandemic and the MCO, courts may consider not only the national but also global action of closing down cities, which is certainly different from other pandemics in modern times (i.e. SARS and MERS). Notably, in the UK case of *Lebeaupin v R Crispin & Co*,[6] it was previously held that epidemics fall under the scope of *force majeure* as follows:

> "… Thus war, inundations and epidemics are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of *force majeure*."

Application of *force majeure* provisions under employment contracts

Given the rarity of *force majeure* provisions in employment contracts in Malaysia, this jurisdiction lacks reported judgments on its application by the Industrial Court. Nonetheless, parties would be bound by their intentions, which must be found within the four walls of the employment contract.[7]

In the event that the employment contract clearly contemplates a pandemic such as COVID-19, the court would also need to consider whether the employer, in seeking to rely on the *force majeure* provision, has complied with the obligations provided under the employment contract when invoking a *force majeure* clause. For example, a notice provision as a pre-condition of invoking a *force majeure* clause may be included in the employment contract or a collective agreement, which obligates employers to provide a notice within a certain time limit to the employees or union before relying on the *force majeure* clause.

Employers should also evaluate whether the COVID-19 pandemic and the MCO excuse the employer's obligations completely or merely suspend its obligations during the MCO period. For instance, if an employment offer has been made to a potential employee wherein the contractual commencement date of employment falls within the MCO period, the employer should consider whether the *force majeure* clause provides for termination of the employment contract or merely defers the commencement date until the business can resume operations.

Notwithstanding the above, the application of a *force majeure* clause in Malaysian employment contracts must be assessed on a case-by-case basis while considering the oft-quoted principle of security of tenure.

6 [1920] 2 KB 714
7 *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal* [2018] 3 MLJ 326

Impact of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 on employment relationships

While Part II (Section 5 to 10) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020[8] provides a form of relief to parties that are unable to perform contractual obligations due to measures undertaken pursuant to the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the categories of contracts covered are limited and do not include employment contracts.[9] Therefore, contractual obligations under employment contracts are unaffected by the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 and would still need to be fulfilled by both employers and employees.

Should employment contracts henceforth include *force majeure* provisions?

One of the lessons employers may take from the COVID-19 pandemic and the MCO into future employment contracts is the incorporation of *force majeure* clauses, which ideally provide for the parties' respective rights, obligations and reliefs upon the occurrence of a *force majeure* event. However, such clauses should not be merely incorporated as a boilerplate without fully considering the consequences. In light of the fact that the doctrine of *force majeure* is not implied as a matter of law, employers should consider seeking appropriate legal advice in incorporating such clauses in future employment contracts.

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8 Temporary Measure for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020
9 Schedule, Temporary Measure for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020