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Assessment of Contractual Damages in the Time of COVID-19

While the commercial challenges of COVID-19 have thrust questions of *force majeure* and frustration into the limelight, the important question of what COVID-19 means for contracts terminated before the pandemic has received little attention. In the coming weeks and months, a pertinent legal issue when evaluating contractual damages is whether COVID-19, as a post-termination event, can be taken into consideration to eradicate or reduce the value of contractual damages.

The overarching question here is, what happens if the defaulting party can **clearly** prove that, in light of COVID-19:

(i) the contract would have been discharged due to *force majeure* or frustration after the breach; or

(ii) the contract would have been terminated after the breach as a consequence of COVID-19.

Following the decisions *The Golden Victory*[1] and *Bunge v Nidera*,[2] it is now clear that post-termination events can be considered when evaluating damages for both long-term and one-off contracts.

The principles set out in these two cases are as follows:

(i) if, at the date of breach, there is a real possibility that an event would terminate the contract or otherwise reduce contractual benefits, the quantum of damages must be reduced proportionately to reflect the estimated likelihood of that possibility materialising;

1 *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353
2 *Bunge SA v Nidera BV* [2015] UKSC 43

(ii) however, where such an event had already happened by the time damages were assessed, courts should have regard to what had actually occurred so that the estimation was no longer necessary.

The profound implication of the decisions in *The Golden Victory* and *Bunge v Nidera* is that where a long-term contract was breached before a supervening event transpired (i.e. COVID-19), and thereafter the occurrence of the supervening event would certainly have rendered the performance of the contract impossible, the damages during the period of supervening event shall be excluded.

Evidently, the outbreak of COVID-19 could have far-reaching effects on future claims for contractual damages. With the implementation of the Movement Control Order in Malaysia, many businesses are or have been forced to cease operations and may subsequently face difficulties in carrying out their contractual obligations. In this regard, parties in breach of contract prior to COVID-19 may seek to rely on the pandemic to eradicate or reduce the amount of damages payable by asserting that the contract could not have been performed anyway.

It bears mentioning that to date, there are no reported case laws in Malaysia on the issue of whether post-termination events can be considered when assessing damages. However, given (i) the judicial attitude of Malaysian judges in upholding the compensation principle; and (ii) that most common law jurisdictions (i.e. Singapore) have expressly recognised the abovementioned principles, it is likely that Malaysian courts would adopt a similar approach towards assessing contractual damages.

The full article may be viewed here.

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