

Client Alert

February 2020

For further information, please contact:

Kherk Ying Chew
Partner
+603 2298 7933
kherkying.chew@wongpartners.com

Brian Chia
Partner
+603 2298 7999
brian.chia@wongpartners.com

Stephanie Phua
Partner
+603 2298 7895
stephanie.phua@wongpartners.com

Eddie Chuah
Partner
+603 2298 7939
eddie.chuah@wongpartners.com

Chong Ker Ling
Associate
+603 2299 6503
kerling.chong@wongpartners.com

Impact on Contracts in the Wake of the Coronavirus Outbreak

The outbreak of the coronavirus (COVID-19) has been declared a global health emergency and has sparked serious concerns worldwide. For businesses, this epidemic has caused various levels of disruption across all major industries, including travel, retail, manufacturing and technology.

In this time of uncertainty, many local and multinational businesses are facing growing concerns with the performance of their contracts affected in varying degrees by the coronavirus outbreak. In particular, certain contracts are now "commercially impossible" to perform. This Alert serves to provide a general guidance on the Malaysia laws with respect to two common questions asked by businesses:

1. What happens to a contract when its performance is affected by the coronavirus outbreak?
2. What are the parties' respective rights, obligations and remedies against each other when a contract has been frustrated by the coronavirus outbreak?

When performance of contract is affected by the coronavirus outbreak

In the wake of the coronavirus, certain matters may result in the impossibility for parties to continue their performance further, such as:

- government directions / regulations / laws which impose prohibitions on certain events;
- non-occurrence or cancellation of an activity or event which forms the basis of the contract;
- inordinate delay which renders the delayed performance commercially or fundamentally different from that contemplated in the contract.

When a change of circumstances occurs after the parties have entered into a contract and renders the contract legally or physically impossible to perform, the contract is said to be "frustrated". The change of circumstances is referred to as a "frustrating event". A party relying on frustration will have to establish the frustrating event. Potential defences may include the argument that the event was caused by the default of one party or that the event was reasonably foreseeable. "Commercial impossibility" does not however amount to frustration.

Force Majeure

In most well-drafted commercial contracts, there will be a clause commonly termed as "force majeure" to deal with the contractual parties' respective rights,



obligations and reliefs if a frustrating event occurs. The contractual stipulations providing for the contingencies (including some of the events set out above) will generally take effect provided that there is no ambiguity in the terms.

Rights, obligations and remedies of contractual parties

In the event a force majeure clause is invoked, the common type of reliefs that avail will include:

- suspension of contractual obligations;
- exclusion from certain liabilities for non-performance or delay;
- termination of the contract.

It is common for parties to bear their own costs arising from any losses arising from such a force majeure event.

Absence of an express and unambiguous force majeure clause, and if frustration applies, a frustrated contract will be deemed void upon the occurrence of a frustrating event. Parties will be discharged from further performance of the contract. The Court then has a wide discretion to allocate the parties' rights and liabilities, including restitution of monies paid or payable, claim for expenses incurred and compensation for benefits rendered to the other party prior to the frustration of the contract.

What you should do right now

Businesses are advised to among others, consider the following steps:

- review your contract to identify the force majeure clause and consider whether you can rely on it or any other contractual provisions;
- check whether there are any limitations or timelines to invoke the force majeure clause;
- consider whether there are mitigating circumstance provided in the contract;
- if new contracts are being entered into, provisions covering the eventualities should be strategically drafted;
- consider negotiating a "win-win" situation as opposed to ending the relationship.

There is no one-size-fit-all solution as the legal consequence of the coronavirus outbreak on any contractual relationship will vary depending on the nature of the contract, the type of obligations, the circumstances in which the obligations are to be performed and the foreseeability of the change in circumstances.

Affected businesses should therefore carefully consider the terms of their contracts and the applicable laws in formulating their responses to safeguard their interests in the wake of the coronavirus outbreak.

www.wongpartners.com

Wong & Partners
Level 21
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur

