

## **Force Majeure: What Is It and Critical Questions to Ask When Invoking and Defending Against It in Malaysia**

## **CLIENT ALERT**

*April 2026*

Recent global events, from Covid-19 lockdowns to the closure of the Straits of Hormuz, have demonstrated how contractual performance can become more difficult, hindered or altogether prevented. Some recurring legal questions in such circumstances are whether parties can be excused from performing a contract, whether the contract can be terminated, or at the very least whether performance may be delayed or suspended. In such circumstances, parties may look to the force majeure clause as a potential basis for relief.

What exactly is force majeure? When can you invoke it as a defence to non-performance? How can you defend yourself if a counter-party alleges there is a force majeure event? This article briefly discusses the answers to these questions.

Force majeure clauses are essentially contractual provisions through which parties allocate risk if an unexpected event occurs. In Malaysia, force majeure is not a statutory concept and courts will not imply a force majeure clause into a contract. Therefore, parties must expressly negotiate and define the scope, inclusions and exclusions of any force majeure clause.

When considering whether to invoke force majeure or when responding to such a claim, the following questions are instructive:

### **1. What is the governing law?**

The effect of the force majeure clause and what must be done by parties may differ depending on the governing law. Consequently, ascertaining what is the governing law is the essential first step.

### **2. What events are covered by the force majeure clause?**

The wording of the force majeure clause must be examined to determine whether the alleged force majeure event, directly or indirectly, falls under the clause. The clause may contain a broad or “catch-all” force majeure event (such as ‘events beyond a party’s control’). Ascertaining whether the clause is applicable will depend on the wording of the clause itself and the particular facts and circumstances surrounding the non-performance.

### **3. What are the ingredients to show that an event falls under the force majeure clause and are the ingredients fulfilled?**

Does the force majeure clause require the event stopping the performance to be insurmountable or is it sufficient that performance is merely hindered or delayed? The applicable standard must be identified and assessed against the circumstances.

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**4. What is(are) the implication(s) of the event?**

It is not necessarily the case that the force majeure clause excuses performance of the contract entirely. The clause may instead provide for an extension of time for performance, suspension of obligations under the contract or even the right for either party to terminate the contract.

**5. What are the other pre-requisites to relying on the force majeure clause?**

Force majeure clauses may impose procedural obligations, such as the requirement to give notice or respond to a force majeure notice within a specific timeframe, provide supporting details or evidence of the event and a duty to take other steps (such as mitigation).

**6. Do you have the relevant evidence?**

Aside from direct evidence of the disruption and its effects, all contemporaneous communications would be useful evidence to support or respond to a declaration of force majeure.

**7. What are the other options if force majeure clause is not applicable?**

If the force majeure clause does not apply, you should consider whether other statutory provisions, doctrines or contractual provisions may assist. For example, is frustration which would void a contract under section 57(2) Contracts Act 1950 an option? Or are there any other clauses that allows you to, for example, suspend performance or redistribute duties, risks and/or losses.

**8. What changes need to be made moving forward?**

If the existing clauses in your contracts (including but not limited to the force majeure clause) are inadequate to protect your rights, given the increasingly regular global uncertainties, you may wish to amend your template contract. As for existing contracts, it may be worth exploring amendments to better allocate risk between the parties. If potential issues are anticipated to arise, it would be prudent to negotiate with the counter-party to vary performance or, if it is to the benefit of both parties, even extinguish the contract, as measures to avoid the matter ending up in Court.

In conclusion, force majeure clauses are not a panacea. Whether you are seeking to rely on such a clause or to resist against its invocation, the outcome will invariably depend on various factors including but not limited to the precise wording of the clause, the governing law of the contract, the specific circumstances giving rise to the claim, the evidence available in respect of the event and whether other conditions and pre-requisites are fulfilled.

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