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When Force Majeure Isn't Enough: Lessons From Malaysian Courts And Insolvency Risks

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In the current volatile global climate defined by shifting geopolitical alliances, energy price shocks, and the lingering after-effects of the pandemic, the force majeure clause (FM) has transitioned from a sleepy boilerplate provision to the primary battleground of commercial litigation. For many businesses in Malaysia, there remains a pervasive, yet dangerous, assumption that an unforeseen event of sufficient magnitude automatically absolves a party of its contractual duties. However, an analysis of Malaysian jurisprudence reveals a far more stringent reality: our courts treat the sanctity of contract as paramount, interpreting FM clauses with a rigour that often leaves the unprepared party exposed to catastrophic liability.

When these contractual shields fail, the consequences are rarely confined to a simple breach of contract; they frequently trigger a descent into financial distress and, ultimately, insolvency.

Force Majeure As A Creature Of Agreement

At the very outset, there is no statutory definition or "common law right" to force majeure. It is entirely a creature of contract. As observed by our Court of Appeal in *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and Another Appeal* [2018] 3 MLJ 326, the intention of the parties must be found strictly within the "four corners" of the contract. If a contract is silent on FM, the Court will not imply such provision; the parties will instead be confined to rely relying on the much narrower and more limited doctrine of frustration under Section 57(2) of the Contracts Act 1950.

The distinction is critical. While a well-drafted FM clause can provide flexibility such as extensions of time or temporary suspension, the doctrine of frustration is far more drastic in nature, resulting in the immediate and automatic termination of the contract, This may not always aligned with the parties' commercial objectives. Furthermore, the Malaysian courts have consistently held that the doctrine of frustration must be applied narrowly, as commercial bargains should not be lightly brushed aside merely because circumstances have changed.

Why Force Majeure Arguments Frequently Fail

Malaysian courts adopt a narrow construction of these provisions. The High Court in *Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd* [2005] 1 MLJ 311, held that the burden of proof rests entirely on the party invoking the clause. To succeed, a party must prove:

(a) the occurrence of an event specifically defined in the clause;

(b) that non-performance was due to circumstances beyond their control; and

(c) that there were no reasonable steps they could have taken to avoid or mitigate the event or its consequences.

The failure to invoke FM may stem from several factors, which includes the following:

The Pitfall Of Self-Induced Frustration:

One of the most frequent reasons for the failure of an FM or frustration plea is that the event was "self-induced". A party cannot rely on a supervening event if it was caused by their own act, decision, or negligence. In *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and Another Appeal* [2018] 3 MLJ 326, a vendor failed to obtain the necessary Director of Land and Survey consent for a property transfer. The Court found that the vendor had submitted a flawed application to the wrong party and subsequently refused to appeal or re-submit a proper application despite the buyer's willingness to wait. The court held this was self-induced frustration; the vendor had essentially manufactured their own impossibility of performance.

(a) The "But For" Causation Hurdle:

A sophisticated development in causation comes from the persuasive UK Court of Appeal decision in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] ECWA Civ 1102, which involved a Malaysian charterer. The

Court held that a party seeking to rely on an FM "exceptions" clause must show that they *would have* performed their obligations "but for" the FM event. In this case, a dam burst in Brazil made shipments impossible. However, The Court found that even if the dam had not burst, the charterer would not have performed anyway due to a collapse in demand. Because the FM event was not the actual cause of the non-performance, the charterer was held liable for substantial damages exceeding US$19 million.

(b) Economic Hardship vs. Radical Alteration:

A common misconception is that a "depressed economy" or "financial difficulty" qualifies as FM. This position is aptly mentioned in *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn* Bhd [2007] MLJU 91, The High Court clarified that conditions of business climate do not generally constitute FM unless the contract explicitly says so. If performance merely becomes more expensive or less profitable, the party remains bound therefore. In another response to an attempt by party to rely on economic hardship, The High Court in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2023] 5 MLJ 422 held that a party's lack of money to pay a debt is not an "impossibility" that triggers frustration.

(c) The Last Bastion: Corporate Rescue Mechanisms (CRM)

Fortunately, the Companies Act 2016 (CA 2016) (and the subsequent amendments) introduced corporate rescue mechanisms, providing distressed companies with viable alternatives to liquidation.

When force majeure relief is unavailable and financial pressures intensify, companies must look beyond the contract and towards the rehabilitative provisions of the CA 2016. These mechanisms offer the necessary breathing space to stabilise operations, restructure obligations, and avoid litigation through one of the following corporate rescue options:

(a) Corporate Voluntary Arrangement (CVA):

CVA is a management-driven, quick restructuring process with minimal court involvement. It triggers an automatic moratorium of up to 60 days, during which no legal proceedings (including winding-up petitions) can continue against the company. However, it is generally ineligible for companies with charges over their property, which limits its use for many bank-financed firms.

(b) Judicial Management (JM):

JM allows a company or its creditors to appoint an independent Judicial Manager to oversee a 180-day moratorium to prepare a restructuring plan. A critical lesson from the recent case of *Desa Tiasa Sdn Bhd v CME Group Bhd & Anor* [2026] 1 MLJ 431 is that unsecured creditors have no right to intervene or appear at the hearing of an application for a JM order. The Court of Appeal clarified that Rule 13 of the Companies (Corporate Rescue Mechanism) Rules 2018 limits the right to oppose specifically to secured creditors and those entitled to appoint receivers. This gives distressed companies a significant strategic advantage in securing a moratorium without being blocked by unsecured judgment creditors.

(c) Scheme of Arrangement:

Under Section 366 of the CA 2016, this is a court-sanctioned restructuring that requires approval from a 75% majority of creditors. Unlike CVA or JM, there is no automatic moratorium; a restraining order must be specifically applied for, and the requirements are notoriously burdensome.

Conclusion

The lessons from the Malaysian courts are clear: force majeure is a precision instrument, not a blunt shield. Reliance on generic or poorly defined clauses is often a recipe for litigation failure and, ultimately, financial distress. For modern businesses, protection lies in two key areas:

(a) Strategic Drafting:

Parties should ensure that FM clauses are carefully calibrated to address contemporary risks, including "government interventions," "sanctions," "blockade" "commodity shortages" or perhaps, "regional geological instability"; and

(b) Proactive Insolvency Management:

Businesses must recognise when a contractual dispute has evolved into a liquidity crisis and take timely steps to address the underlying financial pressures.

When the "four corners" of a contract offer no protection, the Corporate Rescue Mechanisms of the Companies Act 2016 may offer a final, structured pathway to survival - provided they are invoked before the company's viability is beyond repair.

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