Landlords and Tenants vs COVID-19

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In the wake of the disruption to daily lives caused by the COVID-19 outbreak in Singapore, restaurateurs and retailers have faced the brunt of consumers, customers and tourists avoiding crowded public places, eating out or visiting their physical shops. Losses are mounting due to the major impact of the disruption, and many businesses have called on their landlords for help in cushioning the impact of the ongoing pandemic. This article briefly explores the legal obligations between landlords and tenants in the context of the disruptions caused by COVID-19.

The Landlord's Helping Hand

On 13 February 2020, the Restaurant Association of Singapore wrote to 24 major landlords including CapitaLand, Frasers and Mapletree, requesting for rental rebates of up to 50% for the months of February, March and April, on behalf of its 450 members, operating close to 4,000 outlets. It was estimated that takings plunged by as much as 80% following the outbreak, with around 200,000 food and beverage jobs at risk.

The Singapore Retailers Association also revealed similar statistics and called on landlords to assist in relieving rent repayment pressure from their retail tenants through measures such as rent waivers, rent rebates and allowing their tenants shorter hours of operation. Across the causeway, various Malaysian retail associations have similarly appealed to landlords and owners to give rental rebates of between 30% and 50% for the next six months to assist retailers in riding out the effects of the COVID-19 outbreak.

Jewel Changi Airport was amongst the first to respond, reaching out to its tenants with a 50% rebate for rent payable for the months of February and March 2020. Major landlord CapitaLand also announced "wide-ranging" support measures for their retail tenants, comprising approximately 3,500 stores across its portfolio of shopping malls, which include a S$10 million marketing assistance programme and the flexibility to operate shorter hours. These moves follow Hong Kong's biggest landlords such as Sun Hung Kai Properties, Lan Kwai Fong Group, and New World Development – all of whom have offered similar rental concessions to their tenants.

As other tenants continue to hold the line, a key question has come to the forefront: in the face of a public health emergency, what is the legal obligation on the landlord to answer their tenants' call for help?

Rights under the tenancy agreement amid a public health emergency

As a starting point, the legal obligations and rights of the parties between landlord and tenant are set out in the tenancy agreement between parties.

In general, unless the tenancy agreement provides otherwise, there is prima facie no duty on the landlord to offer any concessions, such as rental rebates or waivers in the event of a pandemic outbreak, and the tenant continues to be bound by its obligations to promptly pay rent under the tenancy agreement.

Most commercial tenancy forms do not provide upfront concessions on the tenant, nor do they set out the obligations of a landlord in situations like a disease outbreak or identify the party to bear the costs of compliance with any governmental regulations.

If the landlord is not obliged to help, what then are the avenues available to an affected tenant in the event of a pandemic?

Enforceability of force majeure provisions

Most tenancy agreements contain a force majeure provision, addressing circumstances where unexpected external events prevent a contract party from discharging their duties. In such circumstances, the affected party may be entitled to relief, including a suspension of contractual

obligations; exclusion from certain liabilities for non-performance or delay; and even termination of the contract in limited situations.

There is no universally accepted definition of "force majeure" and it is for the parties to agree on the scope and definition of events that would constitute force majeure under the relevant contract. Examples of such events could include terrorist attacks, war, natural disasters, strikes and also epidemics.

A tenant relying on a force majeure clause would usually have to prove the following:

(i) that a specific event referred to in the clause has occurred and that said tenant was prevented from or delayed in performing its obligations under the contract as a result of the event;

(ii) such non-performance was due to unforeseen and external circumstances beyond the tenant's control; and

(iii) there were no reasonable steps that the tenant could have taken to avoid or mitigate the event or its effects.

The effect of exercising a force majeure clause in the context of tenancy agreements may include a suspension of rent or part thereof, or of the right to terminate the tenancy agreement in extreme events.

However, the existence of the clause does not automatically entitle a party to invoke relief in all situations as of right. Force majeure clauses are usually narrowly drafted to include specified events. Whether or not an event such as the current COVID-19 pandemic amounts to a force majeure event is a matter for interpretation that requires specific legal advice, and will be heavily dependent on the facts of each individual case and the drafting of its force majeure clause.

Force majeure clauses also require the party seeking relief to prove that a prescribed event could not have reasonably been mitigated by preventive action on its part. This means that force majeure may only be invoked when the event referred to has prevented or delayed performance of the contract and not simply because that event exists; caused economic hardship; or made performance of the contract inconvenient or commercially unfeasible.

Contractually, a procedure would usually be set out as to how the clause may be invoked (e.g. written notice to be provided by the affected party to the other). This must be properly followed as recent case law suggests that the failure to do so can impact subsequent legal claims.

Frustration of purpose

In the absence of a force majeure clause, another question to ask is then whether the external event was reasonably foreseeable. If the external event was not reasonably foreseeable, then the next question is whether it fundamentally changes the contractual obligation to become radically different from what was agreed in the contract. In such an event, the doctrine of frustration would apply, and the contract is said to be frustrated and is automatically brought to an end.

In the present circumstances of the pandemic, it may be possible for tenants to seek to rely on the doctrine of frustration if it can be demonstrated that the outbreak of COVID-19 frustrates the purpose of the contract. If successful, the tenancy agreement can be set aside in its entirety since the contractual obligations have been rendered impossible to perform and/or its underlying purpose is radically different.

However, it must be noted that this is a matter to be determined by the courts, which will look at the specific set of facts of each case. In addition to the costs involved in commencing or defending legal proceedings, the threshold to prove frustration is usually very high. Similar to force majeure, the fact that a contract that merely has become more difficult or expensive to perform is usually insufficient to give rise to frustration.

To cite a parallel example in Hong Kong, during the 2003 SARS epidemic, in the case of Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754, the applicant tenant argued that the tenancy agreement was frustrated due to an isolation order, by the authorities against the premises, making it uninhabitable for 10 days. However, considering the circumstances, the courts held that 10 days out of a 24-month lease (which the tenant was 13 months into) was an insignificant duration. The courts also expressed the view that even though the outbreak of SARS could arguably be considered an unforeseeable event, such event did not go as far as to radically alter the fundamental rights and obligations arising from the tenancy agreement.

A collaborative approach

As can be seen, there may be limited contractual recourse for the tenant to seek concessions under their leases. Quite apart from relying on the parties' respective legal positions in contract or at law, however, we have seen a willingness of landlords and tenants to adopt a collaborative approach when handling unforeseen crises, which is heartening to say the least.

Looking beyond the confines of legal contracts and keeping in mind the commercial realities and practical issues, parties may wish to consider the following during these trying times:

(i) Communication – the starting point should always be an open dialogue for negotiation, whether for rent reductions, downsizing the rented premises or a partial surrender of the lease. The landlord loses out if the tenant's business fails, and the landlord has to enforce the lease terms against a tenant that cannot pay the compensation. Effective communication allows the parties to find a win-win outcome.

(ii) Replacement tenants – subject to the provisions of the contract and the landlord's consent, allowing the tenant the flexibility to sublet or assign its rights under the tenancy agreement may enable the tenant to right-size its operation, consolidate its business or assign the whole of its interest to another willing company. Similarly, finding a replacement tenant can help mitigate losses, save costs and agent fees and promote business continuity for both landlord and tenant.

(iii) Grace period – landlords can consider making concessions (as they seem to have presently) and exercise leniency with their tenants, giving

them breathing space to perform their obligations along a workable timeline during the period of difficulty. This recognises the reality that the enforcement and termination of a tenancy in a down market is a lose-lose situation for both landlord and tenant. This is especially so as it comes at the risk of losing a tenant that had hitherto been compliant throughout the term of the lease and replacing it with an unfamiliar party.

In conclusion, in a global pandemic such as the current COVID-19 outbreak, there is limited contractual recourse on the tenant to seeking concessions under their leases to enable their businesses to survive.

That said, all parties are stakeholders in the business ecosystem they share and it is prudent for both the landlord and the tenant to work together to get through these trying times, as the cost and uncertainty associated with terminating a tenancy and procuring a new tenant may be higher. It is thus heartening to note that the commercial landlords in Singapore recognise this business reality, and the fact that both landlord and tenant are aligned in the fight against COVID-19.

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LEGAL UPDATE

COMMERCIAL LITIGATION UPDATE

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COVID-19 – FRUSTRATION, FORCE MAJEURE OR SIMPLY FRUSTRATING?

COVID-19 – A GLOBAL PANDEMIC

The COVID-19 virus that has caused governments to quarantine entire cities and close international borders has been declared a public health emergency by the World Health Organisation. As the number of COVID-19 cases continues to rise globally, repercussions in the commercial sector have been felt from the rising caution exercised by governments and the public at large. For example, the outbreak of COVID-19 has affected deliveries of goods through online shopping platforms, where China-based suppliers have had to cancel orders and businesses with factories in affected areas in China have been affected. Tourism has also taken a hit, with people being less willing to travel, forcing airlines to cut flights to certain countries.

In the wake of these problems, businesses are looking to their contracts and agreements to find ways to escape liability for non-performance. One question which businesses continue to be concerned with is this – is COVID-19 a 'force majeure' event, a frustrating event, or simply frustrating?

In this update, we provide some insight into the issue.

FRUSTRATION VS FORCE MAJEURE

In Singapore, the term 'force majeure' is commonly understood as referring to a specific type of clause which excuses a party from performance in the event of specified categories of neutral events, and its origin is primarily contractual. Strictly speaking, force majeure does not exist as a separate legal doctrine in Singapore, as it is primarily a civil law doctrine. For example, roughly translated, Article 1218 of the French Civil Code provides that force majeure occurs when contractual performance is prevented by an event beyond the control of the debtor, which could not have been reasonably foreseen at the time of contracting and whose effects cannot be avoided by appropriate measures. A temporary impairment suspends the obligation until the resulting delay justifies termination, but if permanent, the contract is automatically terminated.

The closest concept in Singapore is the doctrine of frustration. Broadly speaking, a contract will be automatically discharged upon the occurrence of a frustrating event, that is, an unforeseen event which occurs through no fault of either contracting party, rendering the contractual obligations of parties impossible to perform or radically / fundamentally different from what had been agreed in the contract. Mere hardship or extra cost in contractual performance is insufficient to make an event a frustrating event. Practically speaking, frustration is, as a general rule, more difficult to invoke – mere difficulty in performance is not an excuse as it must be impossible to perform or where performance in such circumstances would be radically different.

In substance, frustration and force majeure are similar in that both doctrines address events which are beyond the control of the parties and render the contractual obligations of parties impossible to perform.

The key difference is that frustration may still be relied upon even if the contract does not contain such a clause, but, at least under Singapore law, force majeure may not be relied upon unless there is a force majeure clause in the contract. In addition, frustration operates to discharge the contract in its entirety, unlike force majeure clauses which often provide for temporary relief with the option of termination in the event of prolonged force majeure.[1]

[1] The rights and obligations of parties in the event of a contract being frustrated are also governed by the Frustrated Contracts Act (Cap 115)

FORCE MAJEURE CLAUSES IN STANDARD FORM CONTRACTS

By and large, force majeure clauses in the present day context are often regarded as 'boilerplate' or standard clauses. Even though the parties have complete freedom in deciding what events will trigger the clause, what consequences or reliefs are to follow and/or whether parties are required to follow a particular procedure to invoke the clause, not much attention is ordinarily placed on such clauses when negotiating as they are typically triggered only in exceptional circumstances.

Types of force majeure events

There are certain events which appear in most (if not all) standard force majeure clauses, although standard forms for some industries may contain additional events which are more relevant to those specific industries. We consider the events from 4 different standard form contracts below.

- Fédération Internationale des Ingénieurs-Conseils ("**FIDIC**"): War, hostilities, invasion, acts of foreign enemies, rebellion, terrorism, insurrection, riot, munitions of war or natural catastrophes such as earthquakes, hurricanes, typhoons or volcanic activity.[2]

- Public Sector Standard Conditions of Contract ("**PSSCOC**"): The term "*Force majeure*" is specified as a ground for extension of time but not defined in the contract. That said, the PSSCOC forms also specify certain events which are normally considered to be force majeure events as "*excepted risks*" and/ or grounds for extensions of time. The full list of events is quite long and includes unusual grounds such as act of foreign enemies, usurped power, ionising radiations, or contamination by radioactivity from nuclear sources and pressure waves caused by supersonic aerial devices.[3]

- Grain and Feed Trade Association ("**GAFTA**"): Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or unforeseeable and unavoidable impediment to navigation.[4]

- International Chamber of Commerce ("**ICC**") Force Majeure Clause 2003: War, armed conflict, hostilities, invasion, act of a foreign enemy, civil war, acts of terrorism, sabotage, piracy, compliance with any law or governmental order, act of God, epidemic, natural disaster such as cyclone, volcanic activity, landslide, tsunami, flood, blizzard, earthquake, or explosion, fire, destruction of machines, general labour disturbances such as boycott, strike, lock-out, go-slow or occupation of premises.[5]

Consequences of force majeure event

The main consequence of triggering the force majeure clause is typically to afford relief to the parties in an even-handed manner, given that such events are ordinarily regarded as 'neutral' events independent of the parties' fault and outside their control. Faithful to the spirit of the 'force majeure' concept, the wording of the clause also typically makes it clear that the force majeure event must have prevented fulfilment of some contractual obligation which could not have been reasonably avoided or overcome.

But even within this rubric, the precise form of relief can cover entitlements to additional time and payment for performance, temporary suspension of contractual obligations and relief from inability to perform and/or even termination of the entire contract when a force majeure event has particularly severe effects.

Such relief may also be subject to the affected party providing timely notice and/or other procedures such as the convening of a committee to discuss and work out a response plan.

We once again consider the differences between the 4 standard forms above:

- FIDIC: Subject to the affected party giving timely notice of force majeure, that party may be entitled to an extension of time

[2] For example, see Clause 19 of the FIDIC Red Book 1999

[3] For example, see Clauses 14 and 25 of PSSCOC (Construction Works) – some of these grounds also appear as 'excepted risks' in the FIDIC 1999 forms

[4] See Clause 20 of GAFTA 100

[5] Paragraph 3 of the ICC Force Majeure Clause 2003

and/or additional payment. In the event that delays due to a specific force majeure event exceed a certain period of time, either party may opt to terminate the contract.[6]

- PSSCOC: Subject to the affected party giving notice within 60 days of the occurrence of the force majeure event, the contractor may be entitled to an extension of time for force majeure (without an automatic corresponding right to additional payment). In addition, where the contractor has been instructed to rectify damage to the works from an 'excepted risk', the contractor may be entitled to additional payment for work done in compliance with such instruction.[7]

- GAFTA: Subject to the affected party giving notice within 7 days of the occurrence of the force majeure event, that party may be entitled to an extension of time. Where more than 30 consecutive days of delay are caused by the event, the other party can opt to cancel the delayed portion of the contract. If the option to cancel is not exercised, the delayed portion will be automatically extended for 30 days, at the end of which the contract will be considered void if delivery is still not fulfilled.[8]

- ICC Force Majeure Clause 2003: If a force majeure event occurs and notice of failure to perform is given without delay, the contract is considered void.[9]

Historical Examples of Frustrating Events

While claims of frustration and force majeure are not common, courts have decided a number of such cases in the past that help to shed some light on what would be considered a frustrating event.

- Embargo by Indonesia on exports of sand in 2007: Singapore courts held that the ban on exports of sand from Indonesia imposed by the Indonesian government constituted a frustrating event, vindicating claims for relief by sand and concrete suppliers (for example, see *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857).

- Compulsory acquisition of land by Singapore government: A contract for sale of land was held to be frustrated when the government compulsorily acquired the land before legal ownership passed to the buyers (*Lim Kim Soon v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233).

- Inability to obtain required regulatory approvals: The failure to obtain the required regulatory approval to for a change of use of the premises was held to be a frustrating event (*Sheng Shiong Supermarket v Carilla Pte Ltd* [2011] 4 SLR 1094). That said, this type of event is likely to be the subject of a specific clause in a properly drafted contract if obtaining such approval is regarded as critical for the transaction.

- Outbreak of war: The onset of war was held to have frustrated a contract for delivery of machinery to Poland, which had been invaded by Germany at the time (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4). This also extended to the situation where wartime legislation prohibiting exports of goods to the warring country had been enacted after the contract for export of goods to that country had been entered into (*Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265).

Is COVID-19 a Frustrating Event or a Force Majeure event?

Frustrating event

Under Singapore law, whether the COVID-19 pandemic would be considered to have frustrated a given contract depends on the nature and severity of its impact on the performance of the contract. Is it impossible to fulfil the contract on the original contract terms, or is it simply more difficult / expensive to do so? The line separating the two is fine and much will depend on whether government orders and restrictions render it

[6] For example, see Clause 19 of FIDIC 1999
[7] For example, see Clauses 14 and 25.2 of PSSCOC (Construction Works)
[8] See Clause 20 of GAFTA 100
[9] Paragraph 4 of the ICC Force Majeure Clause 2003

impossible to fulfil contracts (for instance, because of labour or trade restrictions, travel bans or quarantine requirements or if specified goods have been contaminated and destroyed).

An argument might even be made that the complete destruction of the target market for goods renders performance so radically different that it is no longer the same contract – whether such an argument would succeed remains to be seen.

Force majeure

On the other hand, whether the COVID-19 pandemic triggers force majeure provisions in contracts depends on the express wording of the force majeure clause in question. Parties with contracts which specifically reference "*epidemics*" or "*pandemics*" would stand the best chance of qualifying for force majeure relief, whereas more persuasion may be required for vague terms such as "*Act of God*".

Equally important is the need to show that the outbreak has somehow affected contractual performance according to the standard set out in the relevant force majeure clause, whether it is the standard of complete 'prevention', 'delays' or increased cost.

In fact, force majeure relief as a civil law doctrine may even be available where the law governing the contract is not Singapore law. As such, conflicts of laws principles will also have a part to play, particularly where the contract in question has no choice of law clause.

Frustrated? Seek legal advice

In the circumstances, much will depend on a careful analysis of the relevant contract provisions and it is recommended that parties seeking to invoke these clauses take legal advice before taking action under the contract.

If you have any questions or comments on this article, please contact:

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