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Faculty of Law
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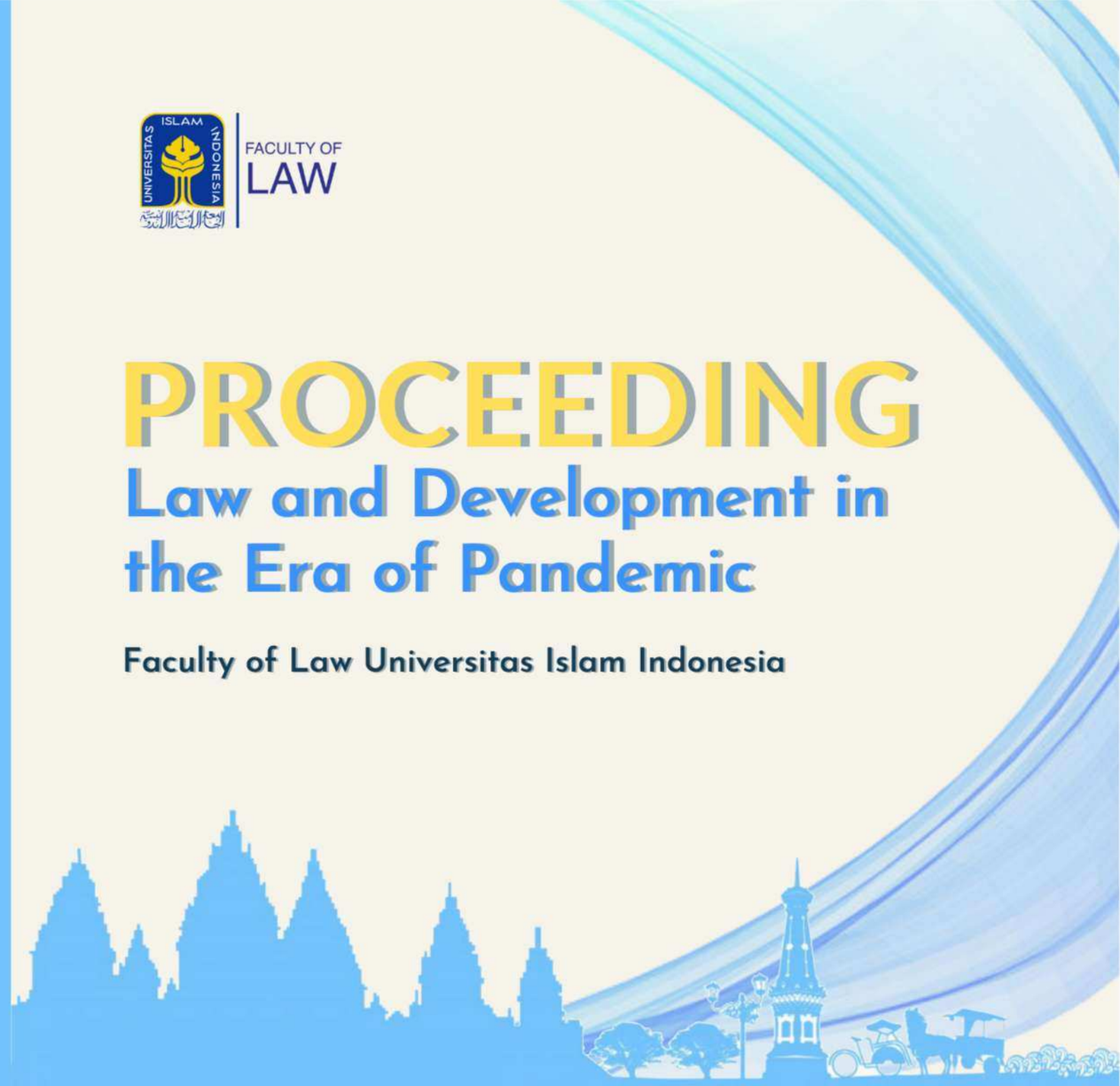
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Foreword

Assalamualaikum, wr., wb.,

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Wassalamualaikum wr. wb.

Editor in Chief,

Dodik Setiawan Nur Heriyanto, S.H., M.H., L.LM., Ph.D.

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The Legal Implications of Covid-19 in Malaysia: Selected Issues

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Abstract

The COVID-19 pandemic is making the world apparent by its devastating character. The pandemic has affected people physically and mentally; the court institutions and the business world are not an exception. The pandemic has undoubtedly impacted business operations worldwide, particularly in countries with a more critical scale of contagion. To help flatten the curve of infection, Malaysia has imposed an aggressive movement control order (MCO) nationwide, effective from March 18, 2020. This paper provides prospective readers on the impact of COVID-19 on the court institutions and contractual obligations in Malaysia. With the enforcement of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020, also known as the COVID-19 Act, relevant provision in several statutes have been modified for temporary measures to reduce the impact of Coronavirus Disease 2019 (COVID-19) in Malaysia. This paper uses doctrinal legal research to study the impact of COVID-19 pandemic in Malaysia, mainly based on library research, whereby a qualitative analysis is adopted to assess improvements of the law in Malaysia concerning court institutions and contractual obligations amid COVID-19 crisis. This paper aims to provide information on the adaptation of court institutions and the law governing contractual obligations in Malaysia amid the global pandemic. This paper also aims to provide an overview of the measures taken by the Malaysian Government in response to COVID-19. The authors would like to acknowledge the efforts and dedication of all front liners during this COVID-19 crisis. To all those who have experienced difficulties during the pandemic, always remember you are not alone..

Keywords**:** *COVID-19, Malaysia, Court Institutions, Contract, Law*

1. INTRODUCTION

The legal implications of COVID-19 pandemic can be seen through drastic changes, particularly in the court institutions. Prior to the COVID-19, Malaysia had limited legislation that incorporates any remote communication technology to conduct proceedings in court. However, due to this pandemic, the court institutions had taken a progressive step in changing the traditional method of conducting proceeding whereby the parties must go to the court and present their case. At present, the Malaysian court institutions have adopted online or virtual hearings as one of the methods to conduct court proceedings. Nevertheless, there are indeed limitations concerning the types of cases and stages of proceedings. Besides, this global pandemic had caused major disruptions towards contractual obligations due to the travel restriction and the closure of non-essential businesses. The enforcement of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (COVID-19 Act) provides temporary relief for the contracting parties concerning any inability to perform certain contractual obligations.

2. PROBLEM FORMULATION

To what extent does the COVID-19 pandemic affect the legal industries and contractual agreement between parties to a contract?

3. ANALYSIS

a. COVID-19 19

Judiciary in Malaysia is not listed as an essential service under the Schedule of the Prevention and Control of Infectious Disease (Measures Within the Infected Local Areas) Regulations 2020 (2020 Regulations). Nonetheless, the judiciary had taken a step to ensure continuous access to justice and uphold the rule of law. On 23 April 2020, Court of Appeal proceedings was conducted through an online platform and were live streamed to the public.[1]

On 17 March 2020, the Office of the Chief Registrar issued a directive stating that the documents can be filed through the application of e-Kehakiman which is an e-filing system. Also, case management for civil cases can be conducted through e-Review.[2] The effectiveness of the virtual operation of court can be seen through the statistic released by the Judiciary as of 15 April 2020.[3]

[1] Karim, Khairah N. 2020. "Court of Appeal goes virtual for the first time [NSTTV]." *New Straits Times.* April 23. Accessed November 25, 2020. https://www.nst.com.my/news/crime-courts/2020/04/586873/court-appeal-goes-virtual-first-time-nsttv.

[2] 2020. "Circular No 063/2020." *Malaysian Bar.* March 17. Accessed November 25, 2020. https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20063-2020.pdf.

[3] Tuan Mat, Tan Sri Tengku Maimun. 2020. "Courts adapting to keep running." *New Straits Times.* April 19. Accessed November 25, 2020. https://www.nst.com.my/opinion/columnists/2020/04/585550/courts-adapting-keep-running.

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Details	Number of Cases
Federal Court	
Case management by way of e-Review	376
Case management by way of email	25
Court of Appeal	
Case management by way of e-Review	1813
High Court	
Civil case management by way of e-Review	4093
Civil case management and hearing (uncontested matters) by way of email	2549
Civil Hearing by way of video conferencing	18
Certificate of urgency by way of e-Review	75
Certificate of urgency by way of video conferencing	12
Criminal case management by way of e-Review	370
Subordinate Courts	
Heard by way of e-Review	2509
Heard by way of email exchanges	27
Heard by way of video conferencing	7
Documents have been filed and processed via e-filing.	111,183

b. The Validity of Online Hearing

The validity of online hearing was discussed in the case of SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors[4] where the High Court has discretion under the Rules of Court 2012 to order the hearing to be heard by video conference. The application is heard is in the interest of justice.[5] The High Court also decided that they have a discretionary power under the Rules of Court 2012 to allow a party to use an unaffirmed affidavit provided that the party gives a Counsel's Undertaking to the court that the unaffirmed affidavit (with the same contents) will be affirmed before a Commissioner for Oaths after the MCO is lifted and the affirmed affidavit will be refiled through the court's E-Filing System.

There are few Amendments Bill 2020 made to the relevant statutes which were approved by the Dewan Rakyat to allow the court to conduct proceedings online.[6]

1) Court of Judicature Act 1964
   a) The new definition of remote communication technology in Section 3 which means a live video link, a live television link or any other electric means of communication.
   b) Introduce Section 15A which allows High Court, Court of Appeal and Federal Court to conduct proceedings through remote communication technology.
   c) Amendment to Section 69(1) which is to provide for the receiving of further evidence through remote communication technology.

[4] [2020] MLJU 400.
[5] Federal Constitution of Malaysia, Article 5(1).
[6] 2020. "Dewan Rakyat approves three Bills linked to courts." *Malay Mail.* August 27. Accessed November 25, 2020. https://www.malaymail.com/news/malaysia/2020/08/27/dewan-rakyat-approves-three-bills-linked-to-courts/1897539.

2) Subordinate Courts Act 1948
   a) The new definition of remote communication technology
   b) Introduce Section 101B to allow Sessions Court and Magistrate Court to conduct proceedings through remote communication technology.
3) Subordinate Courts Rules Act 1955
   a) The new definition of remote communication technology

c. Advantages of Online Hearing

Firstly, it will save cost and time. The court as of now already implements the e-filing, e-review and e-appellate system. This shows that the Malaysian court readiness to use the online platform to conduct the proceedings.

Secondly, uphold the new norms of social distancing. An online hearing will minimize the risk of infection. In fact, the court should maintain online hearing for matters that can be resolved through the online medium. Thirdly, it would reduce the backlog of cases as the court continue to operate and hear the case despite movement control order.[7]

d. Disadvantages of Online Hearing

Firstly, the problem for elderly people. The judge who is sitting at the court are mostly above 50 years old and most of them are not technology savvy. Similarly, to lawyers that are in the same age group which will get affected. Subsequently, this will cause difficulties to both judge and lawyers to look at the bundles of documents and it would take even longer time compared to face-to-face hearings.

Secondly, the demeanor of the witness. This is highly related to the criminal case where online hearing is detrimental to the case. The judge and lawyer cannot access the demeanor of witness during the examination.[8] Not only that, but witness coaching also can happen as it is conducted through the camera.

Thirdly, poor internet connectivity. The online hearing can be tampered with slow or poor internet network which may result in an ineffective process of online hearing. This kind of issue is beyond our control and that is why it serves as one of the drawbacks of online hearings.

e. COVID-19 and Contractual Obligations

When the World Health Organization (WHO) declared COVID-19 outbreak as a pandemic on the March 11, 2020, there was a huge disruption in the business world due to the drastic spike of cases. Several countries have implemented restrictions such as border closures, lockdown restrictions and closing of non-essential businesses; Malaysia is not an exception. On March 18th, 2020, the Malaysian government has declared the Movement Control Order (MCO) as a preventive measure.

[7] 2020. "Online court platform will make for better work efficiency, says lawyer." *Free Malaysia Today.* March 25. Accessed November 25, 2020. https://www.freemalaysiatoday.com/category/nation/2020/03/25/online-court-platform-will-make-for-better-work-efficiency-says-lawyer.

[8] 2020. "Lawyers don't want to go online to cross-examine witnesses during trial." *Malaysian Bar.* June 22. Accessed November 25, 2020. https://www.malaysianbar.org.my/article/news/bar-news/news/lawyers-don-t-want-to-go-online-to-cross-examine-witnesses-during-trial.

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It cannot be denied that the contracting parties were having a lot of difficulties in fulfilling their contractual obligations during the global pandemic. This includes the construction projects, leasing contracts and tourism contracts. The question as to whether or not a party can suspend, delay or terminate a contract has been extensively discussed during that moment. This led to a debate on the issue of force majeure and frustration.

Force Majeure clause or simply known as 'superior force' is a clause that can be found in almost every contract. A force majeure event may include an act of war, pressure waves, specific incidents of exceptional adverse weather condition, natural disaster, and any other unforeseeable circumstances beyond one's control.[9] Hence, the parties may release the obligations and liabilities under the contract if the force majeure clause is successfully invoked. In the case of Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co. Sdn Bhd,[10] the court held as follows:

> *The term force majeure is not intended to enable one party to renege upon its contract to take advantage of and profit from better deals available...The events of force majeure such as universal coal strike or accident to machinery refer to incidents that affect one or both parties as to their ability to perform.*

Meanwhile, in the case of Crest Worldwide Resources Sdn Bhd lwn Fu Sum Hou dan Satu Lagi dan Satu Lagi Guaman Sivil,[11] the court will consider the underlying purpose of the contract before the force majeure clause can be invoked. Also, the court will look at whether the parties have taken steps to mitigate the situation.

On the other hand, a contract is discharged by frustration, where, after the contract is formed, events beyond the control of both parties make it impossible to pursue the contract.[12] The Malaysian Contracts Act 1950 does not use the term 'frustration'. However, Section 57(2) of the Contracts Act has been accepted as providing for the doctrine of frustration, whereby the court relied on English cases on frustration to interpret it. Section 57 of the Contracts Act 1950 provides as follows:

1) An agreement to do an act impossible in itself is void.
2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

On 23 October 2020, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020, also known as the COVID-19 Act had come into operation.[13] This Act provides for temporary measures to reduce the

[9] Netto, Alex Anton, 2020. "Force Majeure in the Age of COVID." CLJ Law at pp. 1-3.
[10] [2007] 1 LNS 54.
[11] [2019] MLJU 512.
[12] Cheong, May Fong. 2010. *Contract Law in Malaysia.* Subang Jaya: Sweet & Maxwell Asia at p. 387.
[13] COVID-19 Act, Section 1(2).

impact of Coronavirus Disease 2019 (COVID-19) including to modify the relevant provisions in several statutes.[14]

Part II (ss 5-10) of COVID-19 Act laid down the "Inability to Perform Contractual Obligation". Section 7 of the Act stated that the contracting parties cannot exercise their rights under the contract, such as claiming for any loss, if any of the parties cannot perform their respective obligations pursuant to the contracts due to restrictions made by the Government. The section reads as follows:

> *The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.*

Meanwhile, Section 10 of the Act provides that any transactions or legal proceedings which took place between the period of the first-MCO until the gazetting of the Act should not be unravelled. The section reads as follows:

> *Notwithstanding section 7, any contract terminated, any deposit or performance bond forfeited, any damages received, any legal proceedings, arbitration or mediation commenced, any judgment or award granted and any execution carried out for the period from 18 March 2020 until the date of publication of this Act shall be deemed to have been validly terminated, forfeited, received, commenced, granted or carried out.*

4. CONCLUSION

To sum up, the amendments to the three main legislation governing courts and the introduction of COVID-19 Act is very much needed to combat the legal implications arises from this pandemic. It can be deduced that Malaysia had taken a positive step in ensuring continuous access to justice and to give appropriate relief towards contracting parties. In fact, this pandemic had taught the whole legal fraternity that legal dispute can be settled through other means without solely relying on the physical appearance before the court. Not only that, the COVID-19 Act also mentioned that where there is a dispute on the inability of the party to perform any contractual obligation, this may be settled by way of mediation.[15] Meaning to say, the parties may resort to alternative dispute resolution in settling the cases. To help resolve the disputes, the Government has opened a special mediation center in Putrajaya, which is established under the Prime Minister department.[16]

[14] COVID-19 Act, Long Title.
[15] COVID-19 Act, Section 9.
[16] Achariam, Timothy. 2020. "Govt Covid-19 mediation center opens today." *The Edge Markets.* November 11. Accessed November 25, 2020. https://www.theedgemarkets.com/article/govt-covid19-mediation-centre-opens-today.

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