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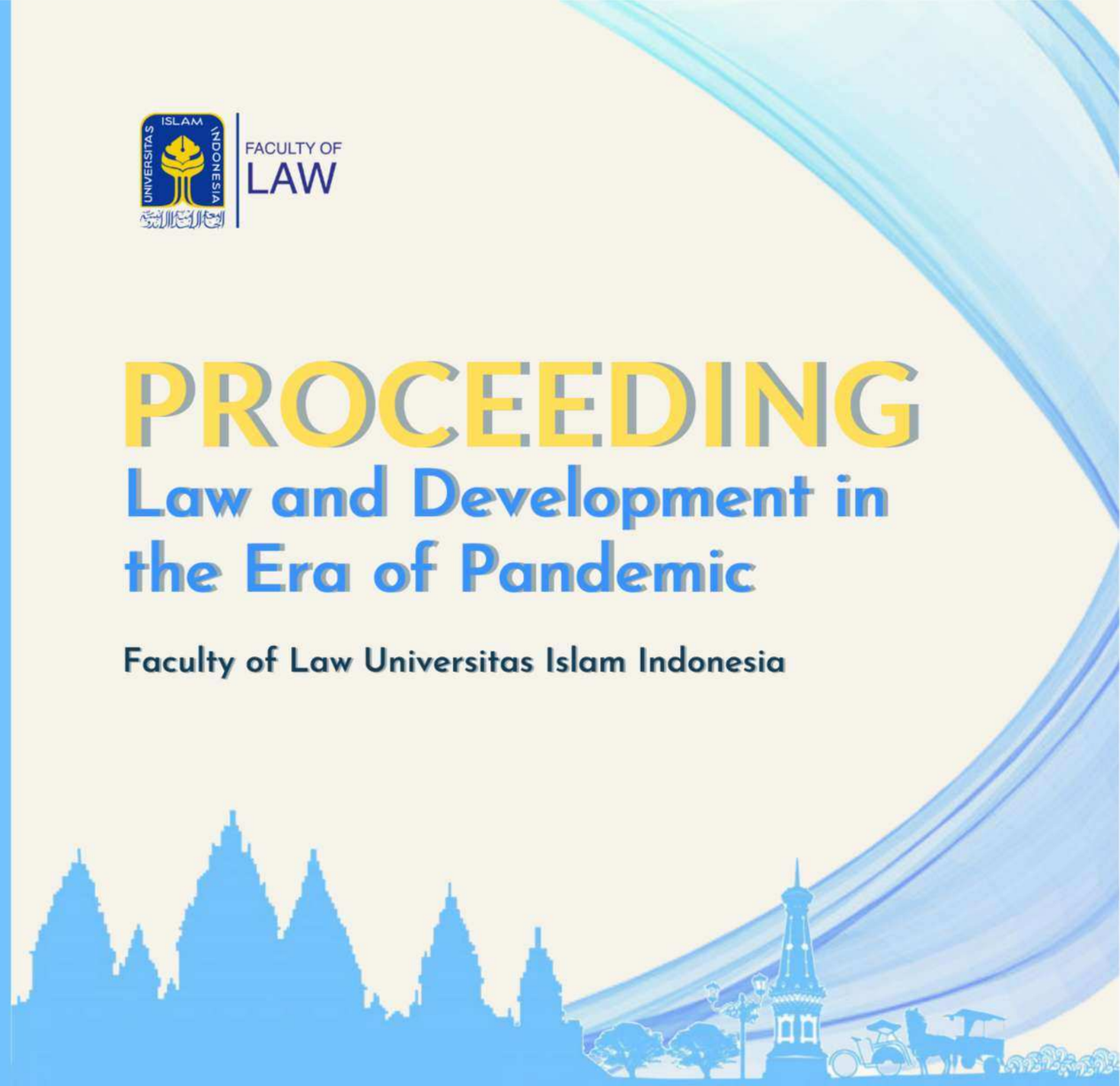

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Table of Content

Editorial Board v

Steering Committee vi

Organizing Committee vi

Table of Content vii

Foreword ix

Paper Submission of ISC 2020

1. **Impact of the Pandemic Covid-19 on International Trade Law** 1
   Dodik Setiawan Nur Heriyanto and Jihyun Park
2. **Analysis of Conventional Mortgage Regulations and Electronically Integrated Mortgage Rights (eMortgage) for Land Deed Officers (PPAT), Mortgagees, and Land Offices in Klaten Regency** 8
   Dian Shinta Amalia
3. **The Role of Notaries in Loan Restructuring Impacted by Covid-19 in Islamic Banking** 18
   Inda Siswanti
4. **Turning The Substitute Notary Into An Acting Notary Upon The Death Of The Notary Public** 29
   M. Dani Fadhlurrohman
5. **Achieving the Role of LPI (Investment Management Institution) as the State Investment Management Institution through the Job Creation Act** 38
   Amalina Dwi Septiana
6. **Covid-19, *Maqasid* Sharia & Islamic Economic Law: VOSviewer Application** 47
   Aam Slamet Rusydiana, Aisyah As-Salafiyah, Muhammad Isa Mustafa
7. **Comprehensive Efforts to Overcome Fintech Interest Rates and Compare with the Conditions of Increasing Fintech in the Pandemic Era** 59
   Aryana Sekar Widyaningsih
8. **Criminal Responsibility Towards Public Transportation Companies if Traffic Accidents Based on Law Number 22 Of 2009 Concerning Traffic and Road Transport** 68
   David
9. **Modifications to Hire Purchase Act 1967 and Housing Development (Control and Licensing) Act 1966: Protection to Purchaser and Financial Institutions Interests During Covid-19 in Malaysia** 72
   Imtiyaz Wizni Aufa binti Othman, Izyan binti Nazim
10. **The Great Reset: Legal Perspective and its Development** 84
    Jeremy Abraham Guntur
11. **Literature Review: The Development of E-Court System Technology as a Transformation of Indonesian Law in the COVID-19 Pandemic Era** 91
    M. Kenza Radhya E. A.

12. **Frustrated Contracts by Covid-19 Impacts** 99
Nik Hajar binti Nik Hisham

13. **Advantages and Disadvantages of The Implementation of E-Litigation in Indonesia During the Pandemic Era** 106
Putri Ariqah

14. **Cyber law in Indonesia and Its Relation to Indonesian Copyrights Law** 111
Rohima Putri Ridhani

15. **Pandemic Preparedness in Indonesia: The Role of Law and Regulation** 118
Safira Dewata Putri Alpatra

16. **The Legal Implications of Covid-19 in Malaysia: Selected Issues** 125
Syed Ahmed Khabir Abdul Rahman, Saiful Akmal Suhaimi

17. **Encourage the Advance of Artificial Intelligent in Replacement the Position of Civil Servant Apparatus During Pandemic to Reduce the Nepotism in Indonesia's Bureaucracy** 132
Yuwan Zaghlul Ismail

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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.

Frustrated Contracts by Covid-19 Impacts

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Abstract

This paper aims to identify the elements and rules to invoke the doctrine of frustration in contracts affected by Covid-19 Restrictions. Another objective is to determine the validity of invoking a force majeure clause as a frustrated event to discharge parties from their obligations. Next, is to examine the available remedies as based on the Contracts Act 1950 and the recently enforced Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) ACT 2020. The problem statement is whether Covid-19 Restrictions is an unforeseeable event that renders the contract to be wholly impossible to perform? The legal methodology used in this study is the Legal Doctrinal Approach derived from legal sources such as case laws and statutes and other legal sources. A non-doctrinal approach is also applied to observe the cause and effect of Covid-19 Restrictions to the performance of contracts. This study will provide the relevant rules and satisfactory conditions in invoking the doctrine of frustration to an unforeseeable event such as Covid-19 Restrictions. This study will also illustrate the possible conditions in applying Covid-19 Restrictions and other events as an unforeseeable event applicable to Force Majeure Clauses. The remedies from legislation to frustrated contracts as provided in the Contracts Act 1950 and the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) ACT 2020 will be analysed to adduce its' applicability to frustrated contracts by virtue of Covid-19 Restrictions. The International Guidelines for force majeure clauses will be examined and extracted to determine its validity to be applied in Covid-19 Restrictions.

Keywords**:** *frustration, force majeure, Covid-19 Restrictions*

1. INTRODUCTION

The recent surge in Covid-19 cases has caused the government to take preventive measures in controlling infection rates. For example, is the enforcement of lockdowns, Movement Restriction Orders and certain Standard Operating Procedures (SOPs) to be practiced by the public. These measures however, had impacted all operating industries to perform their contractual obligations. The question arises whether affected parties should still continue performing their contractual obligations despite the restrictions. If otherwise, what remedies are available for affected parties?

In events of impossibility to perform contractual obligations, the doctrine of frustration is the best method to be opted especially when it is invoked by virtue of statutory prohibition. However, the doctrine of frustration can only be applied when the frustrating event would cause the whole act of performing the contract as *'impossible'*.

This article discusses whether the Covid-19 Restrictions is an event that can invoke the doctrine of frustration by satisfying the elements of frustration and consequently, provide the injured party with remedies for damages.

2. PROBLEM FORMULATIONS

There are some issues in invoking the doctrine of frustration: *first*, whether Covid-19 Restrictions fulfils the elements of frustration to be considered as a frustrated event; *second*, whether there are available remedies for the doctrine of frustration; *third,* whether there are specific legislations on frustrated contracts impacted by Covid-19 restrictions.

3. ANALYSIS

a. Invoking Frustration

1) Covid-19 Restrictions as a frustrating event

In Malaysian Legislation, the doctrine of frustration is provided in section 57 (2) of the Contracts Act 1950 which states that,

> *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.*

This means that the doctrine of frustration can only be applied if the contract becomes impossible by unforeseeable events. The consequence of a frustrated contract is that the contract becomes void. Affected parties can then apply for remedies and restitution based on this provision. The conditions of frustration are also laid out provided in the case of Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Ltd[1] , with the first condition being no provision was available in the contract regarding the unforeseeable event. Then, the parties are not responsible, nor do they have control over the frustrating event that had caused the contract to be radically different than when it was first entered into and it becomes impossible to perform.

[1] [2007] 4 MLJ 201

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To succeed in invoking section 57 (2) of the Contracts Act 1950, the applicants must prove that Covid-19 Restrictions is an unforeseeable event that had altered the contract radically and made it impossible to perform. Covid-19 Restrictions such as the Movement Restriction Order is an unforeseeable event where the parties are not responsible of and is uncontrollable by the parties as it can only be imposed by the government.

The issue is whether the absence of a provision for the unforeseeable event in the contract can justify the whole performance of the contract to be impossible. It is viewed that this may only be applicable to certain occupations, especially daily waged workers that are dependent on face to face contact. This is due to some Covid-19 Restrictions such as the MCO prohibits the act of gathering and encourages contactless practices. In contrast with other occupations such as the education sector, Covid-19 Restrictions does not render the whole act of teaching or learning impossible. As educational and training sessions can still be conducted via online. Therefore, to succeed in invoking the doctrine of frustrations the whole contracted obligation must be impossible to perform.

2) Force Majeure Clauses in Contracts

The first condition as stated in the case of Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Ltd[2], is there must be no provision made in the contract when the frustrated event occurred. In some contracts, force majeure clauses are inserted to assist matters or circumstances that would possibly delay or render the contract impossible.

Force Majeure clauses provide for special circumstances such as delays, temporary discharge of obligations or other acts that may hinder the performance of the act. The essence of this clause is to ensure the continuous bindingness of contract between contracting parties when special circumstances arise, assuring that the contract would not be terminated automatically or when breach of contract is inevitable. Usually, force majeure clauses would include Acts of God, shortage of supplies and other special circumstances.

The validity of force majeure clauses can be referred to in the case Hackney Borough Council v Dore[3] which stipulates that force majeure is an expression that means some physical or material restraint and does not include a reasonable fear or apprehension of such restraint.

However, invoking force majeure clauses is not an easy feat as parties are expected to fulfil contractual obligations despite hardships. Therefore, to invoke force majeure clauses, the unforeseeable act must also be beyond the control of the parties. This is evident in the case of 2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020][4] where Sony stored 2 Entertains media equipment in a warehouse. A riot broke out in 2011 where intruders broke into the warehouse and started a fire which led to the destruction of the equipment. Sony relied on

[2] [2007] 4 MLJ 201
[3] [1922] 1 KB 431
[4] [2020] EWHC 972 (TCC)

the force majeure clause which states:

> *Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected…*

The court held that the break-in was foreseeable and could have been prevented if Sony provided better means of building security. Since building security is within the control of Sony, this clause does not apply to escape liability. In application to Covid-19 Restrictions, parties wishing to apply force majeure clauses should ensure that the provisions and force majeure clause in their contract should be able to cover any other possible events that would render the impossibility of performance or breach due to the restrictions.

a) International Guidelines in invoking Force Majeure Clauses

The International Chamber of Commerce states that force majeure is the occurrence of event(s) or circumstance(s) (Force Majeure Event) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("The Affected Party") proves:[5]

(1)Such impediment is beyond its reasonable control;
(2)That it could not reasonably have been foreseen at the time of the conclusion of the contract; and,
(3)That the effects of the impediment could not reasonably have been avoided or overcome by the Affected party.

In 2010, a volcanic eruption had resulted in delays in the presentation of documents due to the inability of courier companies to deliver packages on time[6]. However, the ICC contends that this eruption is insufficient for the force majeure clause to be applied as the eruption does not render the whole performance of document presentation as impossible when there are other alternatives in doing so. This is evident in the case of "*Tskairoglou & Co Ltd v Noblee Thorl GMBH*"[7] whereas the appellants refused to deliver goods on the grounds that the Suez Canal was closed and would incur more expenses if other alternatives are applied. Therefore, hardship does not justify the performance of a contract to be impossible or as a force majeure event.

In relation to Covid–19 Restrictions, the ICC are of the view that Covid-19 as unlikely to amount to a force majeure event[8].

[5] International Chamber of Commerce (2020), "ICC Force Majeure and Hardship Clauses."
[6] ICC News & Speeches. *Volcanic Eruption Delaying Delivery of Documents under ICC Rules*, 21.4.2010. Paris
[7] [1962] AC 93
[8] ICC, *Guidance Paper on the Impact of Covid 19 on Trade Finance Transactions Issued Subject to ICC Rule*s, 2020.

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3) Legislation on Covid-19

In Malaysia, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) ACT 2020 was enforced on 23rd October 2020 which allows disputes below RM 30,000 to be settled by mediation process. This Act will only be applicable for two years from the published date but liability for frustrated contracts or other obligations prevented by Covid-19 Restrictions are only applicable for 10 months which is from the enforcement of the national MCO on 18th March 2020 until 31st December 2020.

Section 7 of this Act, states:

> *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.*

This means parties affected by Covid-19 Restrictions do not have to perform their contractual obligations and must refrain from taking actions for breach. This section acts as an acting force majeure clause and as a major ruling for frustrated contracts affected by Covid-19 Restrictions such as isolation, quarantine, testing, recovery period and so on.

Even so, the dischargement of obligations is only applicable to contracts specified under the Act's schedule in section 7.

Table 1. Section 7 Schedule

No.	Item
1.	Construction work or construction consultancy and any other related contract to the supply of construction material, equipment or workers in connection with a construction contract
2.	Performance bond or equivalent that is granted pursuant to a construction contract or supply contract
3.	Professional services contract
4.	Lease or tenancy of non-residential immovable property
5.	Event contract for the provision of any venue, accommodation, amenity, transport, entertainment, catering or other goods or services including, for any business meeting, incentive travel, conference, exhibition, sales event, concert, show, wedding, party or other social gathering or sporting event, for the participants, attendees, guests, patrons or spectators of such gathering or event.
6.	Contract by a tourism enterprise as defined under the Tourism Industry Act 1992 [Act 482] and a contract for the promotion of tourism in Malaysia
7.	Religious pilgrimage-related contract

Since this Act was enforced long after the national MCO ended, there are numerous agreements or other arrangements that had been adopted by contracting parties. To pacify any confusion after the publication of this Act, section 10 provides that any form of agreement or arrangement, legal proceedings, mediation or any execution carried out from the period of 18th March 2020 until the date of publication will be deemed to be valid. So, any arrangement or agreement settled would be valid and still in continuity even after the publication of this act if such arrangement was made before the publication.

b. Available Remedies

The Contracts Act 1950 has provided some remedies to a frustrated contract such as damages as in section 57(3), restitution or refund as stated in section 66 of the Contracts Act 1950 and section 15 (2) & (3) of the Civil Law Act.

The new Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) ACT 2020 does not provide compulsory remedies for frustrated contracts in general as section 7 discharges parties from exercising their rights under the contract if it was affected by Covid-19 Restrictions. This act was published almost seven months after the enforcement of the national MCO and during that time span, contracted parties mostly had made arrangements or other agreements to pacify their disputes. Section 10 of the Act has made it clear that such arrangements are valid and is still in continuity.

3. CONCLUSION

The doctrine of frustration can be applied in unforeseeable events to discharge parties from their contractual obligations. Even so, the contract is not automatically void upon breach if such event fulfils the conditions of Force Majeure.

Force Majeure clauses should include more instances of unforeseeable events such as quarantine, riots, lockdown, movement restriction orders, statutory prohibitions, isolation and so on to be more relevantly applied during this pandemic. Covid-19 Restrictions can be considered as a frustrated event only when the whole performance of the contract is impossible. Therefore, parties seeking to take action or remedies must prove that the Restrictions had hindered the whole performance of the contract. Even so, if a force majeure clause is inserted, then the provisions within that clause would be considered.

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