Dear MRCA Members,

Malaysia Retail Chain Association

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FAQs on the Effect of Movement Control Order (MCO) on Tenants

On 16th March 2020, the Prime Minister of Malaysia announced the imposition of MCO for a period of 14 days from 18th March 2020 until 31st March 2020. In an effort to contain the rapid spread of Coronavirus (COVID-19) in Malaysia, it was extended for a further period of 14 days which would bring the MCO to an end on 14th April 2020.

1. In what way does the MCO affect the tenants?

Save and except for the businesses providing essential services as listed under Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020, the businesses providing non-essential services have been told to close their premises and stop their operations during the MCO period. This brings a great financial impact on the businesses especially those who are relying on the daily cash flows and renting the premises at the same time.

In view of the closures of the non-essential businesses, the tenants are concerned whether they are able to pay their landlords on time as they cannot generate any income during the MCO period. If the tenants fail to pay the rent, the landlords may seek legal remedies available to them.

2. What remedy does a tenant have under such circumstances?

The relationship between a landlord and a tenant is based on the tenancy agreement signed between them. It is pertinent for the tenants to review their tenancy agreements in order to check on any clause that provides for, inter alia, suspension of rent or rent adjustment in the case of any unforeseen event. It is rather unusual to have such clause in the agreement and even if there is any, it only covers the situation which is limited to property damage. However, having said so it is not impossible to have such clause in the agreement as long as both parties are agreeable to it. Another clause that the tenants should look for in their tenancy agreements is a force majeure clause.

3. What is a force majeure clause?

A *force majeure* clause is a provision that allows the contractual parties to suspend and/or delay and/or terminate the performance of their contractual obligations under a contract when the unforeseen events which are beyond the control of the parties such as Acts of god, natural disasters, pandemic, epidemic, disease, war and etc occur during the contractual period.

4. Is MCO/COVID-19 a force majeure event?

Yes, if the force majeure clause specifically sets out events like "epidemics", "pandemics", "diseases" or "quarantine". The scope and effect of a force majeure clause is very much depending on how the clause is drafted and the wordings used. Therefore, despite having the force majeure clause in the tenancy agreement, the COVID-19 outbreak may not be considered as a force majeure event if such above wordings are not stated in the agreement. Nevertheless, it may still fall within the scope of force majeure events if the clause covers "act of government", "act of God" or the catch-all phrase "beyond the control of the parties".

5. How does a *force majeure* clause relieve the tenant from his contractual obligations under the tenancy agreement?

The recent outbreak of Covid-19 would fall squarely within the meaning of pandemic, epidemic and disease. Hence, a tenant may exercise his right to invoke the f*orce majeure* clause in the tenancy agreement in that his obligation to pay the rental may be suspended and/or delayed and/or terminated accordingly depends on the wording therein.

6. Can a tenant choose not to terminate the tenancy agreement if the *force majeure* clause allows termination of the tenancy agreement?

A tenant may choose not to terminate the tenancy agreement. However, such intention must be conveyed to the landlord and if necessary, to have any agreed varied terms documented.

7. Is the *force majeure* clause equally applicable to a tenancy agreement that involves a demised premise which is for residential purposes?

It is unlikely for the *force majeure* clause to apply here simply because the tenant can still occupy and reside in the demised premises during the period of MCO.

8. What if there is no force majeure clause in the tenancy agreement?

If there is no force majeure clause in the agreement, the tenant may rely on the doctrine of frustration which is stipulated under Section 57 of the Contracts Act 1950 ("the Act"). In the context of the tenancy agreement, **Section 57(2) of the Act** provides the following:-

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Contract to do act afterwards becoming impossible or unlawful.

(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.

There are three elements that need to be satisfied by the tenant as specified in **Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Bhd [2007] 4 MLJ 20**:-

a) The event (MCO) upon which the tenant relies as having frustrated the tenancy agreement must have been one for which no provision has been made in the contract. If provision has been made, then the parties must be taken to have allocated the risk between them;

b) The event relied upon by the tenant must be one for which he or she is not responsible. In other words, self-induced frustration is ineffective; and

c) The event which is said to discharge the promise (eg: payment of rent by the tenant) must be such that renders it radically different from that which was undertaken by the tenancy agreement. The court must find it practically unjust to enforce the original promise.

In the case of **Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293**, it was held by the Federal Court that a contract does not become frustrated merely because it becomes difficult to perform. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract is entered into. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed. There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

Based on the position taken by the Malaysian courts, it is evident that courts have interpreted the doctrine in a very narrow approach as mere difficulty to perform the contract will not render the contract to be frustrated. Thus, if the tenant intends to claim frustration of tenancy agreement, the tenant must convince the court that the MCO does not only make the payment obligation difficult but impossible to be performed.

In the epidemic-related case of **Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754**, the Hong Kong court rejected the tenant's claim that the tenancy agreement was frustrated due to an isolation order issued by the Department of Health during the SARS outbreak. The isolation order had resulted him not being able to stay

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in the premises for 10 days. The court held that the period of 10 days out of a 2 years tenancy was insignificant and even though SARS was said to be an unforeseeable event, it did not significantly change the nature of the contractual rights and obligations of the parties.

As such, it will not be an easy battle for the tenant to show that the closure of the premises during the MCO period makes it impossible for the tenant to pay full rent to the landlord. However, if the intention of the tenant is to seek suspension of rent or reduced rent, then invoking the doctrine of frustration is not the way to achieve it as the effect of frustration is that the tenancy agreement will be terminated.

9. What can a tenant do if both the *force majeure* clause and the doctrine of frustration have no effect to the tenancy agreement entered into by the landlord and tenant?

The practical step for the tenant to take would be to negotiate with the landlord to work out certain arrangement such as delaying payment of rental, reduction of rental or even suspension of rental during the period of MCO. It is also important to have the negotiated terms documented for record purpose. Nonetheless, it is still in the discretion of the landlords whether or not to grant such relief to the tenants.

Thank you.

Yours sincerely,

MALAYSIA RETAIL CHAIN ASSOCIATION

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Datuk Seri Garry K.S Chua
MRCA President 2016 - 2020

Prepared By,

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