

THE DOCTRINE OF HARDSHIP: EXTENSION TO THE DOCTRINE OF
FRUSTRATION IN MALAYSIA*

*Muhammad Nabil Afham bin M Fuad
Master of Laws in Business Laws (English Program)
Faculty of Law, Thammasat University
Email address: afhamfuad@gmail.com*

Received 25 June 21

Revised 23 August 21

Accepted 9 December 21

Abstract

This article explores the impact of an unexpected change of circumstances relating to the performance of a party's contractual obligations and problems arising from the common law doctrine of frustration that appears to be restrictive in application.

In Malaysia, the doctrine of frustration would only be applicable in two limited circumstances, i.e. where parties' obligations have become impossible or when the change of circumstances will warrant a performance so radically different from what has been originally agreed upon. This limitation may cause problems as, at times, such unforeseen circumstances may not necessarily render parties' performances impossible, but excessively onerous. Whilst the former may be resolved by the doctrine of frustration, parties are left with no appropriate recourse to address the latter.

* This article is summarized and rearranged from the thesis "The Doctrine of Hardship: Extension to the Doctrine of Frustration in Malaysia", Faculty of Law, Thammasat University, 2020.

In addressing this issue, this article applies a comparative study on how other jurisdictions (i.e. Italy, Germany, France and the United States of America) address the issue of onerosity in performing contractual obligations via the doctrine of hardship. Reference is also made to the Principles of European Contract Law 2002 (“PECL”), UNIDROIT Principles of International Commercial Contracts 2016 (“UNIDROIT Principles”) and the Draft Common Frame of Reference (“DCFR”). In summary, this article suggests that the doctrine of hardship should be adopted in Malaysia by including an enabling provision into the Contracts Act 1950, focusing on the requirements of hardship and remedies available, such as renegotiation and alteration of the contractual terms, which are not available under the doctrine of frustration.

Keywords: Frustration, Hardship, Change of Circumstances, Impossibility, Onerous

1. Introduction

Section 57(2) of the Malaysian Contracts Act 1950 (“CA 1950”) provides that a contract will be frustrated and deemed to be void due to the unforeseen change of circumstances and parties will be relieved from their future obligations. However, the frustration doctrine appears to be restrictive as it would only apply when a performance has become impossible or where the performance will become radically different from what was originally contracted. On the other hand, the doctrine of hardship may provide some assistance when the contractual obligations have become, due to unforeseen circumstances, excessively onerous to be performed.

For instance, COVID-19 measures such as closure of business operation (e.g. non-essential services)¹ may restrict certain activities (e.g. mining), leading to shortage of building materials (e.g. steel bars), resulting in the decrease of supply and sudden surge of demand, which in turn leads to an abnormal spike in their prices.² Consequently, a party is forced to procure the material at an unusual and exorbitant price. Here, the doctrine of frustration will not bite and the aggrieved party is left with no remedy as the obligation can still be performed, though extremely onerous.

In this situation, the doctrine of hardship may shed some light. Under this doctrine, parties are expected to, amongst others, renegotiate the

¹ Ashley Tang, ‘Malaysia announces movement control order after spike in Covid-19 cases (updated)’ (The Star, 16 March 2020) <<https://www.thestar.com.my/news/nation/2020/03/16/malaysia-announces-restricted-movement-measure-after-spike-in-covid-19-cases>> accessed 12 August 2021.

² ‘The pandemic has caused the price of steel bars and iron to increase in Malaysia’ (Construction +, 3 February 2021) <<https://www.constructionplusasia.com/my/the-pandemic-has-caused-the-price-of-steel-bars-and-iron-to-increase-in-malaysia/>> accessed 18 August 2021.

contractual terms and, if necessary, the court is empowered to either alter the contractual terms or put an end to the contract. Further, parties are no longer imposed with a higher factual burden of proof (i.e. impossibility to perform) before seeking legal remedies. Unfortunately, to date, the doctrine of hardship is still a foreign subject in Malaysia.

Therefore, this article aims to summarise the limitations of the frustration doctrine and how it could be supplemented by the doctrine of hardship, as practised by several jurisdictions including Italy, Germany, France and the United States of America as well as those which are embodied in the soft law instruments. In this article, the term “aggrieved party” is employed to refer to a party who is affected by the unforeseen change of circumstances.

2. Frustration of contract under Malaysian law

Malaysian law adheres strictly to the concept of “what has been promised must be kept”, which is the underlying principle of an absolute contract.³ However, a contract is only absolute when it is not qualified.⁴ Therefore, section 57(2) of the CA 1950 provides that upon an unforeseen change of circumstances, a contract will be rendered “void when the act becomes impossible or unlawful” to be performed. Consequently, parties will be relieved from their further performance of the contract.⁵ When the contract is frustrated, the law will reinstate the parties to their original position and “any person who has received any advantage under the agreement or contract is bound to restore it”.⁶

³ CA 1950, s 38(1).

⁴ *ibid.*

⁵ *ibid* s 57(2).

⁶ *ibid* s 66.

In *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd*,⁷ the Malaysian Court of Appeal had set out the elements of the doctrine of frustration.⁸ Firstly, the purported change of circumstances must have not been governed under the contract. If such provisions exist, the doctrine of frustration will not be applicable.⁹ Secondly, such change of circumstances must not be self-induced. If the “frustrating event” is attributed to the party who invokes frustration, the law would not step into the matter.¹⁰ In *Dato Yap Peng v Public Bank Bhd*,¹¹ the Malaysian Court of Appeal ruled that the aggrieved party must have used its best endeavours in fulfilling its undertaking under the contract. Failure to do so would render the alleged frustration as self-induced and therefore has no place whatsoever under the doctrine.¹²

Lastly, the change of circumstances would, had the contract still be performed, render the performance so radically different from what was initially agreed upon by parties. In *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors*,¹³ the Court of Appeal observed that the 1997 financial crisis did not render the performance of the contract impossible, but merely “more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different”.¹⁴ Therefore, a contract will not, even due to an unforeseen regional financial crisis, be

⁷ [2007] 4 MLJ 201.

⁸ *ibid* 207.

⁹ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (3rd edn, Lexis Nexis 2010) 493.

¹⁰ *ibid* 512.

¹¹ [1997] 3 MLJ 484.

¹² *ibid* 493.

¹³ [2008] 4 MLJ 852.

¹⁴ *ibid* 861.

frustrated simply because the performance has become more cumbersome to be performed.

2.1 Drawbacks of the doctrine of frustration

Although the doctrine of frustration attempts to relax the rigidity of an absolute contract, it may not be flexible enough given that the doctrine will only become handy when the change of circumstances results in the impossibility to perform. Though it also applies when the performance has become “radically different”, this threshold is nevertheless extremely difficult to be satisfied. This leaves little room for the aggrieved parties to seek remedies when their obligations have instead become excessively onerous to be performed, but not necessarily radically different.

Further, the doctrine of frustration, arguably, does not conform with the good faith principle. For instance, when there is an unforeseen change of circumstances rendering a party’s obligation extremely onerous, the aggrieved party is left with no alternative but to face potential legal action as the difficulty to perform its contractual obligation due to extreme onerosity will not be considered by the Courts. This is exacerbated by the fact that the counterparty is not obliged to, by law or otherwise, take into account the aggrieved party’s predicament before proceeding with legal action. This approach certainly does not promote the duty to act in good faith between parties.¹⁵ Though there is no general duty to act in good faith in Malaysia (in contractual relationships), this author believes that the time has come for the law to acknowledge its importance and how it can improve contract managements and disputes in Malaysia.

¹⁵ Egidijus Baranauskas and Paulius Zapolskis, ‘The Effect of Change in Circumstances on the Performance of Contract’ (2009) 4(118) *Jurisprudence* 197, 198.

Additionally, the doctrine of frustration does not promote the idea of contract preservation. When a contract is frustrated, it will be deemed as void and parties are exonerated from their further performance.¹⁶ This outcome may not be commercially desirable as parties should be encouraged to exhaust their best endeavour to save the contract when it is still possible to do so (e.g. altering the contractual terms). With respect, the author believes that this warrants a new law to be introduced to better address this issue—the doctrine of hardship.

3. Doctrine of hardship under foreign jurisdictions and soft laws

3.1 Italian law

Under Article 1467 of the *Codice Civile* 1942, a party shall demonstrate that there has been a change of circumstances rendering its obligation excessively onerous (*eccessiva onerosità*) which shall be assessed objectively whilst considering all relevant factors surrounding the dispute.¹⁷ Further, such party must also establish that such change of circumstances was extraordinary and unforeseeable at the time of contracting, considering the frequency of occurrence and magnitude of the consequences.¹⁸

If the plea of hardship is legitimate, the aggrieved party is entitled to terminate the contract.¹⁹ However, such termination may be circumvented

¹⁶ CA 1950, s 57(2).

¹⁷ Rodrigo Andrés Momberg Uribe, 'The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives' (DPhil Thesis, Utrecht University, 2011) 78.

¹⁸ Guido Alpa and Vincenzo Zeno-Zencovich, *Italian Private Law* (1st edn, Routledge-Cavendish 2006) 241.

¹⁹ *Codice Civile* 1942, Article 1467.

by the counterparty by proposing an equitable solution (e.g. alteration of terms) with a view to adapt the contract to the new circumstances.²⁰ This way, the contract may be preserved accordingly. However, such proposal by the counterparty is not meant to restore the contractual equilibrium to its original position but merely to remove the excess portion of risks that were not part of the original contemplation.²¹

3.2 German law

The doctrine of *Störung der Geschäftsgrundlage* (disturbance of the foundation of the contract) has been developed as early as post World War I and was later codified into the German Bürgerliches Gesetzbuch (“BGB”), via §313. Essentially, an aggrieved party may be excused if there is a significant disturbance to the basis of the contract which was not foreseen by the contractual parties.²² In this respect, the alleged hardship must be so vital that the parties would not have concluded the contract as they did, had they known such change(s) would transpire.²³ By narrowing such disturbance within the “basis of the contract” realm, it would prevent a party from frivolously pleading hardship.

When hardship is proven, the court may modify the contractual terms to adapt the contract to the new circumstances.²⁴ However, if adaptation is

²⁰ *ibid.*

²¹ Elena Christine Zaccaria, ‘The Effects of Changed Circumstances in International Commercial Trade’ (2005) 9 *International Trade and Business Law Review* 135, 148.

²² BGB, §313(1).

²³ Hannes Rosler, ‘Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law’ (2007) 15(4) *European Review of Private Law* 483, 489.

²⁴ Momberg Uribe (n 17) 191.

impossible or if one of the parties may not reasonably be expected to accept such modifications,²⁵ the contract will then be put to an end and parties will be discharged from their obligations.

3.3 French law

Article 1195 (*imprévision* (unforeseen circumstances)) was incorporated into the French Civil Code 2016 to rectify the serious disproportion and contractual imbalance resulted from an unforeseeable change of circumstances.²⁶ In this respect, Article 1195 of the French Civil Code provides that a party may be excused from its further performance if it can be proven that there was an unforeseeable change of circumstances, rendering its performance excessively onerous. The plea for hardship shall be assessed objectively and all relevant factors shall be considered.

The remedies under Article 1195 are divided into two phases, which are consensual and non-consensual.²⁷ During the former, the aggrieved party may request for a renegotiation of the contract before the counterparty commences legal action. However, the renegotiation process is not mandatory.²⁸ Whilst renegotiating, the aggrieved party is not allowed to suspend its performance²⁹ to avoid any mala fide tactical manoeuvre to prematurely cease its performance.

²⁵ BGB, §313(3).

²⁶ Solène Rowan, 'The New French Law of Contract' (2017) 66(4) *International and Comparative Law Quarterly* 805, 820 – 821.

²⁷ Alain Pietrancosta, 'Introduction of the Hardship Doctrine ("théorie de l'imprévision") into French Contract Law: A Mere Revolution on the Books?' (2016) 3 *RTDF* 1, 5.

²⁸ *ibid* 6.

²⁹ French Civil Code, Paragraph 1 of Article 1195.

If the above fails, the court may, upon the request of the parties involved, adapt the contract by altering the contractual terms. If there is no request being made, the court may, on the application of either party, revise the contract or put an end to it. In doing so, the court may grant the most appropriate remedy as it thinks fit.

3.4 American law

Section 2-615 of the Uniform Commercial Code (“UCC”) exempts a party from its performance in a contract of sale, if such performance has been made impracticable due to an unexpected event and that the non-occurrence of the same was the parties’ basic assumption when the contract was concluded. This “impracticability” excuse is also codified in section 261 of the Restatement (Second) of Contracts 1981 (“2nd Restatement”) with similar requirements though allegedly more liberal in application, as the latter is not restricted to a contract of sale.

Nevertheless, the judges’ attitude towards the same may not be as welcoming. For instance, the courts have been reluctant in invoking impracticability due to various reasons, including the element of foreseeability. In most cases,³⁰ the courts have employed the term “unforeseeable” as opposed to “unforeseen”, making it nearly impossible to demonstrate that the change of circumstances was completely unexpected.³¹

³⁰ *Transatlantic Financing Corporation v United States of America* 1966 U.S. App. LEXIS 6004. See also *Bende & Sons, Inc. v Crown Recreation, Inc.* 1982 U.S. Dist. LEXIS 15119.

³¹ Jennifer Camero, ‘Mission Impracticable: The Impossibility of Commercial Impracticability’ (2015) 13(1) *The University of New Hampshire Law Review* 1, 17.

Besides, the inconsistency in applying the objective³² and subjective³³ standards in determining whether a performance has become impracticable also contributes to the rejection of the “impracticability” excuse.

3.5 PECL

Article 6:111(2) of the PECL recognizes hardship when the performance has become excessively onerous due to the change of circumstances that cannot be reasonably anticipated at the time of contracting. In this regard, a performance is excessively onerous when the change of circumstances has overturned the contract, rendering it to be significantly imbalanced. Article 6:111 of the PECL provides two levels of remedies. Once hardship is proven, the parties are bound to renegotiate³⁴ and failure to do so (in bad faith) will entitle the court to award damages to the claiming party as it thinks fit. If renegotiation fails, the court has the jurisdiction to either terminate or revise the contract to distribute the gains and losses between the parties, as it deems equitable.³⁵

3.6 UNIDROIT Principles

Article 6.2.2 of the UNIDROIT Principles defines hardship as the occurrence of events that fundamentally alter the equilibrium of a contract. However, it limits the application of hardship in two circumstances, i.e. the increase of performance’s cost and the diminution in the performance’s value. Interestingly, the UNIDROIT Principles has extended the timeline of

³² *Eastern Air Lines Inc. v Gulf Oil Corp* 1975 U.S. Dist. LEXIS 15673.

³³ *Asphalt International. Inc. v Enterprise Shipping Corp. S.A.* 1981 U.S. App. LEXIS 15322.

³⁴ PECL, Article 6:111(2).

³⁵ *ibid* Article 6:111(3).

which the change of circumstances may occur. Contrary to other jurisdictions, the happening of such event shall only transpire after the contract is concluded. However, Article 6.2.2 (a) states that the excuse of hardship may also be available when such an event had transpired before or at the time of contracting but only discovered at a later stage. With due respect, this approach may not be proper as such a situation may appropriately fall under the principle of “mistake” in contract law.

Article 6.2.3 of the UNIDROIT Principles provides a two-tier level of remedies. Firstly, the aggrieved party is entitled to demand for a renegotiation with a view to revise the contractual terms.³⁶ However, pending renegotiations, the aggrieved party’s performance is not suspended.³⁷ If the renegotiation is unsuccessful, the court may either terminate the contract or amend the contractual terms. In doing so, the court shall use its best endeavour to prioritise the preservation of the contractual relationship and treat the termination of a contract as a last resort.³⁸

3.7 DCFR

Article III.-1:110(2) of the DCFR provides that hardship occurs when an exceptional change of circumstances renders a party’s obligation so onerous that it would be manifestly unjust to expect the said party to hold up to their bargain. If the alleged hardship exists, the court may vary the contractual terms or terminate the contract. Contrary to the PECL and UNIDROIT Principles, the DCFR only provides judicial intervention as the sole remedy

³⁶ UNIDROIT Principles, Article 6.2.3 Comment 5.

³⁷ *ibid* Article 6.2.3 Comment 4.

³⁸ Baranauskas and Zapolskis (n 15) 210.

and that renegotiation is not compulsory.³⁹ However, before the court can intervene, it must first be shown that the aggrieved party has made a reasonable attempt to renegotiate in good faith with the counterparty to preserve their contract.

4. Applicability of the doctrine of hardship in Malaysia

4.1 Benefits and challenges in implementing the hardship doctrine

Based on the analysis on how the doctrine of hardship is being applied in other jurisdictions, it appears that the doctrine of hardship offers benefits to contractual parties whose performances have become so onerous due to the occurrence of an unexpected change of circumstances. Firstly, the hardship doctrine may relax the strict application of an absolute contract. Though the notion of an absolute contract seeks to bind parties to their bargain, it shall be relaxed when a change of circumstances results in the fundamental variation of the contractual equilibrium, creating undue advantages to one party and prejudice to the other.⁴⁰ After all, parties shall only be bound to their contract so long as the fundamental conditions at the time when the contract was formed remain unchanged.⁴¹

Further, the excuse of hardship offers alternative remedies where parties' performances have become more burdensome due to unforeseen

³⁹ Emanuele Tuccari, 'Change of Circumstances and Judicial Power: A European Perspective of Contract Law' (The European Conference on Politics, Economics and Law 2015 Official Conference Proceedings, The International Academic Forum, 2015) 6 <<https://papers.iafor.org/submission17377/>> accessed 1 June 2020.

⁴⁰ Zaccaria (n 21) 136.

⁴¹ Baranauskas and Zapolskis (n 15) 198.

events, something that is not governed by the frustration doctrine. Here, the aggrieved party has been driven to a corner where the doctrine of frustration may not offer any remedies whatsoever. For instance, instead of being exposed to the probabilities of breaching the contract, the doctrine of hardship offers the parties to, amongst others, adapt the contract to the new circumstances.

Regardless, the introduction of the hardship doctrine may be a daunting task due to several challenges. For instance, the core of the hardship doctrine essentially lies on the principle of good faith, which is prevalent in most civil law countries.⁴² In essence, the doctrine of good faith requires a party not to enrich itself from the unforeseen change of circumstances at the detriment of the counterparty.⁴³ However, the concept of good faith in contract law seems to be a foreign subject in common law jurisdictions (including Malaysia),⁴⁴ given that common law jurisdictions handle this issue differently (i.e. frustration).⁴⁵ Nevertheless, the Malaysian Court of Appeal⁴⁶ had signified its willingness in acknowledging the importance of the good faith principle, though some “major qualifications have to be factored in”.⁴⁷ Further, it may assist the judges in creating greater security upon the parties

⁴² Ingeborg Schwenzer, ‘Force Majeure and Hardship in International Sales Contracts’ (2008) 39 VUWLR 709, 721.

⁴³ Klaus Peter Berger and Daniel Behn, ‘Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study’ (2019-2020) 6(4) McGill Journal of Dispute Resolution 78, 86.

⁴⁴ Baranauskas and Zapolskis (n 15) 203.

⁴⁵ Ewan McKendrick, *Contract Law: Texts, Cases and Materials* (5th edn, Oxford University Press, 2012) 494.

⁴⁶ *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619.

⁴⁷ *ibid* 724-725.

against the “risk of opportunism and exploitation”,⁴⁸ in the case of an unforeseen change of circumstances.

Additionally, given that the court has the power to adapt the contract in the case of hardship, such process may lead to arbitrariness as the court may not have standard guidelines in doing so.⁴⁹ However, this issue may be mitigated by the fact that the court may not, despite such power, rewrite the entire contract to the extent of changing its very nature⁵⁰ and shall conform with the good faith principle.⁵¹ Ultimately, the court’s adaptation is never meant to completely restore the contractual equilibrium to its original position completely, but merely to make the excessively onerous performance bearable for the aggrieved party.⁵²

Nevertheless, the reluctance of the Malaysian courts to rewrite a contract⁵³ is not wholly devoid of merit. Though contract alteration in the case of hardship appears to be fair, it would go to the extreme if we blindly allow the courts to do so as this will promote uncertainty in contracting. Hence, an alternative mechanism will be proposed to circumvent this legal restriction, as will be illustrated in paragraph 4.2 below.

4.2 Proposed mechanism to be adopted in Malaysia

Based on the analysis above, this author believes that it is time for Malaysia to incorporate the doctrine of hardship into its contract law regime.

⁴⁸ Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford University Press, 2006) 495.

⁴⁹ Momberg Uribe (n 17) 276.

⁵⁰ *ibid.*

⁵¹ Tuccari (n 39) 5.

⁵² Momberg Uribe (n 17) 277.

⁵³ *Bank Islam Malaysia Berhad v Lim Kok Hoe and Anor* [2009] 6 MLJ 839, 852.

This proposal is to supplement the doctrine of frustration as it only offers remedies primarily where performance is impossible, leaving no room for those whose performances have become extremely onerous. Thus, an amendment to the CA 1950 by incorporating a new provision on the excuse of hardship may be helpful.

4.2.1 Elements of hardship

In invoking hardship, the aggrieved party shall first demonstrate that there is indeed hardship by establishing several key elements, which are as follows:-

- (a) The circumstances relating to the conditions forming the basis of the contract have been significantly changed rendering the performance excessively onerous;
- (b) The change of circumstances must be unforeseen; and
- (c) The alleged change occurs after the formation of the contract.

Akin to German law, it must first be proven that there is a change of circumstances that relates to the “conditions” forming the basis of the contract. Though CA 1950 does not clearly define what the term “condition” means, the Malaysian courts have distinguished the term “condition” and “warranty” in several cases. For instance, the Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd*⁵⁴ held that payment for the property’s purchase price constitutes a condition and failure to deliver such payment would amount to a breach of condition and consequently, entitling the innocent party to repudiate the contract. Essentially, this would depend on whether or not a particular term is being regarded as of fundamental importance by the parties.

⁵⁴ [1996] 3 MLJ 675.

Conversely, if the term is merely subsidiary, it may be regarded as a warranty.⁵⁵ Where there is a breach of warranty, the innocent party is only entitled for damages and not repudiation of the contract.⁵⁶ By applying the same notion here, the aggrieved party must demonstrate that such hardship is not merely minor but shall relate to the essential terms of the contract to warrant the application of such legal excuse. By imposing a higher standard, we may avoid the doctrine of hardship from being invoked arbitrarily as they fancy.

Secondly, the alteration to the conditions of the contract must have “significantly changed” rendering the obligation “excessively onerous” to be performed. In determining the issue of “significantly changed” and what would amount to “excessively onerous”, a two-tier test (i.e. quantitative and qualitative methods) may be adopted and an objective standard shall be employed in determining the same.

Under the quantitative method, the court may come up with a numerical threshold (e.g. percentage) as a yardstick. For example, the American courts would usually consider an increase of more than 100% of performance’s cost as impracticable. However, this numerical threshold may not be conclusive given that not all hardship cases can be quantified.

Thus, the quantification analysis shall be supplemented with the qualitative method. In this regard, other factors may also be helpful in assessing the alleged hardship. For instance, the court may consider, amongst others, the party’s overall profits in the preceding years and the ability to spread losses to other similar contracts.

⁵⁵ Alsagoff (n 9) 232.

⁵⁶ *ibid* 235.

Further, the aggrieved party shall demonstrate that such change was unforeseen by the parties at the time of contracting. The importance of the element of “foreseeability” directly correlates with the allocation of risk in a contract. When a party has agreed to accept the risk of the occurrence of an event, such party is forbidden from excusing itself from its performance. In assessing the same, the author believes that the main concern regarding the “foreseeability” issue is not merely about the possibility of occurrence per se, but also the severity of the consequences.

Lastly, it shall be proven that the change of circumstances must have only occurred after the contract was concluded. If the change had already transpired before or at the time of contracting, then such case will fall within the ambit of mistake in contracting and therefore, shall be dealt with its peculiar elements thereof (i.e. sections 21 to 23 of the CA 1950).

4.2.2 Available remedies

This author proposes for a three-tier remedy to be formulated, which consists of renegotiation, contract adaptation and termination of the contract via judicial intervention. Once hardship is proven and similar to Article 6:111(2) of the PECL and Article 6.2.3 of the UNIDROIT Principles, the aggrieved party is entitled to renegotiation to modify the contractual terms. In this regard, the court is empowered to order the parties to enter into renegotiation to adapt the contract, where the circumstances deem it to be commercially possible and just. This judicial intervention in compelling parties to renegotiate is not completely alien in Malaysia. In practice, it is not unusual for the court to order parties to undergo a mediation process, before proceeding to the merits of the case. Additionally, the concept of renegotiation is not devoid of merits

given that the parties themselves are in the best position to pan out the most sensible solution for them.

Where the renegotiation is fruitless, the court is then empowered to alter the original terms of the contract. In doing so, the court must adhere to the general principle of distributing losses and gains arising from the said hardship equitably amongst the parties. However, such distribution is not meant to restore the parties to their original position as if the said hardship never existed, but merely to limit the losses within the normal range of commercial sacrifice. Though the Malaysian courts are generally reluctant to rewrite a contract, this author believes that a proper mechanism may be drawn to address this issue.

For instance, the court may, instead of modifying the contract by its own volition, order the parties to provide their own proposals for the court's consideration. This way, the court does not simply exercise its faculty of mind and modify the contract on its own accord but merely choosing the best solution based on the parties' arguments. Arguably, the court is not trying to rewrite the contract but merely facilitating the parties to redesign their contract by examining their proposals to achieve an equitable solution for all.

Where the court believes that an adaptation is not prudent despite the parties' proposals, the court may have no other option but to put an end to the contract, discharging parties from their future obligations. In doing so, further reliefs may be ordered, including but not limited to, assessment of damages in favour of the party unaffected by such hardship given that generally an innocent party may terminate its contract and claim for damages when there is a breach of condition of the contract.⁵⁷ Further, it shall also be noted that the right to terminate would only dispense the future obligation,

⁵⁷ *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan Mcknight* [1983] 1 MLJ 220, 227.

not to restore the parties to *ex-ante* position,⁵⁸ except when there is a total failure of consideration.⁵⁹ Therefore, if the party invoking hardship does not abandon its obligation in its entirety, the innocent party may not be restored to its original position (i.e. restitution) but can merely be awarded with damages.

Further, in granting the said orders and reliefs, the court is implored to consider, amongst others, the existence of the hardship as proven and that the alleged breach of the contract on the part of the aggrieved party was not wholly attributable to the party so alleged. After all, the change of circumstances which has affected the performance was not only unforeseen by the promisor, but the promisee as well. Therefore, to impose the losses arising from the said hardship in its entirety to only one party whilst no one is at fault would, arguably, be unfair and commercially burdensome.

4.2.3 Further requirements and provisos

The party invoking hardship shall demonstrate that the contract does not contain any specific clause governing the alleged hardship. If such provision exists, the said provision will prevail, and the doctrine would not step into the matter in dispute. This requirement may encourage parties to exercise due diligence in identifying any possible change of circumstances at the earliest time possible. Besides, parties will also have the incentive to draft more cohesive contractual provisions by allocating the risks in the most efficient manner, instead of leaving their fates in the hands of an outsider (i.e. the court).

⁵⁸ *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500, 506.

⁵⁹ *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1, 8.

Further, pending the disposal of the dispute, the aggrieved party will not be allowed to abandon its obligation in its entirety. Notwithstanding the plea of hardship, this author believes that the law shall require such party to use its best endeavour to fulfil its obligation to the extent that the situation permits. This would prevent any party from invoking hardship as a tactical manoeuvre to put a halt to its obligations prematurely.

5. Conclusion

Though the doctrine of hardship is alien to the Malaysian contract law framework, one may not deny the benefits that such doctrine may offer. Considering today's climate where unforeseen events may occur at any time which may disrupt contractual performance, a change of law by adopting the hardship doctrine may offer some guidance to the affected parties. It is undeniable that the doctrine may not be perfect, but perfection needs time and time needs consideration. Though the doctrine of hardship as summarised in this article may be vigorously opposed due to the existing legal restrictions (e.g. lack of good faith principle in the Malaysian contract law), the author implores that the said doctrine deserves a spotlight and further analytical discussion is certainly required in ensuring that the application of the same, though novel, is not contrary to the Malaysian basic legal framework.

Bibliography

Books

Ahmad Alsagoff S, *Principles of the Law of Contract in Malaysia* (3rd edn, Lexis Nexis 2010)

Alpa G and Zeno-Zencovich V, *Italian Private Law* (1st edn, Routledge Cavendish 2006)

Brownsword R, *Contract Law: Themes for the Twenty-First Century*, (2nd edn, Oxford University Press, 2006)

McKendrick E, *Contract Law: Texts, Cases and Materials* (5th edn, Oxford University Press, 2012)

Journal Articles

Baranauskas E and Zapolskis P, 'The Effect of Change in Circumstances on the Performance of Contract' (2009) 4(118) *Jurisprudence* 197

Camero J, 'Mission Impracticable: The Impossibility of Commercial Impracticability' (2015) 13(1) *The University of New Hampshire Law Review* 1

Christine Zaccaria E, 'The Effects of Changed Circumstances in International Commercial Trade' (2005) 9 *International Trade and Business Law Review* 135

Peter Berger K and Behn D, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2019-2020) 6(4) *McGill Journal of Dispute Resolution* 78

Pietrancosta A, 'Introduction of the Hardship Doctrine ("théorie de l'imprévision") into French Contract Law: A Mere Revolution on the Books?' (2016) 3 *RTDF* 1

Rosler H, 'Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law' (2007) 15(4) European Review of Private Law 483

Rowan S, 'The New French Law of Contract' (2017) 66(4) International and Comparative Law Quarterly 805, 820-821.

Schwenzer I, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39 VUWLR 709

Legislations

French Civil Code 2016

German Bürgerliches Gesetzbuch 2002

Italian Codice Civile 1942

Malaysian Contracts Act 1950

Restatement (Second) of Contracts

Uniform Commercial Code

Court Decisions

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619

Asphalt International. Inc. v. Enterprise Shipping Corp. S.A. 1981 U.S. App. LEXIS 15322

Bank Islam Malaysia Berhad v Lim Kok Hoe and Anor [2009] 6 MLJ 839

Bende & Sons, Inc. v. Crown Recreation, Inc. 1982 U.S. Dist. LEXIS 15119

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675

Dato Yap Peng v Public Bank Bhd [1997] 3 MLJ 484

Eastern Air Lines Inc. v Gulf Oil Corp 1975 U.S. Dist. LEXIS 15673
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201
LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor [2007] 4 MLJ 1
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852
Tan Chong & Sons Motor Company (Sdn) Berhad v Alan Mcknight [1983] 1 MLJ 220
Transatlantic Financing Corporation v United States of America 1966 U.S. App.
LEXIS 6004

Soft Laws

Draft Common Frame of Reference
Principles of European Contract Law 2002
UNIDROIT Principles of International Commercial Contracts 2016

Dissertation

Momberg Uribe R. A., 'The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives' (DPhil Thesis, Utrecht University, 2011)

Conference Paper

Tuccari E, 'Change of Circumstances and Judicial Power: A European Perspective of Contract Law' (The European Conference on Politics, Economics and Law 2015 Official Conference Proceedings, The International Academic Forum, 2015) 6 <https://papers.iafor.org/submission17377/> accessed 1 June 2020

Newspaper Article

Tang A, 'Malaysia announces movement control order after spike in Covid-19 cases (updated)' *The Star* (Kuala Lumpur, 16 March 2020) <<https://www.thestar.com.my/news/nation/2020/03/16/malaysia-announces-restricted-movement-measure-after-spike-in-covid-19-cases>> accessed 12 August 2021

Website

'The pandemic has caused the price of steel bars and iron to increase in Malaysia' (*Construction +*, 3 February 2021) <<https://www.constructionplusasia.com/my/the-pandemic-has-caused-the-price-of-steel-bars-and-iron-to-increase-in-malaysia/>> accessed 18 August 2021