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## HOW CAN YOU, DURING THE CORONAVIRUS OUTBREAK, BE DISCHARGED OF YOUR CONTRACTUAL OBLIGATIONS IN SINGAPORE?

SME's as well as retail tenants in Singapore have been under exceptional pressure for the past months, yet most landlords have continued business as usual and kept basic rent unchanged, notwithstanding fall in the part indexed on turnover.

You have been asked to work from home to avoid contamination by Covid-19, you were previously rented an expensive office in the business district and you have to pay the rent every month even if you are not able to work from there.

So how can you be discharged of your contractual obligations?

You can either, but only if you fulfil the conditions, mention Force majeure, Hardship or frustration.

**Force majeure** is a clause that is frequently included in commercial contracts which allows a party to be excused from performing its obligations on time when some unforeseen outside event beyond the parties' control (also known as a force majeure event) prevents or delays performance.

However, according to Singapore law, force majeure cannot be argued for a party to withdraw from its contractual duties unless there is a clause in the contract and the clause applies.

So, you have to check if you have such clause in your tenancy agreement and the wording of the clause as sometimes a force majeure clause will prescribe a specific procedure for a party to invoke the clause.

Otherwise, usually one party simply writes to the other informing them that a force majeure event has occurred and explaining how this has impacted the party's ability to perform its obligations.

But the termination of the contract may not be the best outcome if you consider the amounts invested by tenants and if you remain optimistic that sunshine may come after the rain. Thus, a hardship clause may be more suited

Example of a **hardship clause**:

### Part B

1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

[a] the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

[b] it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

3. Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

Source: ICC Force Majeure Clause 2003, ICC Hardship Clause 2003 published in February 2003

A hardship clause, requests re-negotiation of the contract if the continued performance of one party's contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.

The Clause places upon the parties the duty to negotiate alternative reasonable terms without expressly referring the matter to a court

If you don't have such adequate clauses in your commercial tenancy agreement, you should still review it carefully for any provisions that may assist in negotiations to alleviate the burden.

Otherwise, you may need to rely on **frustration** if you don't have a force majeure clause or a hardship clause in your contract and a major unforeseen event (Covid-19) beyond your control prevents you from discharging your contractual obligations.

In Singapore, the **Frustrated Contracts Act** relieves parties from their duty to discharge their contractual obligations if it has become impossible to perform them.

A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.

But similarly, to the Force majeure Clause, when a contract is frustrated, it is essentially cancelled.

There is no need to pay any sums set out in the contract. If any payments have already been made but not used to provide goods or services, it should be possible to obtain a refund or partial refund.

The Frustrated Contracts Act gives discretion to the courts to determine the most equitable manner of cancelling the contract and ensuring that neither party will unjustly benefit from the cancelled contract at the other's expense.

However, not every event that has a negative impact on your business will entitle you to cancel a contract. Frustration is a common law doctrine whose application test is set out by the Courts. So, which constitutes a frustration event much depends on the wording of your contract and the specificity of your case.

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