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THE APPLICATION OF GOOD FAITH IN CONTRACTS DURING A FORCE MAJEURE EVENT AND BEYOND WITH SPECIAL REFERENCE TO THE COVID-19 ACT 2020

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ABSTRACT

Many parties face difficulties in performing contracts due to the economic dislocation since the outbreak of COVID-19. The extraordinary nature of this pandemic situation calls for good faith in contractual settings. The discussion of this paper focuses on the imposition in a *force majeure* event which will cause many contracts to be unenforceable. The research method used doctrinal analysis to discuss the *force majeure* clause in the context of the COVID-19 pandemic and the obligation of good faith in contracts. This paper will discuss the COVID-19 pandemic as a *force majeure* event, arguing that the rise of "good faith" in contract law and the application of "good faith" in contracts as a mitigation for a *force majeure* event.

The paper will then present its conclusion and recommendations. The findings highlight the significance of applying "good faith" in the event of *force majeure* and beyond as a mitigating factor in alleviating uncertainty and unfairness.

Keywords: COVID-19 pandemic, good faith, *force majeure,* COVID-19 Act 2020.

INTRODUCTION

The COVID-19 pandemic has turned a health disaster into an economic shock that has devastated the world's most vulnerable sectors. The pandemic has had a profound impact on the global economy, with a slew of serious consequences affecting people from all walks of life. It has also had a devastating impact on global economic ties, affecting workers, consumers, and businesses (Noor Azah Aziz et al., 2020). Staff absences, newly mandated workplace health and safety standards, and liquidity challenges are among the critical issues that have arisen. The global nature of the pandemic is unprecedented and businesses all over the world are in desperate need of resuming operations in order to survive the prospect of folding up for good. Many contracts, on the other hand, were unable to be completed due to the several phases of the Movement Control Orders (MCOs) that had been implemented. The Malaysian government's MCOs, which included travel restrictions in and out of the country, the shutdown of non-essential services, and other imposed measures, have raised a lot of issues, especially among businesses (Al-Daboubi & Alqhaiwi, 2022). Concerns have been raised about whether contractual obligations may be breached as a result of the pandemic. The inability of a party to perform a contract due to unprecedented circumstances is termed as a f*orce majeure*. *Force majeure* allows for the suspension of performance and may permit the complete discharge of a contract. The enforcement of the MCOs in Malaysia would mean that there is a *force majeure* event under any existing contract and/or serve as a legal basis for contract termination.

In numerous contractual settings, renegotiations have revolved around and will continue to be influenced by *force majeure* provisions. Having a *force majeure* provision in a commercial contract by the contracting parties is a common practice. There are two types of *force majeure*

events: permanent and temporary. Permanent *force majeure* occurs when contractual fulfilment is impossible. The whole or substantial portions of the contract is uncompleted for the relevant continuous period of the duration stated in the contract. As a consequence, the contract is terminated. Temporary *force majeure* is when the fulfilment of the contract is halted for a temporary period. Once the catastrophic period ends, the contract can be fulfilled again. Suspension and extension of time is the possible solution.

The *force majeure* clause provides the justification for a delay or the failure of performing the contractual obligations due to unprecedented circumstances, such as riots, wars, acts of god, explosions and pandemics. In the event of such circumstances, the contracting parties who rely on the *force majeure* clause must show the existence of the following four conditions: (i) the occurrence of such an event; (ii) the particular event has prevented, hindered or delayed the parties in carrying out their contractual obligations; (iii) the non-fulfilment was because of situations that are out of their control; and (iv) the parties have taken reasonable measures to deter or mitigate such an event or its repercussions. In the case *Malaysian Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718, the Court of Appeal held that the words *force majeure* has been held in many cases to have a more extensive meaning than an 'act of god'. In the case of *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and Another Appeal* [2018] 3 MLJ 326, the court held that the *force majeure* clause can only be used when it is expressly stated in the contract. This means that in the absence of a *force majeure* clause, the law stipulates that the non-performance caused by the occurrence of any external event that prevents the performance of a party having no control over such event, such as war, pandemic, disease, or any act of God, cannot be excused.

Recently, Malaysia has gazetted an act of Parliament known as the Temporary Measures for Reducing the Impact of Coronavirus Disease 19 (COVID-19) 2020, which has its legal force on 23 October 2020 (hereinafter referred to as the COVID-19 Act 2020). The COVID-19 Act 2020 is in effect for two years starting on 23 October 2020, or in accordance with the date or duration stated in the Act. The Act is one among the several measures adopted by the Malaysian government to assist individuals and businesses affected by the economic woes caused by the pandemic. The aim of the Act is to reduce the economic

and financial effects of the pandemic, more specifically in contractual performance as highlighted in Section 7 of the Act, which has stated that:

> "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."

By virtue of the aforementioned provision, the government allows contractual parties to postpone contractual obligations which have been affected by the COVID-19 pandemic from the possibility of legal action being taken. This means the contracting parties cannot exercise their contractual rights under the contract, that is by seeking redress for the inability of the other contracted party to fulfil its obligations. However, this measure is merely a temporary relief for the contractual parties until a certain specified date. The types of contracts covered by Section 7 of the Act are also restricted to only certain specific types, such as contracts for construction work or construction consultancy, contracts for professional services, leases or tenancies of non-residential immovable property, events, contracts with tourism businesses, and contracts related to religious pilgrimages (Schedule to Part II).

Using doctrinal analysis, this paper aims to link the *force majeure* clause during the COVID-19 pandemic to the question on the obligation of "good faith" in contracts. The paper will discuss the COVID-19 pandemic as a *force majeure* event, the development of "good faith" in contract law and the application of "good faith" in contracts as a mitigation for a *force majeure*. Finally, the paper will conclude with a conclusion and recommendations.

COVID-19 PANDEMIC AS A *FORCE MAJEURE* EVENT

A *force majeure* clause typically exempts one or both parties from performing the contract due to the occurrence of events caused by unprecedented circumstances. In the case of *RHB Capital Bhd v Carta*

Bintang [2012] 10 MLJ 469, it was stated that: "Force majeure clauses are clauses generally intended to include risks beyond the reasonable contract of a party. In essence, it frees both parties from liability or obligation when an event such as war, riot or act of God such as an earthquake takes place". The events could be fires, wars, typhoons, acts of terrorism strikes and other unforeseen situations that are out of the parties' control, and as a result preventing or diminishing the value of the contractual performance. As mentioned earlier, the scope of *force majeure* is considered and ascertained according to the specific facts or circumstances peculiar to the particular case, namely fulfilling the conditions of event occurrence, hindered or delayed obligations, out of control non-fulfilment, and reasonable mitigating measures.

The initial outbreak of COVID-19 in the city of Wuhan in China which then rapidly deteriorated into a pandemic as the virus spread across the globe. The pandemic is regarded as one of the events that may invoke a *force majeure* as it fulfilled the characteristic of "unforeseeable", "unavoidable", "uncontrollable", "impracticable", and "beyond a party's responsibility" (Hansen, 2020). The pandemic has had a wide-ranging impact on contractual relationships. Some companies have voluntarily shut down to avoid exposing their workers and customers to the risk of getting Covid-19 (International Labour Organization, 2020). Other companies have been forced to close since customers have stopped visiting their businesses out of fear of infections and/or workers have been diagnosed with the illness. Non-essential businesses have been asked to suspend operations, abiding the government's orders. On the other hand, companies which are not affected by the pandemic or government's order, have been subjected to closures due to the suppliers' inability to provide materials for their operations. Besides, companies may also have been forced to close as a result of the shortage of economic support. For example, credit from financial institutions has been hardly available. These circumstances are all likely to affect the contractual obligations between the parties concerned.

In general, the COVID-19 pandemic is not an event that is reasonably foreseeable when parties enter into a contract. The occurrence of the COVID-19 pandemic is unavoidable as it can be considered as an act of God. The outbreak of the pandemic is beyond the control of the contractual parties, whilst the imposed restrictions represent the mitigating measures to control the spread of the pandemic.

Consequently, contractual parties are unable to fulfil the contractual liability, leading to unenforceable contracts. Thus, the COVID-19 pandemic clearly fulfils all the conditions of being a '*Force Majeure*' event (LLC, 2020).

RISE OF THE GOOD FAITH IN CONTRACT LAW

In the eighteenth and nineteenth century, the landscape of contract law has changed due to the development of politics, economics and society in parallel with the *laissez faire* period (Carlin, 2002). There has been less intervention from the government due to the practice of free market capitalism. The contract law underwent a radical transformation from the classical theory to a modern one (Carlin, 2005). The classical theory of contract propounds the idea of contract freedom and sanctity that depends on the bargaining power of the contracting parties. It ties the court's hands as it now cannot interfere. In contrast, modern contract law expects the law to uphold fairness and justice due to issues related to the inequality in bargaining power, the widespread use of standard-form contracts and the emergence of many types of economic activities which have hampered contract freedom. Recently, courts are more willing to interfere to overrule the contract clear terms when the contract is found to be unfair and unjust by way of differing interpretations of the contract (Fong, 2009).

Eliminating uncertainty and unfairness is associated with the concept of "good faith". The doctrine of "good faith" has received wide attention as it is considered a 'modern armour' in contract law. It promotes fairness and justice, which differs from the classical contract law's expectation (Fong, 2009). "Good faith" may appear to be a hazy concept, but it is omnipresent in contract law. For example, two hundred years ago, in the case of *Carter v Boehm* (1766) 3 Burr 1905, Lord Mansfield famously said that "Good faith is a principle that can be applied to all contracts". In Australia, the concept of "good faith" was given recognition in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26NSWLR 234. Priestley J opined that the appropriate method towards the development of "good faith" is to subdue unfairness. His Honour succinctly observed that:

> "People generally, including judges and other lawyers, from all strands of the community, have grown used to

> the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view, this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

Recently, the Supreme Court of Canada acknowledged "good faith" as a concept to advance contract fairness. According to Cromwell J.'s opinion in *Bhasin v Hrynew* (2014) SCC 71 (S.C.C.), if there is a duty to uphold contractual agreements, it will not only make the law more definite and just, but it will also be in keeping with the commercially reasonable expectations. In this case, it serves as an act of justice to the misled appellant as he lost his business value.

In a similar vein, the COVID-19 pandemic is considered as a *force majeure* event whereby many contracts are unenforceable, creating uncertainty and unfairness to the contracting parties. COVID-19 continues to plague the world as there appears to be no end to the pandemic. Thus, as a 'modern amour' in contract law, "good faith" serves as a commendable solution in dealing with the many contractual issues between parties.

Good Faith: A Notion Protean in Nature

Although the term "good faith" is increasingly of interest in contract law, it has a variety of connotations (Nurhidayah Abdullah, 2020). "Good Faith" has numerous definitions, including honesty, cooperation, rationality, justice, parties' reasonable expectations, and regard for others' interests. The most prevalent expression of "good faith" is its moral idea, like honesty (Terry & Cary, 2009). However, incorporating moral concepts such as honesty into "good faith" adds to inevitable conflict, causing the meaning to become less focused. Although some scholars and commentators found that the numerous meanings of "good faith" have been confusing and contradictory to each other, Lord Gyles J commented on the issue in the case of *Council of the City of Sydney v Goldspar Australia Pty Ltd* (2006) 230 ALR 437, 498-499 as follows:

> "The 'variety of opinions' in both the authorities and commentaries as 'bewildering' and noted that approaches vary from the 'cautious' to the 'adventurous'".

In contracts, "good faith" refers to the idea that the parties have a duty to one another that goes beyond the specific terms of the agreement (Gava & Kincaid, 1996). When exercising one's contractual rights, a party is expected to consider the interests of the other party. The existence of "good faith" is perceived as respecting the fairness and justice of the contract without disrespecting the contract's freedom and sanctity. "Good faith" ensures that the contract is viable for the parties by aligning the concept of "good faith" with the spirit of the contract (Bolieiro, 2015). In *Kirke La Shelle Company v Paul Armstrong Company* (1933) 263 N.Y 79,87, a New York Court of Appeals case, it was stated that in:

> "Every contract there is an implied covenant that neither party shall do anything which will have (the) effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."

"Good faith" differs from the maxim *pact sunt servanda* because it gives breath to the fairness and justice to the contractual parties. In a contract, "good faith" is ascertained by the examining the specific circumstances and contexts. Einstein J stated in the case *Hudson Resources Limited v Australian Diatomite Mining Pty Limited & Anor* [2002] NSWSC 314, that the context of an agreement is determined by the agreement as a whole and the circumstances in which it was signed. This indicates that "good faith" cannot operate in isolation; it requires a context. By its very nature, "good faith" is a wide notion that can be used in a variety of ways to protect the contract's benefits. Understanding the background of a certain agreement is critical to determining its meaning. If "good faith" is established throughout the negotiation process, for example, only issues related to the negotiation process will be considered.

The notion of "good faith" is present in most civil law statutes, including the French Civil Code (1804), the German Civil Code (BGB) (1900) and the Italian Civil Code (1942), and they all give examples of what "Good Faith" entails. The approach of civil law to "Good Faith" may be found in the overall philosophy of contract, which regards the parties' relationship as its centre point (Klein & Bachechi, 1994), which indicates that the contracting parties'

behaviours must, in general, adhere to "Good Faith". After the two world wars, "Good Faith" has become the central aspect in German contract law when it comes to resolving economic and social issues. Article 242 of the German Civil Code (BGB) emphasises the need of honouring contractual agreements. According to this Article, which focuses on the parties' behaviour while taking into account standard business practises, a debtor is required to perform the contract in good faith. "Good Faith" is defined in this context as "treu und glauben", which literally translates to "faith and credit" (Powers, 1999). "*Treu und glaube*n" was previously enshrined in Roman law's "*bona fides"*, and the notion is akin to the French term "*bonne foi"*, which means "Good Faith". "*Treu und glauben"* is contextually interpreted as follows:

> "*Treu*" …signifies faithfulness, loyalty, fidelity, reliability; '*Glauben*' means belief in the sense of faith or reliance. The combination of "*Treu und Glauben*" is sometimes seen to transcend the sum of its components and is widely understood as a conceptual entity. It suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interests of the other party, and it implies and comprises the protection of reasonable reliance. Thus, it is not a legal rule with specific requirements that have to be checked but may be called an 'open' norm. Its content cannot be established in an abstract manner but takes shape only by the way in which it is applied" (Whittaker & Zimmerman, 2000).

The interpretation of Article 242 on how a debtor is performing in private law has evolved beyond its actual wording. Article 242 has had a significant impact on the evolution of German contract law, as the courts introduced a number of requirements to ensure that a contract is faithfully performed, such as the duty to defend interests, the duty to provide full information, and the duty to collaborate. Since the legislative basis for deriving a new general principle of law is insufficient in practice, German courts have used the provision on a wider scale. Despite the fact that "good faith" is mentioned frequently and plays an important role in the German Civil Code (BGB), it is not defined. As a result, judges in civil law systems, such as that found in Germany, are more creative in incorporating "good faith" into the black letters of the law. The courts have used Article 242 to impose

additional obligations that are not clearly stipulated in the contract or in statutes on contracting parties. As a result, Article 242 is regarded as a broad application for resolving any contract disputes that arise between the parties. It was opined that,

> "You can find a source (be it a court decision or a scholarly theory) for every solution imaginable or wanted, BGB Article 242 [*German civil code* good faith provision] serving as the legal anchor to even the wildest propositions and results" (Schlechtriem, 1997).

In addition to Article 242, another clause, that is Article 157, which deals with contractual interpretation standards, indicates that when evaluating the terms of a contract, "good faith" shall be considered. According to Article 157, contracts must be interpreted in "good faith" when usual use is taken into consideration. These two clauses imply that "good faith" must be present in all contractual elements. In other words, the court considers "good faith" as a critically important factor in ensuring that the parties' needs and interests are fairly balanced.

English law, in contrast to civil law, adopts a different method and disregards "good faith" as a core philosophy. English law favours pragmatic solutions, implying that there is no such prevailing concept of "good faith". Despite the fact that English contract law does not recognise "good faith", it often follows the conditions of "good faith". This means that English courts make piecemeal decisions in circumstances of unfairness where "good faith" is inferred. Lord Acner commented in the case of *Walford v Mile*s [1992] 2 AC 128,138 that,

> "Good faith is inherently repugnant to the adversarial position of the parties involved in negotiations…"

In practice, negotiating the obligation to "negotiate in good faith" is as difficult as it is fundamentally irreconcilable with a party's position. Similarly, in the terms of performance, English law placed a premium on the parties' contractual rights. As illustrated in the case of *James Spencer & Co Ltd v Tame Valley Padding Co. Ltd*, (Court of Appeal, 8th April 1998, Unreported) Lord Justice Potter commented that,

> "(There is) no general doctrine of good faith in the English law of contract. The Plaintiffs are free to act

> as they wish provided that they do not act in breach of a term of the contract."

Other legal notions in English law, such as "non-derogation from grant", "unconscionability", "common law duty to collaborate" and "fiduciary obligations", can address the issues of unfairness, contractual injustice, and uneven bargaining. In comparison to "good faith", these legal notions are well-established and long-standing. The Court of Appeal for Ontario in the case of *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 172 O.A.C. 78 (CA), referred to Finn J (previously Judge of the Federal Court of Australia) who demonstrated the blurry distinction between these legal concepts as follows:

> "Unconscionability' accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in defence to that other's interests, it then proscribes excessively self-interested or exploitative conduct. 'Good faith', while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The 'fiduciary' standard for its part enjoins one party to act in the interests of the other-to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much of the most contentious of the trio is the second 'good faith'. It often goes unacknowledged. It does embody characteristics to be found in the other two.'

In addition to *caveat emptor*, English courts are more likely to apply a specific legal concept than a broad principle to achieve the same results. Legal notions such as duress, mistake, misrepresentation and undue influence are sufficient to cope with particular issues of fairness. Lord Wilberforce in the case of *New Zealand Shipping Co. Ltd v A.M Satherwaite & Co Ltd (*1975) QB 154 denoted English law as follows:

> "English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts uneasily into the marked slots of offer, acceptance and consideration."

The development of contract under common law has been influenced by the intervention of statutes at a specific level where the statutes acknowledge the presence of "good faith" in particular circumstances over the last half of the 20th century. "Good Faith" is a common tenet in insurance context, with *Carter v Boehm* (1766) 3 Bur 1905 establishing the duty of "good faith" almost 250 years ago. Lord Mansfield, in that case, opined that:

> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary."

Later, the Insurance Contracts Act 1984 (Cth) codified "good faith" in section 13 of the Act, which states clearly:

> "Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished."

"Good Faith" was well known in the insurance industry due to the obligation of "utmost good faith". In addition, this section stated explicitly that in order to reap the benefits of the insurance contract, both contractual parties must be transparent to each other through the duty of disclosure.

Nevertheless, the phrase "good faith" is used in a variety of statutory and common law contexts. The term has been mentioned in Sections

120-124 of the Bankruptcy Act 1966 (Cth), sections 51-52 of the Trade Practices Act 1974 (Cth), and Section 181(1) of the Corporations Act 2001 (Cth). These Acts make reference to "good faith" in two ways: (i) openly mentioned in the legislation; and/or (ii) indirectly indicated in others. For instance, "good faith" is implied in section 181(1) of the Corporations Act 2001 (Cth), which states that a corporation's directors or other officers must exercise their powers and perform their obligations in "good faith". The corporation's best interests are served by a fair interpretation of duties. The wide breadth of legislative references to "good faith" clearly indicates that "good faith" is an expected quality. "Good Faith" is well established in common law in the context of a fiduciary or employment relationship when there is a "special kind of relationship" via implied terms of "good faith", projecting confidence and reciprocal trust. The pervasive discourse of "good faith" in both legal systems indicates the flexibility of "good faith" in achieving justice and fairness.

The Arrival of Duty of "Good Faith": Implication or Construction

The duty of "good faith" is established through implied terms. In general, implied terms for "good faith" is divided into: "implied in law" and "implied in fact". The former is based on the legal ramifications of a particular type of contract, whereas the latter is based on a necessity test. There are debates and misunderstandings over the position of whether the implied duty of "good faith" is a term "implied in law" or a term "implied in fact".

According to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26NSWLR 234, "good faith" can be implied in both fact and law. In practice, however, the situation is different because there may be some overlap. In the above case, Priestley J had this to say:

> "Although the authorities discussed by Hope JA in Castlemaine Tooheys seem to require a sharp distinction to be drawn between implication ad hoc and by law, assigning the former to the fact of particular contract, and the latter to the legal incidents of contracts of different classes, consideration of the contract in the present case shows there may be a good deal of overlap between the two categories."

Peden (2001), on the other hand, believes that incorporating good faith, through implied terms, may be more of a setback than a constructive force in establishing the "good faith" requirement. The "Construction" method is the most effective means of incorporating "good faith" because it gives effect to the parties' intentions when interpreting the contract in its entirety, as well as avoiding any unreasonable construction where possible. The method has two processes: "interpretation" and "construction". The courts determine the meaning of words through "interpretation", whereas the legal ramifications are determined through "construction" (Peden, 2001). The method is based on the "theory of cooperation", whilst any other approach could lead to illogical and improper reasoning (Peden, 2001).

The obligation of cooperation has long been a part of contract law to promote justice, fairness, and cooperation in carrying out contractual obligations. Lord Blackburn's judgment in *Mackay v Dick* (1888) 6 App Cas 251, 262 illustrates the duty to cooperate as follows:

> "As a general rule … wherein a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agree to do all that is necessary to be done on his part of the carrying out of that thing, though there may be in express words to that effect."

Thus, the obligation of cooperation is used to the extent that it is required in a contract to keep the contract from becoming void. In the case of ABB *Transmissions & Distributions Sdn Bhd v Sri Antan Sdn Bhd* (2009) 7 MLJ 644, the High Court stressed that the first defendant had a "duty of cooperation" in the performance of the subcontract to ensure that the plaintiff carried out its work in a timely and orderly manner. Therefore, both "duty of cooperation" and the principle of "Construction" works 'hand in glove', whereby the principle of "Construction" incorporating good faith by focusing on a party's intention and the "duty of cooperation" foster cooperation between them. Despite the fact of how controversial the concept of "good faith" is, the principle of "construction" promotes cooperation between contractual parties and the attainment of the contract's objectives.

THE APPLICATION OF GOOD FAITH IN CONTRACTS

The COVID-19 Act 2020 provides an opportunity to introduce "good faith" through the principle of "Construction", particularly the "theory of cooperation" so as to ensure that contracts remain enforceable. "Construction" is a unique notion since it encompasses both interpretation and construction. When construing the contract as a whole, the process of interpretation and construction works to give effect to the parties' intentions while avoiding any unreasonable impact. The concept of "good faith" promotes cooperation and fairness. Despite the fact that section 7 of the Act may cause the contract to be halted, the application of "good faith" will ensure that the deal will continue as usual. Since the COVID-19 pandemic has impacted so many people and sectors, a balance must be established between reopening businesses and flattening the infection curve. In this context, "good faith" can be used as a mitigating factor to ensure that a contract is still enforceable, notwithstanding the difficulties that the contracting parties are experiencing.

During the COVID-19 pandemic, an extraordinary effort must be made to ensure that the principle of "good faith" will be used. It is critical that contracts are made more flexible for the contracting parties. Hence, it is proposed that the parties concerned renegotiate the contract's terms and conditions without rewriting it in the spirit of "good faith", taking into account the interests of the other party involved in the contract. Many raw materials, for example, are difficult to obtain due to logistical constraints; therefore, the parties affected should renegotiate to limit the production of the material to a realistic output target, so that the contract does not have to be halted. To make the contract valid, both parties must agree to add a supplementary agreement, which can alleviate the impact of the COVID-19 pandemic on the agreement. Renegotiation is possible, for example, in terms of price, time, and quantity of manufacturing, but not in terms of quality.

The two regimes that establish the concept of "good faith" are the "contractual approach to "good faith" and "the expected moral standard" (Peden, 2000). By considering "good faith" as an implied term, the "contractual approach to good faith" aims to give it a meaning based on the parties' intentions (Burton & Andersen, 1990). This approach adheres to the traditional contractual approach to the implication of provisions, in order to give the contract business efficacy. "The expected moral standards" in a contractual relationship

are concerned with the desirable behaviour. The parties' conduct is assessed by examining the parties' behaviours in specific circumstances. A merchant's desired behaviour is defined as an example of "good faith". This approach is based on the Uniform Business Code, Section 2-103(b), which characterises good faith in the context of a merchant as "honesty in fact and adherence to acceptable commercial standards of fair dealing in the trade".

"Good faith" is synonymous with honesty, which is a hackneyed term. In *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, Priestly, J. argued that "good faith" should be defined by a moral standard, and that the standard of 'fairness' can be expected on the basis of a society's contemporary expectations. The abstract nature of the concept makes it difficult to encapsulate the entire notion of "good faith" in a single definition. As a result, an attempt has been made to define "good faith" using the following three concepts: (i) honesty; (ii) consideration for the parties' other interests; and (iii) cooperation/loyalty (Mason, 2000). These multiple categories provide a clearer understanding of its meaning. Similarly, there is a technique known as "An Excluder" which eliminates any type of bad faith in order to determine its meaning (Summers, 1968). This approach is particularly appealing because it opens up a substantial dimension of its meaning without relying on only one of its meaning, which can be difficult to pin down at times. The current expected moral standards, which are honesty, consideration for the parties' other interests, cooperation/loyalty and "An Excluder" were the common expectations of the contracting parties in a contract. In a nutshell, the benefits of the concept of "good faith" which although has many definitions, allows for a more workable and flexible definition that can be tailored to the particular needs experienced during the pandemic of COVID-19 and beyond. It is an important and necessary move away from the rigidness of the traditional contract.

CONCLUSION AND RECOMMENDATIONS

This article has highlighted the significance of "good faith" in contracts triggered by a *force majeure* event, that is, the COVID-19 pandemic. The pandemic is unprecedented, and contracting parties are faced with a great deal of uncertainty as to when it will stop, despite the fact that they must still fulfil their contractual obligations. Through Section 7 of the COVID-19 Act 2020, the Malaysian government has taken the

necessary steps to alleviate the consequences of the pandemic on such contractual obligations.

Since the Act has a time lapse clause, the court should apply the doctrine of "good faith" to all types of contracts during and after the COVID-19 epidemic. The adaptability of "good faith" provides the advantages of concept flexibility to suit the parties' intention and behaviour expectations from the contract without overwriting the contract, but rather provide a more flexible solution that respects contract freedom and sanctity. The advantages of "Good Faith" having numerous definitions, including honesty, cooperation, rationality, justice, parties' reasonable expectations, and regard for others' interests will allow for more certainty in interpreting a contract which been affected by the COVID-19 pandemic.

The meaning of "good faith" should be evaluated through the lens of "Construction" via the "duty of cooperation" involving two processes: (i) "interpretation"; and (ii) "construction". The "duty of cooperation" is enforced only to the extent that it is required to secure the contract's promised benefits. The "interpretation" method entails the courts determining the meaning of words, whereas the "construction" method entails determining the legal consequences of the contract. The "Construction" method allows judges to be more inventive in their interpretation. "Good faith" is a long-standing concept in many statutes, and it is conceivable to legislate it in the COVID-19 Act in a similar way.

The seven categories in the COVID-19 Act should not be the limit of the application of "good faith" in contracts; rather, it should provide a long-term solution rather than a short-term solution. It is important to emphasise that "good faith" can reduce the uncertainty and unfairness by acting as a mitigating factor. In this regard, the contract's outcome may at least be predicted, albeit other aspects such as price, time, and quantity will need to be reassessed. In short, the principle of "good faith" can foster a constructive relationship between contracting parties during this challenging pandemic period and beyond.

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