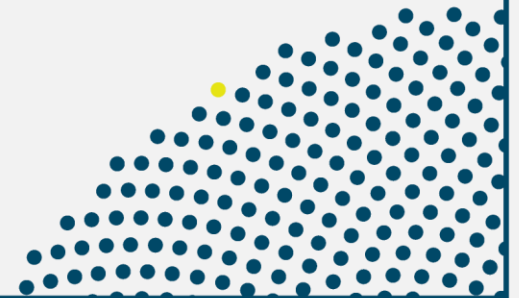


29 April 2020



WEEKLY  
WEDNESDAY  
WEBINAR

# A Legal Health Check for your Transactions





# COVID-19: Force Majeure and Frustration of Contract

**PART I** Force Majeure Clauses

---

**PART II** Do MCO Regulations constitute Force Majeure Events in Leases and Tenancies?

---

**PART III** Frustration of Contract



**Jeyakuhan S K Jeyasingam**

**Partner**

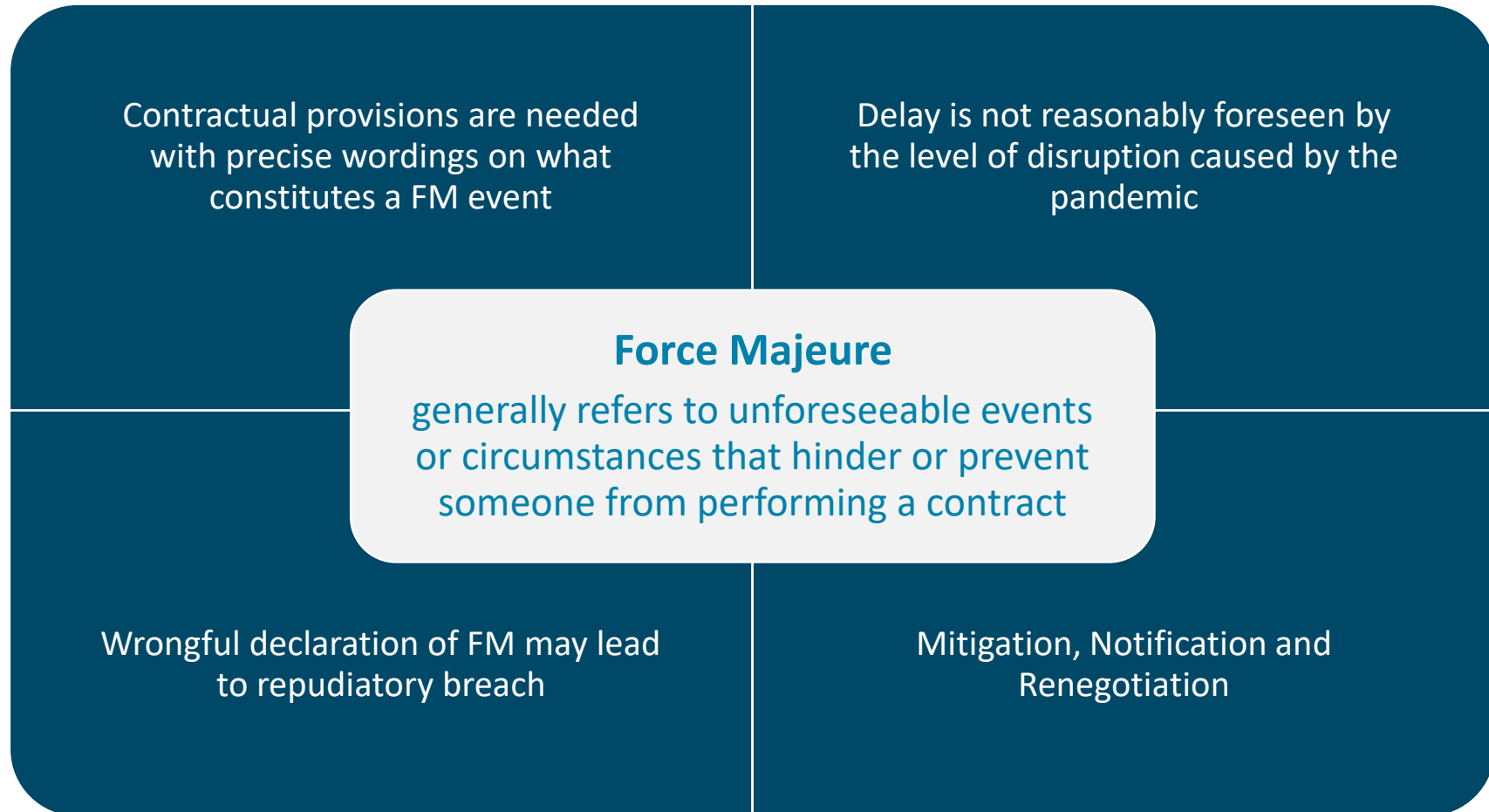
Zaid Ibrahim & Co. (a member of ZICO Law)

[jeyakuhan.jeyasingam@zicolaw.com](mailto:jeyakuhan.jeyasingam@zicolaw.com)

+603 2087 9987



## ● Force Majeure Clauses



## ● Force Majeure Clauses

### **Contractual provisions are needed with precise wordings on what constitutes a FM event**

- What constitutes a force majeure event depends on the precise wordings of the force majeure clause.

### **Delay is not reasonably foreseen by the level of disruption caused by the pandemic**

- Establish that any delay or disruption in fulfilling contractual obligations is not within the reasonable foresight of the parties.
- While an epidemic could be reasonably foreseen, given other viral outbreaks such as SARS, it is arguable that the current unprecedented level of disruption is unforeseeable.
- Establish a causal link between the outbreak or ensuing governmental actions, and the delay or failure to perform the contract.

# ● Force Majeure Clauses

## **Wrongful declaration of FM may lead to repudiatory breach**

- Be careful not to wrongly declare a force majeure event.
- This could be construed by the other party as a repudiatory breach, giving the party a right to claim damages for breach.

## **Mitigation**

Take reasonable steps to mitigate the effects of the delay or failure to perform. Failure to do so may undermine your ability to rely on the clause.

---

## **Notification**

Check if there are specific notification requirements that apply in a force majeure event, i.e., timing and how the other party is to be notified. Such requirements should be strictly adhered to.

---

## **Renegotiation**

Consider if it would be better to renegotiate or discuss with the other party on a constructive solution to deal with the disruptions, rather than ending the contract.

# ● MCO Regulations and FM Clauses in Leases/Tenancies

How do the MCO Regulations affect the rentals due to be paid by the tenants?

## Commercial Tenancies & Leases

Essential Services

Non-essential Services



## FM Clause stipulated in the contract

Allocation of risk

Exemption from liability



## Outcome of claiming FM

Rental reduction

Contract comes to an end

# ● MCO Regulations and FM Clauses in Leases/Tenancies

## How do the MCO Regulations affect the rentals due to be paid by the tenants?

Pursuant to Paragraph 5(1) of the Regulations, it is provided that:

**“Any premises providing essential services may be opened provided that the number of personnel and patron at the premises shall be kept to the minimum.”**

For shopping malls, the Regulations do not expressly prohibit them from continuing their daily operation. Tenants that provide essential services such as banking, postal, healthcare & medical and food supply are permitted to operate subject to the conditions of the Regulations.

### Commercial Tenancies & Leases

#### Essential Services

permitted to remain open during government enforced hours.  
**- tenants providing essential services will continue to generate revenue, albeit at a smaller margin.**

#### Non-essential Services

must remain closed during MCO.  
**- but what about the tenants who have no option but to cease their operations under the Regulations as they are not in the business of essential services as defined by the Regulations?**

# ● MCO Regulations and FM Clauses in Leases/Tenancies

## If there is an FM Clause stipulated in the Lease/Tenancy

### Allocation of risk & Exemption from liability

In the context of a Lease/Tenancy, the purpose of an FM clause is to contractually allocate the risks between the landlord and the tenant with regard to the occurrence of future events in specific circumstances, all of which are stipulated within the clause itself. FM clauses are intended to include risks beyond the reasonable contract of a party. In essence, it frees both parties from liability or obligation when a supervening event takes place.

## Outcome of claiming FM

### Rental reduction

The specifics of the FM clause vary from one agreement to another as the contracting parties are free to stipulate the terms of the clause. If the Tenancy provides that rental shall be reduced due to any cause beyond the landlord or tenant's control, such as flood, fire, earthquake and other Acts of Gods, as well as military operations, war, blockade, pandemic disease outbreak, act or actions of state authorities, i.e. the Regulations, then the tenant is entitled to a reduced rental under the FM clause.

### Contract comes to an end

This may be the inevitable outcome in some instances when the FM clause is triggered.



## ● MCO Regulations and FM Clauses in Leases/Tenancies

### If there is no FM Clause stipulated in the Tenancy/Lease

We refer to the Supreme Court case of ***Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd [1994] 3 MLJ 192***. In this case, there was no force majeure clause in the sale and purchase agreement to excuse performance by the vendor on account of any extraneous event obstructing the performance with the vendor having no control at all over such event and through no fault of the vendor. The Supreme Court held that if a party makes an unqualified or absolute promise, he accepts the risk of performance of that promise becoming impossible. He will not be discharged from liability if performance becomes impossible through no fault of his own.

## ● Frustration of Contract

**Can a contract  
be discharged  
by frustration?**

In the absence of contractual provisions such as FM, parties may alternatively seek to rely on the doctrine of frustration, which applies by operation of law

In Malaysia, for a discharge by frustration to be successful, one would need to show that the event or change in circumstances were not self-induced, and renders the performance of a contract radically different from what was originally undertaken, to the extent that the court must find it unjust to enforce the original promise

If there is no such FM clause in the tenancy agreement, a tenant may have to look for another avenue – whether or not the tenancy agreement can be frustrated

Section 57 Contracts Act 1950 – 2 situations of a contract being impossible to perform

Case study - A contract does not become frustrated merely because it becomes difficult to perform

## ● Frustration of Contract

### The doctrine of frustration is codified in the Contracts Act 1950, specifically Section 57:

Section 57. Agreement to do impossible act.

57. (1) An agreement to do an act impossible in itself is void.

(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.

### Application of section 57:

In ***Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201***, the Court of Appeal stated that a tenant pursuing frustration of the tenancy agreement must show three of the following elements:

- (a) the event, [i.e. the MCO under the Regulations], upon which the tenant relies as having frustrated the tenancy agreement must have been one for which no provision has been made in the tenancy agreement;
- (b) the event relied upon by the tenant must be one for which it is not responsible; and
- (c) the event which is said to discharge the promise, i.e. the tenant's covenant to pay full rental to the landlord, must be such that renders it radically different from that which was undertaken by the tenancy agreement.


## ● Frustration of Contract

### Application of section 57:

The Federal Court in the case of *Public Forest Industries Sdn Bhd & Anor v Lin WenChih & Anor* held that:

“A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was 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...”

Guided by the statutory provision of the Contracts Act 1950 and the legal precedents set by the Malaysian courts, a tenant will face an uphill battle in proving to the court that the tenancy agreement may be frustrated due to the reason that it will face financial difficulty in coming up with the monthly rental. Even if a tenant is able to frustrate the tenancy agreement, the effect of frustration is that the tenancy agreement shall be rendered void, and not the intended effect of a reduced rental throughout the period of the MCO.



# COVID-19: Force Majeure in various contracts, and comparison with material adverse change clauses

**PART I** Components of FM clauses

---

**PART II** What is a MAC clause and its difference with FM clauses

---

**PART III** Components of MAC clauses



**Tan Wooi Hong**

**Partner**

Zaid Ibrahim & Co. (a member of ZICO Law)

[wooi.hong.tan@zicolaw.com](mailto:wooi.hong.tan@zicolaw.com)

+603 2087 9805



## ● Examples of FM clauses in various contracts

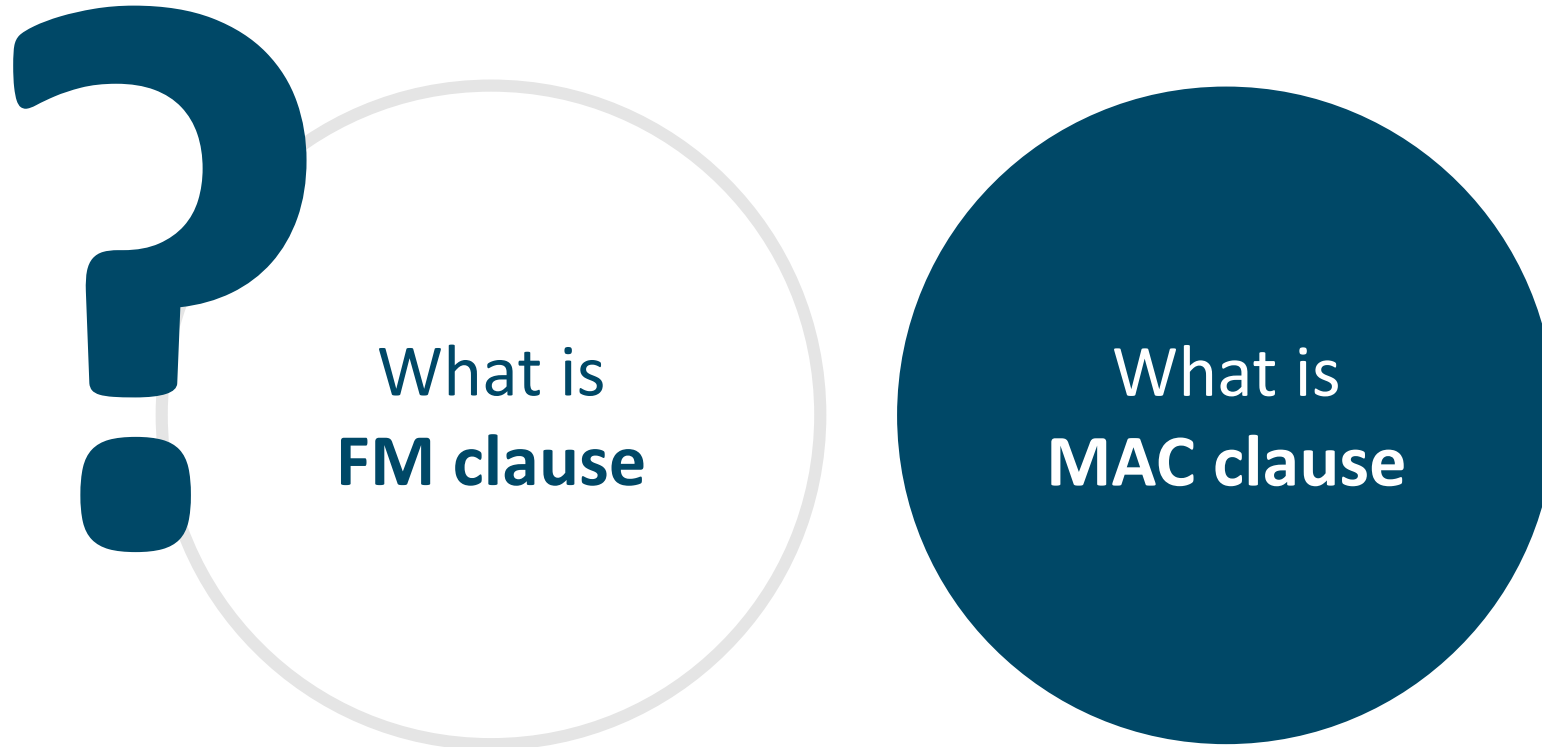
Bank Facility Agreement	Master agreement for derivatives instruments
Procurement contracts eg aircraft	Construction contract

### Ingredients

- 1 **Triggering Events**
- 2 **Relieved Party**
- 3 **Intended Consequences**

- 4 **Notification**
- 5 **Duty to Mitigate**
- 6 **Discussion in Good Faith**

## ● Difference between FM and MAC clauses



## ● Examples of MAC clauses

Shares / Assets Sale and Purchase Agreement

Equity underwriting agreement

Subscription Agreement for Sukuk programmes

### Ingredients

- 1 **Triggering Events**
- 2 **Relieved Party**
- 3 **Intended Consequences**





# COVID-19: Representations, Warranties and Indemnities

**PART I** Introduction

---

**PART II** Impact

---

**PART III** Enhanced Measures



**Stephanie Choong Siu Wei**

**Partner**

Zaid Ibrahim & Co. (a member of ZICO Law)

[stephanie.choong@zicolaw.com](mailto:stephanie.choong@zicolaw.com)

+603 2087 9835



## Risk minimization tools



### Representations

Statement of facts which, if false, give rise to a claim for damages as misrepresentation under tortious law



### Warranties

Statements of fact which, if false, give rise to a claim for damages on the basis of breach of contract



### Indemnities

Undertaking given by one party to reimburse another party directly for certain expenses upon occurrence of agreed circumstances

### False statements

Negotiated representations and warranties becoming untrue

01

02

### Lack of protection

Insufficient protection from existing representations, warranties and indemnities.

03

04

### Potential disputes

Giving rise to potential disputes on the coverage of certain representations and warranties

### Indirect consequence

Potentially triggering the material adverse change clause or right to terminate

# ● Enhanced Measures : Ongoing and Potential M&A Transactions

## Buyers



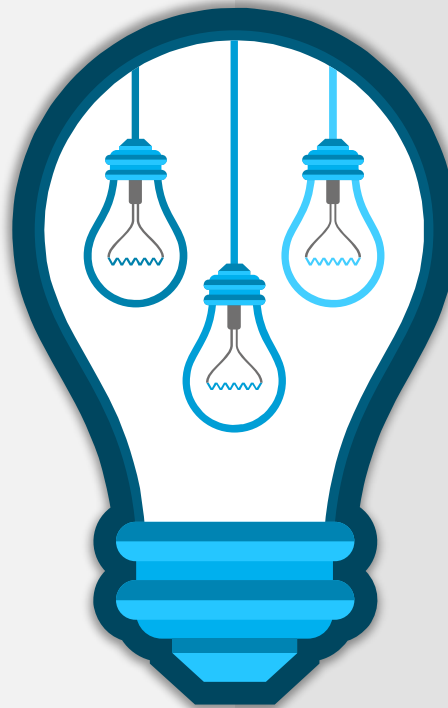
### Special representations and warranties

on Covid-19 business contingency plans and financial position as a method to understand the exposures and safeguards the sellers have against Covid-19



### Specific indemnities

to provide an enhanced protection on Covid-19 related risks



## Sellers



### Exclusion or limitation of liability

to exclude or limit any Covid-19 related business risks



### Re-examine

to check on the given representations and warranties to ensure that they are not inadvertently breached and if so, to consider providing disclosure



# COVID-19: Future Proofing Your Deals

**PART I**    Impact

---

**PART II**    Future Deals

---



**Idahani Ismas Ismail**

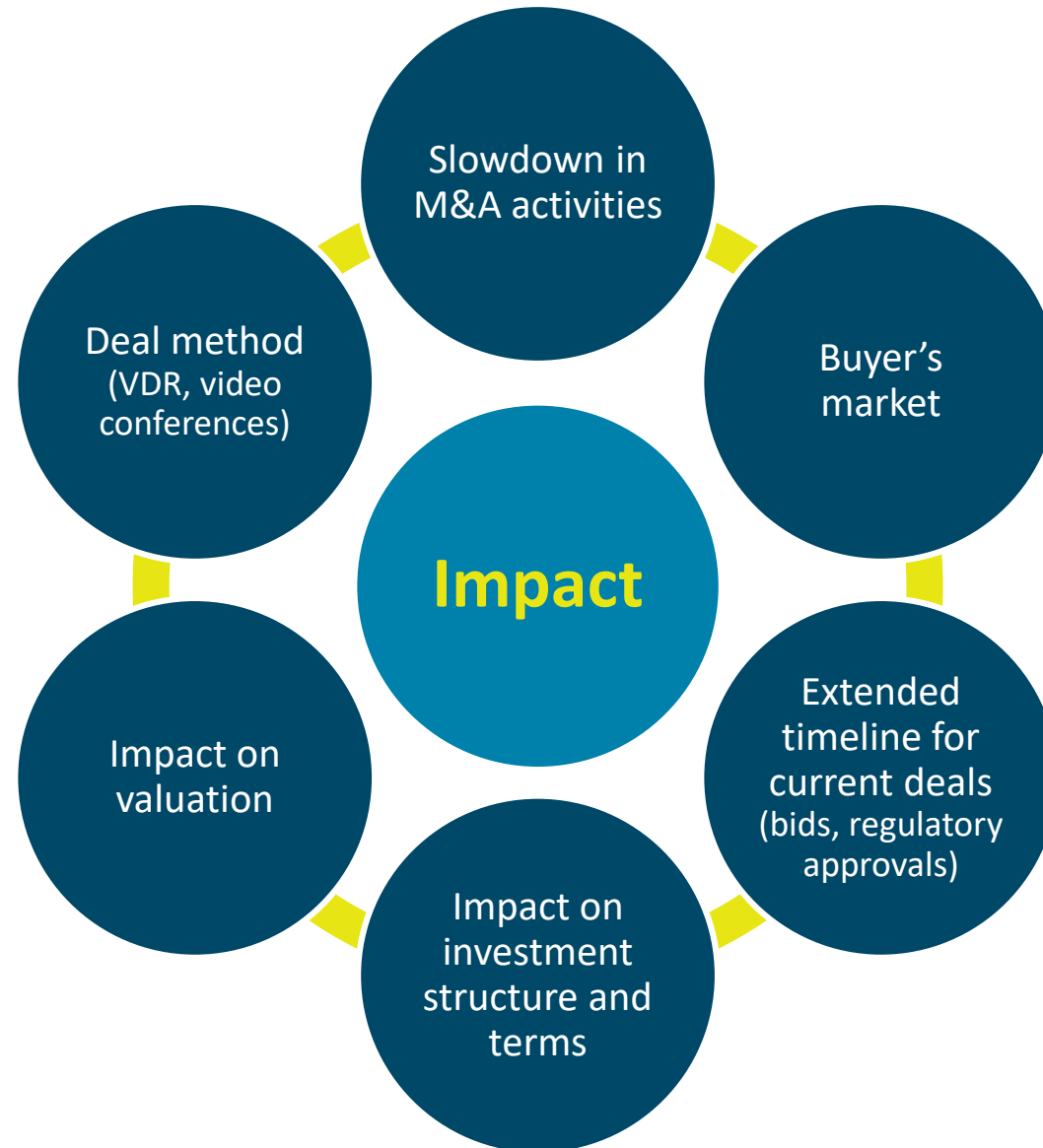
**Partner**

Zaid Ibrahim & Co. (a member of ZICO Law)

[idahani.ismas@zicolaw.com](mailto:idahani.ismas@zicolaw.com)

+603 2087 9852





## 1 STRUCTURE

### Buyer

- Ensuring adequate working capital post-deal
- Preference for completion adjustment or deferred consideration (to address immediate impact)
- More emphasis on indemnities, warranties, valuation, earn-outs

### Seller

- Minimising the impact of COVID-19 on the business
- Preference for cash consideration due to uncertain future performance

## 2 DUE DILIGENCE

- Practical impact to current and foreseeable future deals (logistics, social distancing)
- Virtual data room, video conferencing
- Queries on business continuity plan, pandemic management, reliance on external suppliers
- Employment issues (ability to work remotely)
- More focus on force majeure and termination provisions in contract review

## ● Future Deals

### 3 DOCUMENTATION

- Expect some delays (stop date, long stop date)
- MAC clause
- Conduct before completion (seller's ability to take emergency actions)
- Warranties (what can the seller provide?)

### 4 WARRANTY & INDEMNITY INSURANCE

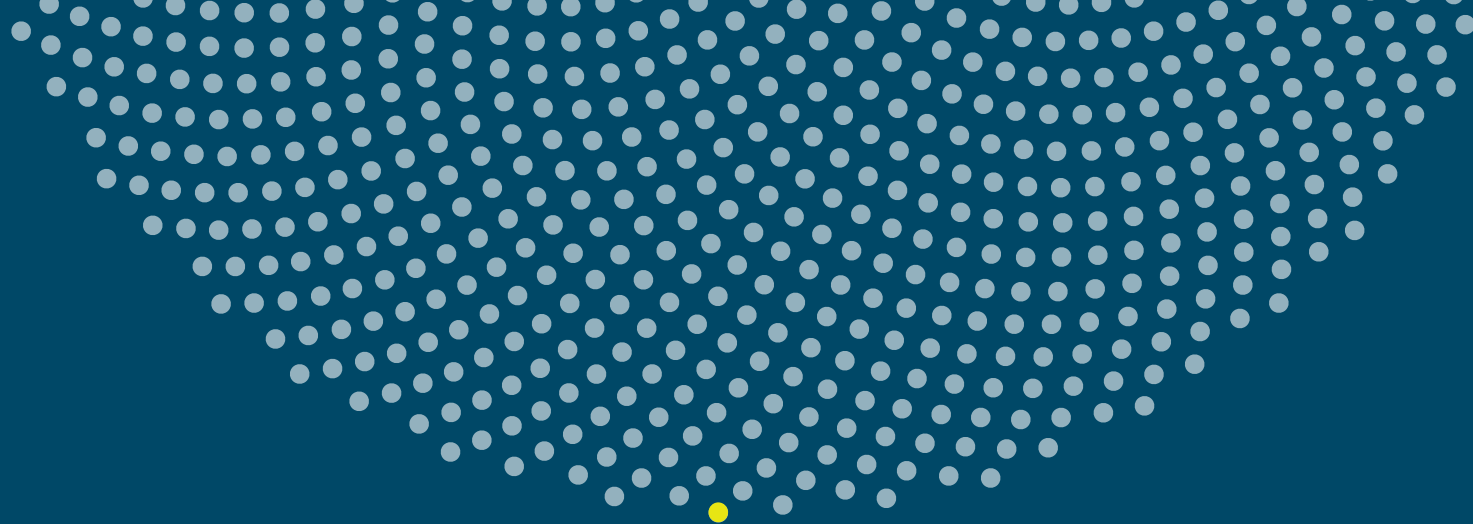
- Adequacy of buyer's due diligence into the impact of COVID-19 on the business (legal and financial) - economic losses, supply chain, disruption to business, termination of commercial contracts
- Seller's disclosure of the impact of COVID-19 on the business
- W&I policy - Is it a known risk? If so, may be excluded from coverage
- Moving forward, some insurers may consider specific exclusion of COVID-19 related losses from policy coverage



## ● Q&A session



**Share your questions  
with us!**



# THANK YOU

ASEAN INSIDERS, by origin and passion



[www.zicolaw.com](http://www.zicolaw.com)

BRUNEI | CAMBODIA | INDONESIA | LAOS | MALAYSIA | MYANMAR | PHILIPPINES | SINGAPORE | THAILAND | VIETNAM