

CONTRACTORS APPREHENSION OF DOCTRINE OF FRUSTRATION
AND FORCE MAJEURE CLAUSE IN CONSTRUCTION CONTRACTS

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DEDICATION

This thesis is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time.

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ABSTRACT

The spread of Covid-19 had constrained the entire world to uphold the lockdown where all the business areas and daily activities were put on hold and new standards were embraced from around 2020 up to this point. The construction industry was one area that was seriously impacted by this pandemic, including Malaysia. Endless discussions regarding the Doctrine of frustration were brought forward regarding determining the Covid-19 impact on the contracting party who plan to seek relief using this clause. Thus, the purpose of this study is to investigate whether the Doctrine of frustration can be applied in light of the Covid-19 pandemic and the level of awareness of contractors regarding the Force Majeure clause in Malaysia. This study was carried out using a mixed methodology. This method encompasses of integrated literature review, and a questionnaire survey was used. A literature review on the Doctrine of frustration stated that, unlike Force Majeure clauses, the Court could only consider frustration in the absence of a Force Majeure clause. Various case analyses found that under section 57 of the Contracts Act 1950, a pandemic such as Covid-19 would not be sufficient to frustrate a contract. For the second method, various construction professionals distributed the questionnaire survey. Descriptive analyses were done from the survey data using IBM Statistical Package for Social Sciences (SPSS). This paper uncovers a varying degree of awareness of the Force Majeure clause, for the most part, because of an absence of Experience with managing Force Majeure. This study was finished with specific proposals to work on enforcing the Force Majeure clause for future statements.

ABSTRAK

Penyebaran Covid-19 telah mengekang seluruh dunia untuk menegakkan perintah berkurang di mana semua kawasan perniagaan dan aktiviti harian ditangguhkan dan piawaian baharu telah diterima mulai sekitar 2020 hingga ke tahap ini. Industri pembinaan adalah salah satu bidang yang terjejas teruk akibat wabak ini, termasuk Malaysia. Perbincangan yang tidak berkesudahan mengenai Doktrin of Frustration telah dikemukakan mengenai penentuan kesan Covid-19 kepada pihak yang berkontrak yang merancang untuk dapatkan bantuan menggunakan klausa ini. Justeru, tujuan kajian ini adalah untuk menyiasat sama ada doktrin Frustration boleh diaplikasikan memandangkan pandemik Covid-19 dan tahap kesedaran kontraktor berhubung klausa Force Majeure di Malaysia. Kajian ini dijalankan menggunakan metodologi campuran. Kaedah ini merangkumi kajian literatur bersepadu dan tinjauan soal selidik telah digunakan. Kajian literatur tentang Doktrin Frustration menyatakan bahawa tidak seperti klausa Force Majeure, Frustration hanya boleh dipertimbangkan oleh mahkamah jika tiada klausa Force Majeure. Pelbagai analisis kes membawa penemuan bahawa di bawah seksyen 57 Akta Kontrak 1950, wabak seperti Covid-19 tidak akan mencukupi untuk menggagalkan kontrak. Bagi kaedah kedua, tinjauan soal selidik telah diedarkan kepada pelbagai profesional pembinaan. Analisis deskriptif dilakukan daripada data tinjauan menggunakan IBM Statistical Package for Social Sciences (SPSS) Penemuan daripada kertas kerja ini mendedahkan bahawa terdapat tahap kesedaran yang berbeza-beza mengenai klausa Force Majeure, sebahagian besarnya disebabkan oleh ketiadaan pengalaman dalam menguruskan Force Majeure. Kajian ini telah selesai dengan cadangan tertentu untuk mengusahakan penguatkuasaan klausa Force Majeure untuk kenyataan masahadapan.

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LIST OF ABBREVIATIONS

MCO	-	Movement Control Order
UTM	-	University Teknologi Malaysia
UNIDROIT	-	International Institute for the Unification of Private Law

LIST OF SYMBOLS

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CHAPTER 1

INTRODUCTION

1.1 Problem Background

The last major pandemic the world faced was in 1918. Then, the Spanish flu infection infected 500 million populations and claimed over 50 million lives. Presently following 100 years, in 2019, the world is faced with Coronavirus (Covid- 19) outbreak. Until July 2021, the pandemic had infected over 182 million of the world's population, with over 3.9 million death cases. However, they admit that the toll is two to three times higher than official figures suggest (WHO, 2020).

In order to fight the ongoing pandemic, the Malaysian Government had to enforce the Movement Control Order or MCO on the 18th of March 2020. However, this order which was initially planned to last two weeks turned into a more prolonged ordeal and ended on July 2021. The burden brought through implementing the Movement Control Order (MCO) by the Malaysian authorities and the rapid increase of the COVID-19 pandemic throughout the planet has extraordinarily affected the construction sector and local business areas.

As of the first quarter of 2020, the Australian economy has contracted 10%, with expected damage of roughly \$5 billion. On the other hand, the U.K.'s economy has weakened by 5.8% or £301.5 million daily. Following this trend, the pandemic has reduced investments in the Indian building industry by 13% to 30% and reduced the gross domestic product by 23.9% in India. It does not stop there. The rate of unemployment has increased to 27.11% as of May 2021. Just as these large economically growing countries have felt the adverse effect of covid-19, Malaysia was not spared. The Malaysian construction sector experienced a huge decay of

RM18.5 billion during the Movement Control Order (MCO) stretch between March and April 2020.

The vast majority of construction activities besides those arranged as essential organizations were stopped through the implementation of MCO, which over the long haul has brought about a 30% loss of workers' supply and their pay and diminished the utilization of construction materials by 42% (equivalent to RM4.6 billion). This high loss in revenue is not the end of the problem, as even after the MCO was over, the contractors could not fulfil the end of their contract due to various reasons, such as lack of material or human resources. To escape from this contractual obligation, many contractors now turn to look for the Force Majeure clause in their contract to apply for an EOT. Contracts which do not contain such clauses are looking to invoke the Doctrine of frustration to do the same.

1.2 Problem Statement

The year 2020 has shown us how much an unexpected occasion might make loads of harming the entire world and that we are so powerless to the demonstration of God. For our nation Malaysia, the misfortune and expansive impacts brought about by this worldwide pandemic are equivalent to the remainder of the world. This incorporates the bankruptcy of numerous organizations. The spike ascends in joblessness, crisis alert in the medical care area, the deficiency of pay for individuals, highly emergency in a few nations, lengthy duration of lockdown, and more (Casady & Baxter, 2020).

One of the significant sectors that this has impacted was the construction sector. The construction industry is one of the pillars of a country's monetary advancement. Construction projects are progressively mind-boggling, bringing about complex agreement reports, and due to these, disputes are plentiful (Rahmat & AbdulRahim, 2020; Adebisi Raji, 2020). Nevertheless, as a direct cause of the Movement

Control Order, which the Government implemented to keep a check on the pandemic, the contract which reinforced the different parties in a construction project must be analyzed in depth.

This is because movement control order (MCO) has created a setback for finishing construction works because of the closure of the site, disturbance to the program and labor shortages (Thamodaran & Sri Kantha, 2020). When such delay occurs in a project, it will have unfriendly outcomes on project goals concerning time, cost and quality. This is the point at which the terms Force Majeure and frustration of contract come to the surface to assist us in better comprehending the choices available when a cataclysmic event such as the pandemic hits us and how can the term assist an individual in managing their legitimate arrangement. As much as it is significant for us to satisfy our commitment written upon a contract, some things are undeniable and considerably tricky for us to fully satisfy due to certain conditions, such as a worldwide pandemic.

However, different construction-related issues emerged, and the construction clause on Force Majeure got its spot in the limelight in conversation among the practitioners in considering the effect on the contracting party that tries to depend on this arrangement to look for help for the unfulfilled contract. The argument was mainly because the event was beyond everybody's control (Hansen, 2020).

Although the future remains uncertain, it is not uncommon for the construction industry to anticipate such an event to occur again. In fact, the construction industries are one of the sectors which is prone to risk and uncertainties. As such, the Force Majeure clause which is a contractual provision in the Malaysian standard form of contract such as PAM, CIDB 2000 and PWD serves as a risk distributor between parties when such an event occurs (Law, 2010). As important as they are, there are many cases where the Force Majeure clauses are not well drafted which results in conflicts, disputes and failure to invoke the clause itself. When such an event occurs, the parties can look towards the Doctrine of frustration.

Hence, this research attempts to study the applicability of Force Majeure in light of the movement control order implemented by the Malaysian Government. The applicability of the Doctrine of frustration will be analyzed for contracts that do not contain the Force Majeure clause. Furthermore, Malaysian contractors' awareness of the Force Majeure clause and its importance in construction contracts will also be studied.

1.3 Research Questions

The questions of the research are:

- (a) How can the Doctrine of frustration be applied in light of Covid-19?
- (b) What is the level of awareness of contractors regarding the Force Majeure clause in Malaysia?

1.4 Research Objectives

The objectives of the research are:

- I. To determine the applicability of the Doctrine of frustration be applied in light of Covid-19
- II. To determine the level of awareness of contractors regarding the Force Majeure clause in Malaysia

1.5 Scope of the Research

The following scope and limitations restrict the following research:

- (a) Focused on cases on the applicability of Doctrine of frustration
- (b) Construction professionals recruited for survey were not from contract background

1.6 Significant of Research

This research aims to provide further insight into the current construction contract situation in Malaysia in relation to the effects brought by the Movement Control Order (MCO) enforced during the Covid-19 pandemic. This pandemic was another peculiarity, and few legal events can be alluded to in deciding the ideal way to manage its contractual impacts. Consequently, when contractors could not perform their contractual obligation, they looked towards Force Majeure as a clause to escape from it. However, they were severely lacking in knowledge as it was a rarely used clause.

Furthermore, the standard forms used in Malaysia, such as PAM, JKR, PWD forms and more, state that the Force Majeure clause needed to be expressly incorporated into the contract and expressly read together with other provisions. Although, there are many cases where the Force Majeure clauses are not well drafted which results in conflicts, disputes and failure to invoke the clause itself. This has caused some contractors to invoke the Doctrine of frustration as a way out of their contractual obligations. Unlike Force Majeure, the Doctrine of frustration is implied by common law and can be invoked without an express Force Majeure clause as per the Contracts Act 1957 (Jayabalan, 2020).

Hence, this study aims to provide more light on Force Majeure, its applicability to the movement control order, and whether the Doctrine of frustration can be helpful in light of the pandemic. Moreover, the research will also study the level of awareness of Malaysian contractors regarding the Force Majeure clause. This will show us how familiar contractors are regarding this clause and even allows us to suggest improvements on how the awareness can be increased.

1.7 Research Methodology

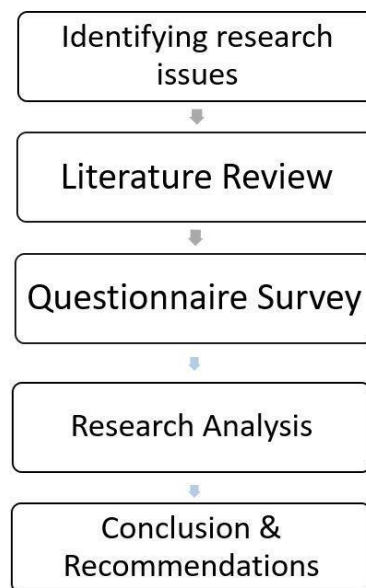


Figure 1.1 Research cycle

The method to achieve the research objectives will be done by analyzing the Doctrine of frustration. Firstly, the background and how the Doctrine came to be will be dissected to reveal that the Doctrine hailed from Roman law, which is ancient and out-of-date. Following that, the Doctrine of frustration, as in the Contracts Act 1950, is examined to mirror the limit of the Doctrine when applied to a pandemic circumstance. Finally, an integrative literature review which reviews, investigates,

and blends relevant literature for more information, will be done. Furthermore, data regarding the familiarity and knowledge of the construction professionals regarding the Force Majeure clause will be taken. This is done through a questionnaire survey which will be constructed using Google form and distributed to various construction professionals from different fields.

1.8 Chapter Arrangement

In order to achieve the research objective, which is to study the applicability of the Doctrine of frustration to be applied in light of Covid-19 and the level of awareness of Malaysian contractors regarding the Force Majeure clause, a mixed method which encompasses of integrated literature review and questionnaire survey will be used. Briefly, the research cycle will be separated into five principal stages:

Chapter 1: Identifying research problems

Chapter 1 provides background of the study, problem statement, research questions which led to the formation of the research objectives and research significance of this study nature of this study. Furthermore, the significance of the research, a brief review on the methodology used and the chapter arrangement of the research was categorized.

Chapter 2: Literature Review

The second phase of the research which is in chapter 2 introduces the basis Doctrine of frustration, its application in Malaysia and the theories surrounding the doctrine for the research. Moreover, the contractual provision for frustration which is Force Majeure and the events and effects of successful invocation was analyzed. The

differences between Force Majeure clause and the Doctrine of frustration were interpreted.

Chapter 3: Research Methodology

This phase of the research enlightens on the chosen research methodology to address the issue and answer the research questions. This chapter contains the research design and the development of instruments to achieve the objective. Mean analysis was the chosen analysis used to evaluate the quality of research.

Chapter 4: Research Analysis

This chapter comprises qualitative and quantitative data analysis along as the data collected. The qualitative method was used to achieve the first objective of the study through the analysis on successful and unsuccessful cases on the Doctrine of frustration and to compare it with the current situation in Malaysia. Moreover, the questionnaire survey was analyzed with SPSS to get the mean level of awareness on the construction clause: Force Majeure.

Chapter 5: Conclusion & Recommendations

This chapter discuss the overall findings of the research. Furthermore, the chapter reflects on the limitations of the research and the knowledge that it can contribute to the community. The chapter proposes recommendations for future research and ended with conclusions.

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