

FORCE MAJEURE EVENTS IN CONSTRUCTION INDUSTRY

KOO ZHONG YEE

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Choose an item.

Faculty of Built Environment & Surveying
Universiti Teknologi Malaysia

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DEDICATION

This thesis is dedicated to my father and mother, who taught me to work hard to complete even the most difficult tasks.

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ABSTRACT

In recent years, there have been increasing questions about force majeure events, especially after COVID-19 affected the entire Malaysian construction industry. This also made the participants in the construction industry aware of the insufficient understanding of the force majeure clause. Therefore, this study aims to improve the understanding of force majeure clauses in Malaysia and under what circumstances a party may invoke the clause to relieve liability for failure to perform the contract. In this study, documentary analysis was adopted. The standard forms of contract of the Public Works Department (PWD), Pertubuhan Arkitek Malaysia (PAM), The Institution of Engineers, Malaysia (IEM), Construction Industry and Development Board (CIDB) and International Federation of Consulting Engineers (FIDIC) were studied. These standard forms of contract have been chosen as they are commonly used by the Malaysian construction industry. In addition, a legal analysis of past law cases was carried out. Based on the findings, it was concluded that force majeure is any situation or circumstance beyond the control of both parties, usually including war (or similar), acts of terrorism, riot (other than that caused by the contractor's employees, subcontractors or agents), natural disasters (see the list provided in the clause), governmental acts and epidemics. The force majeure clause may be triggered or relied upon when the related party able to prove that (i) the facts within the scope of the force majeure clause, (ii) the force majeure event prevented, hindered or delayed its performance of the contract, (iii) the non-performance was caused by circumstances beyond party's control, and (iv) all reasonable steps were taken to avert the alleged force majeure event. In conclusion, this study provides a clearer definition of force majeure and a useful reference for construction industry participants on the issue of force majeure.

ABSTRAK

Kebelakangan ini, terdapat banyak pertanyaan mengenai peristiwa ‘force majeure’, terutama setelah COVID-19 mempengaruhi seluruh industri pembinaan Malaysia. Ini juga menyedarkan para peserta industri pembinaan mengenai pemahaman yang tidak mencukupi mengenai klausa ‘force majeure’. Oleh itu, kajian ini bertujuan untuk meningkatkan pemahaman tentang klausa ‘force majeure’ di Malaysia dan dalam apa keadaan sesuatu pihak boleh menggunakan klausa tersebut untuk melepaskan tanggungjawab kerana gagal melaksanakan kontrak. Dalam kajian ini, metodologi analisis dokumentari. Bentuk kontrak yang standard seperti ‘Public Works Department’ (PWD), Pertubuhan Arkitek Malaysia (PAM), ‘The Institution of Engineers, Malaysia’ (IEM), ‘Construction Industry and Development Board’ (CIDB) dan ‘International Federation of Consulting Engineers’ (FIDIC) telah dikaji. Bentuk kontrak standard ini telah dipilih kerana biasanya digunakan oleh industri pembinaan Malaysia. Sebagai tambahan, analisis terhadap kes-kes lalu telah dilakukan. Berdasarkan maklumat yang diperolehi, dapat disimpulkan bahawa ‘force majeure’ adalah keadaan di luar kawalan kedua-dua pihak, biasanya termasuk perang (atau yang serupa), tindakan keganasan, rusuhan (selain daripada yang disebabkan oleh pekerja kontraktor, subkontraktor atau ejen), bencana alam (lihat senarai yang disediakan dalam klausa), tindakan pemerintah dan wabak penyakit. Klausa force majeure boleh dicetuskan atau diandalkan apabila pihak berkaitan dapat membuktikan bahawa (i) fakta dalam skop klausa ‘force majeure’, (ii) peristiwa ‘force majeure’ mencegah, menghalang atau menangguhkan pelaksanaan kontraknya, (iii) kontrak tidak dilaksanakan disebabkan oleh keadaan di luar kendali pihak, dan (iv) semua langkah wajar telah diambil untuk mengelakkan kejadian ‘force majeure’. Kesimpulannya, kajian ini memberikan definisi yang lebih jelas mengenai ‘force majeure’ dan rujukan yang berguna bagi peserta industri pembinaan mengenai isu force majeure.

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LIST OF ABBREVIATIONS

CIDB	-	Construction Industry and Development Board
COVID	-	Coronavirus Disease
FIDIC	-	International Federation of Consulting Engineers
IEM	-	The Institution of Engineers, Malaysia
ISM	-	Institute of Surveyors Malaysia
JCT	-	Joint Contracts Tribunal
JKR	-	Jabatan Kerja Raya
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Works Department
UTM	-	Universiti Teknologi Malaysia

CHAPTER 1

INTRODUCTION

1.1 Problem Background

Construction is a very complex industry with many risks and uncertainties that could not be foreseen. Chen et al. (2018) mentioned that the construction projects are always accompanied by huge risks as the cooperation between employers and contractors is very complicated and usually involves long-term relationships. Besides that, Ezeldin and Abu Helw (2018) also point out that the construction industry faces many uncertainties, such as market price fluctuations, adverse weather changes, government actions and decisions, inflation and other factors that we cannot foresee. As a result of this series of risks, people have adopted a legally binding contract to protect the interests of both parties.

The main purpose of using a contract is to make the bound parties fulfil their obligations. Conflict in the construction industry is an inevitable problem, which can be caused by poor communication, payment problems, personnel problems, cultural differences, delays, scope changes, and et cetera. Each side has its own interests, goals or ideas, and if those interests are affected, it can lead to some form of confrontation or conflict within the organization. Therefore, with the consent of the parties, the contract also contains some clauses which most reasonably protect the interests of the parties.

Although people have tried to take all possible events into account, construction disputes keep happening. This may be due to some clauses in the contract being incomplete, which affects the interests of the parties and often leads to unhappiness afterwards, so the parties seek legal solutions. One of those incomplete clauses is the force majeure clause. This is inevitable because force majeure events cannot be predicted or estimated. According to Ezeldin and Abu Helw (2018), the risk of force

majeure is one of the most important risks to be considered by both parties in a contract.

Force majeure clause is an important tool to reduce the risk of liability for cancellation of plans due to unforeseen events. Most standard form of contracts contain a force majeure clause which relieves the involved parties from performing their contractual obligations if certain circumstances beyond their control arise, making performance impossible. Taking appropriate precautions from the outset can reassure both parties that even in the worst case, the terms of the contract will be respected and both parties will be treated fairly.

In recent years, there have been increasing questions about force majeure events, especially in the wake of COVID-19. Mohd Zin et al. (2021) mentioned that the construction industry is affected by the adverse effect of Covid-19. In this context, a number of measures, such as action movement control order (MCO), have been put in place in response to the spread of the COVID-19 outbreak. This resulted in delays in the completion of the construction project due to site closures and disruptions in procedures and manpower. Since the force majeure clauses in some contracts do not mention such event, many people do not know what measures should be taken.

This has led the construction industry to take force majeure clauses seriously, and researchers around the world to pay more attention to related issues. Relevant researchers should conduct in-depth research and analysis on force majeure events in the construction industry. This will not only give participants in the construction industry more confidence, but will also let people know what to do in certain situations. It is hoped that by clarifying the force majeure events, unnecessary disputes can be solved or reduced.

1.2 Problem Statement

The standard forms of contract are widely used because it takes into account the risks and benefits of involved parties, thus balancing the risks undertaken by all parties. Zakaria et al. (2013) stated that the administration of construction contract in Malaysia normally facilitated through the standard form of contract. However, the standard form of contract used in Malaysia still has some shortcomings, especially in the wake of COVID-19. In order to slow down or control the spread of the COVID-19 epidemic, the Malaysia's government announced the Movement Control Order (MCO). Due to this MCO restriction, many companies have been forced to temporarily shut down operations, making it difficult for companies to maintain liquidity and revenue. Under this control order, the construction industry is also affected. According to Azmi et al. (2021), the construction industry also raised questions about the impact of the MCO on the contract.

Besides that, Mohd Zin et al. (2021) also state that most standard form of contract used in Malaysia do not identify 'epidemic' or 'pandemic' as one of the specific events listed under its force majeure clauses, and this causes a number of problems. This also made the participants in the construction industry aware of the insufficient understanding of the force majeure clause. This indicates that the definition of force majeure in the standard form of contract used in Malaysia needs to be expressed more clearly. If the force majeure clause in the standard form of contract not explicitly stated, the party may not be able to stop performing its contractual obligations when certain circumstances beyond its control occur which render performance impossible, unlawful or commercially impossible. Therefore, all parties concerned must have certain understanding or knowledge of the force majeure clause and know under what circumstances they may take or rely on force majeure clause.

In light of the discussion on the issues related to force majeure events in construction, it appears that there are rather minimal amount numbers of research in regards to what events should be considered force majeure. Beyond that, there are few studies on a comprehensive or uniform definition of force majeure. Therefore, it is

necessary to conduct a more in-depth study of the definition of force majeure and the circumstances in which parties are entitled to invoke force majeure clauses.

1.3 Research Objectives

The objectives of the research are:

- (i) To determine available definition of force majeure as stipulated in standard form of contracts applicable in Malaysia.
- (ii) To identify circumstances under which the parties are entitled to rely on the force majeure clause to relieve the parties of their liability.

1.4 Scope / Limitation of the Study

This study focuses the force majeure under the standard form of contract that commonly used in Malaysia, but limits its scope to (i) Public Works Department (PWD) Form 203A 2010, (ii) Pertubuhan Arkitek Malaysia (PAM) Contract 2018, (iii) The Institution of Engineers, Malaysia (IEM) Form of Contract 2011 and (iv) Construction Industry and Development Board (CIDB) Standard Form of Contract 2000, and also (v) International Federation of Consulting Engineers (FIDIC) standard form of contract. Besides that, in order to identify circumstances in which the parties are entitled to rely on the force majeure clause, law case analysis of relevant cases from 2000 to 2021 was conducted.

1.5 Significance of Study

This study provides sufficient information about the force majeure clause. Through the study of relevant cases, the force majeure clause can be more clearly and deeply understood. Therefore, this study plays an important role in reducing conflicts or disputes caused by force majeure.

1.6 Chapter Organization

This subsection will explain the entire research process from study design, development of literature review, and finally analysis of data.

1.6.1 Chapter 1

This chapter explains the background of study, problem statement, and also the objectives of this research. Besides that, the scope of research was established for the topics we focused on. Significance of research also determined in this chapter. This chapter basically explains the object of research and the importance of studying it.

1.6.2 Chapter 2

This chapter includes a literature review of force majeure clauses in standard form of contracts used in Malaysia.

1.6.3 Chapter 3

This chapter explains how the entire study was conducted. This includes the entire research process from study design, developing a literature review, analyzing data or information, and finally making conclusions and recommendations.

1.6.4 Chapter 4

This chapter introduces the law case related to force majeure and analyses it. Finally, put all the findings in a prepared table.

1.6.5 Chapter 5

In this chapter, the results are summarized and some recommendations for future research are given.

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