

CAN THE CONTRACT BE RENEGOTIATED DUE TO COVID-19 PANDEMIC?

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Choose an item.

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DEDICATION

To my beloved parents, family, and friends
for their endless love, care and financial support.

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ABSTRACT

The coronavirus COVID-19 pandemic is hitting the country and led the Malaysia's government imposed the Movement Control Order ("MCO") across nationwide in combating the pandemic outbreak. Businesses were force to closed, hurting the economy, not least to the construction industry. Results the constructions industry stalled behind. Enforcement of MCO led the circumstances that made contractual commitments more onerous to fulfil and its consequences of its ranged from a decrease in the availability of commodities, human and materials resources , to the suspension and, in some cases, termination of parties or entire projects. As such, much recent discussion has been on contractual rights that permit contractual parties to be released from their duties. Considering the occurrence of the said pandemic in the world is new, it is understandable contractual right will give least positive impact to the contractual parties and may force the parties attempt to renegotiate the contract. The research's objective is to identify the possibilities of renegotiation of contract in construction industry as to the relief to the negative impact result from the COVID-19. Targeted respondents are derived from the contract department personnel or higher management that has vast experience in project management for contractual matter especially in any renegotiation for the contract. Interviews, questionnaires, are method for data collection as opinion on the problem. Key matter is the resolution to produce the relief rather than negative to the construction industry. Six (6) interviews were conducted. All projects were impacted by the adherence of MCO as construction site were stopped, five (5) contracts were remain unchanged whereas one (1) contract is renegotiated with precedent of "Change of Law". Respondents' opinion that exercising contractual rights only brings the parties to dead-end. Practical benefit is most crucial to the resolution toward the affected project which most recommended to allow the contract be renegotiated. Law evolves throughout the current issue, Man-made Law to disobey. Right and interest of relevant parties especially commercial contract reserve to be amended upon change of circumstance that out of control. Hence, contract is renegotiable due to pandemic Covid-19.

ABSTRAK

Pandemik coronavirus COVID-19 telah melanda negara dan kerajaan Malaysia telah melaksanakan Perintah Kawalan Pergerakan (“PKP”) di seluruh negara dalam memerangi wabak pandemik itu. Banyak perniagaan terpaksa gulung tikar sehingga menjejakan ekonomi terutamanya sektor pembinaan tidak dapat mengikuti progres di tapak binaan. Penguatkuasaan PKP menyukarkan pihak-pihak berkontrak memenuhi tuntutan kontrak yang telah dipersetujui. Hal ini telah memberi impak yang terdiri daripada kekurangan bekalan komoditi, sumber manusia, bahan binaan dan menyebabkan penggantungan serta penamatan sesebuah projek. Oleh sebab itu, banyak diskusi yang membincangkan hak kontrak membenarkan pihak kontrak mendapat pelepasan daripada tugas mereka. Memandangkan kejadian wabak tersebut di dunia adalah masih baru, dapat difahami bahawa akan memberi impak yang paling tidak menguntungkan kepada pihak-pihak yang berkontrak dan mendorong untuk melakukan rundingan semula kontrak. Objektif kajian ini adalah untuk mengenalpasti kemungkinan rundingan semula kontrak dalam industri pembinaan bagi mengurangkan kesan negatif pandemik COVID-19. Responden yang disasarkan adalah terdiri daripada kakitangan jabatan kontrak atau pengurusan tertinggi yang berpengalaman luas dalam isu kontrak, terutamanya dalam sebarang rundingan semula kontrak. Kaedah yang digunakan bagi pengumpulan data adalah melalui soalan kaji selidik dan sesi temu bual bagi mendapatkan pandangan berkenaan isu yang dibincangkan. Perkara kritikal ialah penyelesaian itu haruslah memberi manfaat kepada sektor pembinaan. Enam (6) sesi temu bual bersama responden telah dijalankan bagi setiap projek yang berbeza. Pematuhan PKP memberi kesan kepada semua projek apabila kerja di tapak pembinaan harus dihentikan. Kajian mendapati bahawa lima (5) kontrak kekal tidak berubah, manakala satu (1) kontrak telah dirundingkan semula dengan “Perubahan Undang-undang” yang telah dilakukan sebelum ini. Menurut responden, penegasan hak kontrak mengakibatkan jalan buntu bagi pihak yang terlibat. Faedah praktikal atau pun *Practical Benefit* adalah penting untuk menyelesaikan projek yang terjejas, dan amat disyorkan supaya kontrak dirundingkan semula. Undang-undang berkembang mengikuti peredaran isu semasa, membenarkan pelanggaran undang-undang buatan manusia. Hak dan kepentingan pihak yang

berkaitan, terutamanya kontrak komersial berhak untuk dipinda apabila berlaku perubahan keadaan di luar kawalan. Oleh itu, kontrak boleh dirunding semula kerana pandemik Covid-19.

TABLE OF CONTENTS

	TITLE	PAGE
	DECLARATION	iii
	DEDICATION	iv
	ACKNOWLEDGEMENT	v
	ABSTRACT	vi
	ABSTRAK	vii
	TABLE OF CONTENTS	ix
	LIST F FIGURES	xiii
CHAPTER 1	INTRODUCTION	15
1.1	Background of Study	15
1.2	Problem Statement	17
1.3	Research Question	18
1.4	Research Objectives	18
1.5	Significance of the Study	18
1.6	Research Methodology	19
1.7	Organization of Chapter	20
	1.7.1 Chapter 1 - Introduction	20
	1.7.2 Chapter 2 – Literature Review	20
	1.7.3 Chapter 3 – Research Methodology	20
	1.7.4 Chapter 4 – Data Analysis	21
	1.7.5 Chapter 5 – Conclusion and Recommendations	21
1.8	Chapter Summary	22
CHAPTER 2	LITERATURE REVIEW	23
2.1	Introduction	23
2.2	Temporary Measure for reducing the impact of Coronavirus Disease 2019 (COVID-19) Act 2020	25
2.3	COVID-19 Pandemic Impact on Contractual Provision.	28

2.4	Force Majeure Laws in Malaysia	32
2.4.1	PAM Form 2006 with Quantities	33
2.4.2	P.W.D Form 203A (Rev 2007)	35
2.4.3	FIDIC Red Book 2017	38
2.4.4	Asian International Arbitration Centre (AIAC) 2019 Edition	41
2.5	Contract Modification	42
2.5.1	Contract Act 1950	42
2.5.2	Bilateral Contract and Unilateral Contract	45
2.5.2.1	William v. Roffey Bros & Nicholls	47
2.5.2.2	Stilk v. Myrick 1809	50
2.6	Contract Renegotiation	53
2.6.1	Contract Renegotiation	57
2.6.2	Contract Renegotiation in Singapore	59
2.6.3	Contract Renegotiation in China	59
2.6.4	Contract Renegotiation in England & Wales	60
2.6.5	Contract Renegotiation in France	61
2.6.6	Contract Renegotiation in Germany	62
2.6.7	Contract Renegotiation in Hong Kong	62
2.6.8	Contract Renegotiation in Italy	63
2.6.9	Contract Renegotiation in Japan	64
2.6.10	Contract Renegotiation in Spain	65
2.6.11	Contract Renegotiation in United States	67
2.6.12	Contract Renegotiation in Countries	67
2.7	Frustration of Contract	71
2.8	Claimable For The Additional Loss & Expenses Incurred	76
2.9	Chapter Summary	76
CHAPTER 3	RESEARCH METHODOLOGY	78
3.1	Introduction	78
3.2	Research Methodology	79
3.3	Research Design	80

3.3.1	Initial Study	80
3.3.2	Literature Review	81
3.3.3	Data Collection	81
3.3.4	Data Analysis	82
3.4	Research Instrument	83
3.5	Interview Design	87
3.5.1	Section A	88
3.5.2	Section B	88
3.6	Writing the Report	91
3.7	Chapter Summary	91
CHAPTER 4	DATA ANALYSIS	93
4.1	Introduction	93
4.2	Response Rates	93
4.3	Respondent No. 1	94
4.3.1	Force Majeure	95
4.3.2	Termination Clause	95
4.3.3	Contract Modification	96
4.3.4	Can the contract be renegotiated due to COVID-19?	97
4.4	Respondent No. 2	97
4.4.1	Force Majeure	98
4.4.2	Termination Clause	98
4.4.3	Contract Modification	99
4.4.4	Can the contract be renegotiated due to COVID-19?	99
4.5	Respondent No. 3	99
4.5.1	Force Majeure	100
4.5.2	Termination Clause	100
4.5.3	Contract Modification	101
4.5.4	Can the contract be renegotiated due to COVID-19?	102
4.6	Respondent No. 4	102
4.6.1	Force Majeure	103

4.6.2	Termination Clause	103
4.6.3	Contract Modification	103
4.6.4	Can the contract be renegotiated due to COVID-19?	104
4.7	Respondent No. 5	104
4.7.1	Force Majeure	105
4.7.2	Termination Clause	105
4.7.3	Contract Modification	105
4.7.4	Can the contract be renegotiated due to COVID-19?	106
4.8	Respondent No. 6	106
4.8.1	Force Majeure	107
4.8.2	Termination Clause	109
4.8.3	Contract Modification	114
4.8.4	Can the contract be renegotiated due to COVID-19?	116
4.9	Summary of Finding Table	117
4.10	Chapter Summary	129
CHAPTER 5	CONCLUSION AND RECOMMENDATIONS	131
5.1	Introduction	131
5.2	Summary of Key Finding & Achievement	131
5.2.1	Force Majeure	133
5.2.2	Termination	133
5.2.3	Contract Modification	134
5.2.4	Can the contract be renegotiated due to Covid-19	135
5.3	Limitation of Study	135
5.4	Recommendations for Future Study	136
5.5	Chapter Summary	136
REFERENCES		137

LIST FIGURES

FIGURE NO.	TITLE	PAGE
Figure 1.1	Research Methodology Flow Chart	7
Figure 2.1	Overview of contract-renegotiation law by jurisdiction	61
Figure 3.1	Research Process (Oliver,2010)	78

CHAPTER 1

INTRODUCTION

1.1 Background of Study

The Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Fernando, 2020) Order 2020 was enacted by the Malaysian government as a response to the COVID-19 pandemic and to combat the spread of the virus. For the most part, all states and federal territories in Malaysia have been deemed to be contaminated local areas with effect from March 18, 2020, until March 31, 2020, inclusive. The relevant time has been extended to 14 April 2020 as a result of the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020, which was passed on 14 April 2019. Throughout the period, the Government of Malaysia imposed the Movement Control Order (“MCO”) across Malaysia, where, save as provided under the Prevention and Control of Infectious Diseases (Measures Within The Infected Local Areas) Regulations 2020 and eventually the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (No. 2) Regulations 2020 (“Regulations”) which gathering and movement are restricted.

The vast majority of daily activities have been suspended – whether they are in commercial establishments or educational institutions, or in any other kind of social meetings or activities, for that matter. Only businesses that provide "Essential Services," as defined in the Schedule to the Regulations, are permitted to be operated.

The general construction business is not considered to be a "essential service" but oil & gas.

Most of the construction works were halted during the MCO apart of those considered as essential services and critical. Despite the MCO was lifted, disruption to the construction industry is encountered continuously such as the SOP of health and safety measures to be incorporated to the construction site whereby preventing them to execute the works as per plan.

The members of construction industry such as the owners, developer, contractors and subcontractors were experiencing varies impact result from the COVID-19 pandemic. Direct impacts such as limitation of available resources such as the construction materials, labours due to due to the restriction on the conducting operation and limitation of movement, effecting the construction progress eventually lead the contractor to the delay, suspension, termination of parties and also financial constrain. Hence, many businesses especially contractors found themselves to be in the position of impractical in performing the contractual obligation and seeking the performance relief.

The COVID-19 situation has triggered a chain of events that will obstruct, postpone, or halt the performance of numerous contracts over the next few months. Businesses are likely to face pressure from a variety of sources: material shortages, staff shortages, restrictions on personnel movement, restrictions on conducting operations, other legislative and administrative actions, and the insolvency of contractors, subcontractors, and suppliers, to name a few. Many firms, through no fault of their own, will find themselves unable to meet some or all of their contractual

commitments and will be obliged to seek temporary or permanent relief from performance through any methods available.

Such an unprecedented treat as such pandemic COVID-19 that would led to the introduction new legislation around the globe. As a result, there is a considerable chance that the effect of Covid-19 on projects may result in a change in law entitlement under several construction contracts. (Holman Fenwick Willan LLP, 2002)

1.2 Problem Statement

The COVID-19 epidemic causes construction projects suffer, were stalling due to the enforcement of MCO and its consequences of its ranged from a decrease in the availability of commodities, human and materials resources , to the suspension and, in some cases, termination of parties or entire projects. (James P. Chivilo, Gina A. Fonte, 2020). It have created circumstances that made contractual commitments more onerous to fulfil. As its consequence, much recent discussion has been on the force majeure or termination clauses that allows contractual parties to be released from their duties.

Considering the occurrence of the said pandemic in the world is new, it is understandable the slackness of force majeure provision in the contract that conclude the pandemic is further hampering the recovery of contract's obligation of both parties and it would only led to the termination thereafter. The contractual duty in light of

business interruptions caused by the pandemic may force the parties attempt to renegotiate the contract (Amélie T. Gouin, 2020).

Hence, this thesis is to if the contract can be renegotiated due to COVID-19 in the construction industry, within Law, in the bids of looking for the relief.

1.3 Research Question

Can the contract be renegotiated due to the COVID-19 pandemic?

1.4 Research Objectives

The objectives of this research is to identify the possibilities of renegotiation of contract in construction industry as to the relief to the negative impact result from the COVID-19.

1.5 Significance of the Study

This research is seeking an answer to the most fundamental question of how the contractual binding to be renegotiated in bidding in seeking of the relief from such event.

1.6 Research Methodology

The ground works embraces the composition of techniques and measurements in conducting research whereby from literature to study of the not only limited to the relevant clauses in the contract bidding in the construction industry toward the effect result from the COVID-19 but also within the Law and the possibility of getting the contract be renegotiated despite the absence of the relevant clause that could lead to the renegotiation.

Respondents were selected whereby experience in handling the contractual matter pertaining the issue, and the respondents are from contract department and also top management of organisation in construction project management.

In the questionnaire, a part of the background of respondent, questions is raised not only limited to the perspective of contractual parties but also experience in renegotiation of contract.

Collection data were exercised to be analysed for facts finding in determine the possibilities of renegotiation of contract

Thereafter, research finding to be written up and presented which data derived from the collection and analysis. Objective were expected to be met throughout the said research process.

The finding would be concluded and be recommended thereafter.

1.7 Organization of Chapter

1.7.1 Chapter 1 - Introduction

Chapter one is provides the study's outline, start with its background and progressing via problem statement, aim, research questions, objectives, the significant of the study, the research methodology, the expectation of findings, the scope and limitation of the study, importance of the study and the chapter organisation.

1.7.2 Chapter 2 – Literature Review

Chapter two, a discussion on how the an issue has impacted on the construction industry. The outbreak of pandemic Covid-19 rock the nation that led the government imposing the restriction in battling the pandemic via MCO to nationwide. Industries facing its negative impact from the said enforcement and seeking relief from the impact. Author to research the possibility of positive outcome (relief) form such event, begins with the Covid-19 Act 2020 that enforced to nation. Whether the pandemic Covid-19 is covered under the construction contract, renegotiation of the contract toward the contract modification in bidding for relief. Other relevant precedent issue that would bring positive impact to construction industry as a whole.

1.7.3 Chapter 3 – Research Methodology

This chapter to cover the systemic mechanism in solving the problem by certain method upon the research study procedures. Collection of data, analyzation of data subjects to the discussion under the research method. Its begin in identify the problem for the research project, the topic, the method be used and lastly the objective for the

research. Research design is formed for data collection, which part of the strategy in addressing the research problem. Interview and questions, a apart of the targeted respondents in obtaining relevant data toward the problem.

1.7.4 Chapter 4 – Data Analysis

This chapter is to describe the data collection from the research method which is Interview and Questionnaires. The questionnaires is form and interviews sessions with the targeted respondents to be conducted, and data as such to be analyst. Opinion, answer on the subject matter were closely be monitored for relevant data to be obtained to the subject matter, as well as to the problem statement. Limitation such as time constraint, reluctancy of respondent to provide certain crucial information (contract's clauses) were expected to be part of its struggle.

1.7.5 Chapter 5 – Conclusion and Recommendations

Upon data collected from the research method. Conclusion and recommendation to be provided under this chapter. Literature review on the possibility of the contract be renegotiated whilst respondents from industry aired their view on the matter as well. Research methodology play crucial roles in getting the data be consistence with one another. Recommendation is concluded base on the literature review, respondents' opinion and the positive impact on the construction industry.

1.8 Chapter Summary

Covid-19 Act 2020 enforced by Government follow with the MCO in battling the pandemic outbreak which eventually hurt the industries economy especially on the construction field. Construction industry's player facing the impractical practise to continue the construction progress as plan but ceased due to the restriction imposed by the Government. This led the businesses seek for performance relief. However, the pandemic outbreak is not inclusive in the construction contract and it almost brings to the dead end for the effected parties whom seeking for the relief. Hence, author's research in "Can the contract be renegotiated due to the COVID-19 pandemic?" with objective in identify its possibilities that could bring the positive resolution. Research methodology embraces techniques, measurement in the literature study in relevant clauses / areas. Targeted respondent are to be selected for relevant data with background as well as the field experience. Research finding to be produced hereafter upon data collection and analysis. Objective were expected to be met throughout the research process.

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