

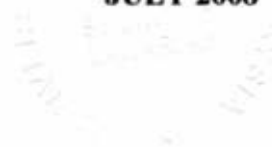
FORCE MAJEURE IN EXTENSION OF TIME

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**A project report submitted in partial fulfillment of the
requirements for the award of the degree of
Master of Science
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DEDICATION

To my beloved family,

Mom and Dad

Brother and sisters.. (Hale, Villa, Teley and Ebin)

my cousin Bilutz

To my lovely Housemates

Kathleen Hazel, Fenella and Gerard

My Friend

Fara & Ron

.....**Thank you for everything**

May God Bless always be with us

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ABSTRACT

Time is extremely important issue in construction. Most of construction contract specify time to complete the construction work. However, during the execution of the contract, circumstances may arise and leads to delay. In circumstances that delay occurs, the employer is entitled to claim for damages but time of completion also can be extended if the delay is caused by the relevant event which provided in extension of time provision in construction contract. One of the relevant events is force majeure. What is the definition of force majeure that applies in construction contract? What are the circumstances that are accepted as force majeure event in claiming for extension of time? The study aimed is to determine the meaning of a force majeure clause as the relevant events of extension of time. The findings of this study will assist to reduce uncertainty or difficulties in the event that relate to claiming of extension of time under the event of force majeure. The approach adopted in this research is law based cases. There are no limitations as for the court cases referred to in this study in terms of type of projects as long as the case is related to the force majeure event in claiming of extension of time. A total of six cases focusing on what is the interpretation of force majeure were studied. Through the analysis of court's judgments, the meaning of force majeure in extension of time have been determined. Force majeure means all circumstances independent of will of man, and which it is not in his power to control or responsibility which is caused by a superior force or irresistible force or overwhelming power.

ABSTRAK

Masa merupakan satu isu yang sangat penting di dalam pembinaan. Kebanyakan kontrak pembinaan menyatakan masa penyiapan bagi kerja-kerja pembinaan. Walau bagaimanapun, semasa pelaksanaan kontrak, keadaan-keadaan tertentu yang boleh menyebabkan kelambatan berlaku mungkin timbul. Dalam keadaan di mana kelambatan berlaku, majikan berhak terhadap tuntutan kerugian tetapi masa penyiapan juga boleh dilanjutkan sekiranya kelambatan adalah disebabkan oleh sebab-sebab yang diperuntukan dalam kelambatan dan lanjutan masa dalam kontrak pembinaan. Salah satu daripada sebab yang diperuntukan adalah *force majeure*. Apakah makna *force majeure*? Apakah keadaan yang diterima sebagai keadaan *force majeure* untuk menuntut lanjutan masa? Kajian ini adalah untuk menentukan makna *force majeure* sebagai sebab-sebab kelambatan yang wajar untuk lanjutan masa. Hasil kajian ini akan membantu mengurangkan ketidakpastian dan kesukaran dalam keadaan yang melibatkan tuntutan lanjutan masa di bawah *force majeure*. Pendekatan yang digunakan dalam kajian ini adalah berdasarkan kes undang-undang. Kes mahkamah yang dirujuk di dalam kajian ini tidak dibataskan dari segi projek, asalkan kes-kes tersebut berkaitan dengan *force majeure* dalam tuntutan lanjutan masa. Sebanyak enam kes yang berkaitan dengan *force majeure* telah dikaji. Melalui analisis keputusan mahkamah, makna *force majeure* di bawah lanjutan masa dapat ditentukan. *Force majeure* dianalisis sebagai suatu keadaan yang di luar kuasa seorang manusia yang mana di luar bidang kuasa kawalan atau tanggungjawabnya yang disebabkan oleh suatu tekanan atau desakan yang besar, yang tidak dapat ditahan atau kuasa yang sangat kuat.

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- P.J Van der Zijden v Tucker & Cross* [1975] 2 Llyod's Rep.240
- Rapid Building v Ealing*

Thames Valley Power Limited v Total Gas & Power Limited[1988] 1KB 874

Thomas Borthwick (Glasgow) Ltd v Faure and Fairclough Ltd[1968]

Wells v Army and Navy Cooperative Society (1902)

LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
AC	Appeal Cases
Build LR	Building Law Reports
CLJ	Current Law Journal (Malaysia)
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
HL	House of Lords
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PC	Privy Council
QB	Queen Bench
SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background Studies

According to Charmer (1990), time is extremely important issue in construction. Together with cost and quality, it is a primary objective of project management, and a major criterion by which the success of a project is judged¹. It is the contractor's obligation to complete the construction works as agreed in the contract on time as time is the essence of the contract.

In circumstances that delay occurs, the employer is entitled to claim for the damages. If there is no provision for extension of the contract period, then in contracts

¹ Murdoch & Hughes. Construction Contract Law and Management. 3rd edition Spon Press. London. 2000

that having a specified date for completion and a liquidated damages clause, the employer would be purporting to be entitled to recover liquidated damages from contractor for failure to complete the works². But the time for completion can be extended if the delay is caused by some relevant events in extension of time provision in construction contract where in Malaysia, it is provided under the Standard Form of Contract PWD 203A clause 43 and PAM 2006 clause 23. According to Chow³, the extensions of time clauses have two significant effects which are:-

1. They affect the extension to which the contractor could be made liable for liquidated damages in the event of delay to the completion of works under construction contract.
2. Extension of time are granted on account delays attributable to some act of prevention by the employer for time related damages and disruption losses

In our common view it seems like the extension of time provision are for the interest of the contractor so that the contractor will have more time and that extent will relieving him from the threat of Liquidated Damages. In fact, the extension of time are inserted to protect the potential right of the employer to claim for Liquidated Damages⁴.

The relevant events which give rise to an extension of time are natural events that are fault of neither party or events that are the responsible of the employer⁵. One of the relevant events that covered by the extension of time provision is force majeure event.

² Robinson, N. M. et al. Construction Law in Singapore and Malaysia. 2nd Edition. Singapore: Butterworth Asia (1996).

³ Chow Kok Fong. Law and Practice of Construction Contract. 3rd Edition. Singapore: Sweet & Maxwell Asia (2004)

⁴ Robinson, N. M. et al. Construction Law in Singapore and Malaysia. 2nd Edition. Singapore: Butterworth Asia (1996).

⁵ Sundra Rajoo. The Malaysia Standard Form Building Contract (The PAM 1998 Form). 2nd Edition. Kuala Lumpur: Butterworth Asia. (1999)

The expression of force majeure is a curious French expression which is usually considered to cover a host of highly unusual and superhuman events⁶. In general, the contractor takes upon himself the obligation of completing the works in all events including the risk of force majeure events short of circumstances which frustrate the contract⁷. In the classic case of *LeBaupin v Crispin* (1920)⁸, the court accepted that the “term is used with reference to all circumstances independent of the will of man, and which it is not in his power of control...” It was held to include wars, epidemics and strikes but a cautionary note is struck in the judgment on the interpretation of force majeure clause:⁹

...[The force majeure clause] should be construed in each case with close attention to the words which precede or follow it with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument...

1.2 Problem Statement

One of the potential difficulties in the projects is that the contracts entered into are governed by laws which may be unfamiliar to one or other of the contracting parties. For example, there is a difference in the way that force majeure is treated in common and civil law jurisdictions¹⁰. Even as most of the civil codes make provisions for force majeure events, at common law, force majeure is not a term of art and its meaning is far

⁶ Chow Kok Fong. *Law and Practice of Construction Contract Claims*. 2nd Edition. Singapore: Longman (1993)

⁷ Sundra Rajoo. *The Malaysia Standard Form Building Contract (The PAM 1998 Form)*. 2nd Edition. Kuala Lumpur: Butterworth Asia. (1999)

⁸ [1920] 2 KB 714

⁹ *Ibid.*

¹⁰ Jeremy Glover. *FIDIC: an overview The Latest Developments, Comparisons, Claims and Force Majeure* (2007)

from clear. No force majeure provision will be implied in the absence of specific contractual provisions, and the extent to which the parties deal with unforeseen events will be defined in the contract between them. Thus without a specific clause, there will not necessarily be relief for force majeure events.

The aim of the force majeure clause is to exempt a party from performance on the occurrence of a force majeure event. Commercially, the clause is there to address risks which cannot necessarily be economically insured and which are outside the control of the parties to the contract¹¹. In *Thomas Borthwick (Glasgow) Ltd v Faure and Fairclough Ltd*¹²: ‘The precise meaning of this term...has divided the lawyers for years. Commercial men have no doubt as to its meaning. Unfortunately, no two commercial men can be found to agree upon the same meaning...’

Because of the broad definition of force majeure, it may lead to a different ways in which the employer and contractor are treated when it comes to making claims¹³. For example, in the case of *British Electrical and Associated Industries v Pately Pressings Ltd*¹⁴, a term of contract which ran ‘...the usual force majeure clauses apply’ was, not surprisingly, found to be void for uncertainty.

As what has been explained in the background studies, force majeure provision is provided as one of the relevant event in claiming the extension of time in building contract. From the table below, we can see that even in the standard form of contract for

¹¹ Jeremy Glover. FIDIC: an overview The Latest Developments, Comparisons, Claims and Force Majeure (2007)

¹² [1968]

¹³ Jeremy Glover. FIDIC: an overview The Latest Developments, Comparisons, Claims and Force Majeure (2007)

¹⁴ [1953]

building contract also not all of the standards provide a clear definition of force majeure and this uncertainty can lead to dispute among the contracting parties¹⁵.

Standard Form of Building Contract	Clause	Definition of Force Majeure (Given / Not Given)
PWD 203A	43(a)	No
PAM 2006	23.8(a)	No
CIDB 2000	24.1(a)	No
FIDIC	19	Yes
PWD DB/T 2002	45	Yes

Table 1.1: Comparison of Force Majeure Provision in Standard Form of Building Contract.

The question is what is the definition of force majeure that applies in construction contract? What are the circumstances that are accepted as force majeure event in claiming for extension of time?

1.3 Objective of the Research

The objective of this study is to determine the meaning of a force majeure clause as the relevant events of extension of time.

¹⁵ Murdoch & Hughes. Construction Contract Law and Management. 3rd edition Spon Press. London. 2000

1.4 Scope of the Research

The approach adopted in this research is case law based. There are no limitations as for the court cases referred to in this study in terms of type of projects as long as the case is related to the force majeure event in claiming of extension of time.

1.5 Significance of the Research

This research is expected to give a review to contractors and employer to reduce uncertainty or difficulties in the event that relating to claiming of extension of time under the event of force majeure. A better understanding of the definition of force majeure in construction will be much help in avoiding disputes between both contracting parties.

1.6 Research Methodology

The first stage of this research is involved literature review on time-related matters in the construction industry. Initial study has been carried out involving extensive reading and understanding of the concepts involved which is to identify the research topic, objective, scope of the research and prepare the outline of the research. It is also to identify the type of data needed and where we can find the sources of data for the research.

In the second stage, then data and information collecting was carried out. Primary source was law cases found in Malayan Law Journal through the access of Lexis Nexis available in the university's online database. Secondary sources such as articles, journals, textbooks and other related websites also being studied and referred to in the course of the whole research.

In the third stage, analysis has been done on collected information and arranged in an orderly manner. Finally, the fourth stage where by in this stage writing up will be carried out, followed by checking and correction of writing.

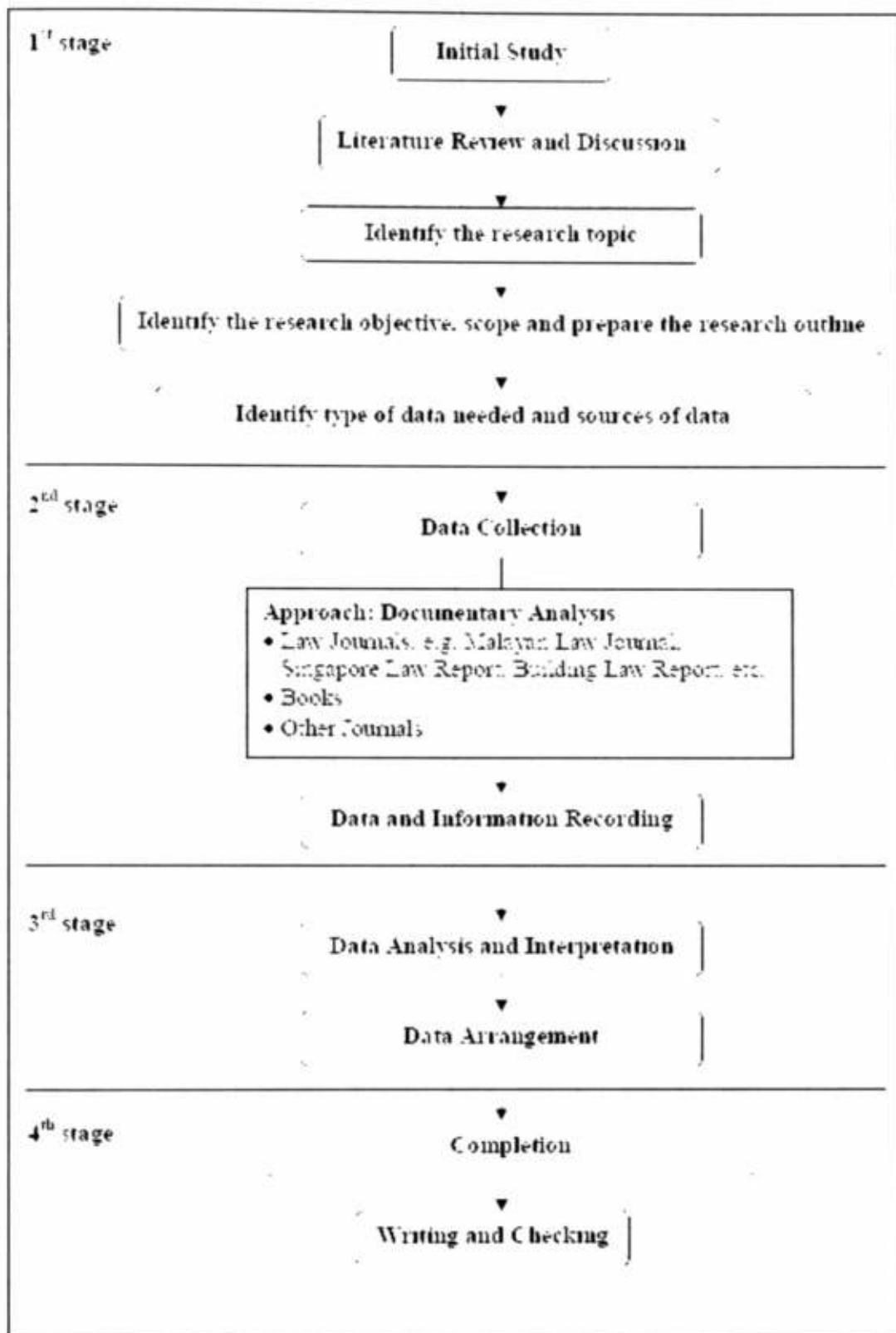


Figure 1.1 : Research Process and Methods of Approach

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