


APPLICABILITY OF *FORCE MAJEURE* CLAUSE IN CONSTRUCTION
CONTRACT IN MALAYSIA

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Specially Dedicated for...

My Parents...

Hj. Abdollah B. Hj. Jamal

Hjh. Hasnah Bt. Hj. Ismail

Khairi B. Md. Zainal

Khairiyah Bt. Abd. Khalid

My Siblings...

Especially my brother, Dr. Zakaria B. Hj. Abdollah

&

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Muhammad Abu Bakar As-Siddiq B. Khairi

Thank you for everything...

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ABSTRACT

Force majeure clause is essentially a contractual risk allocation tool. Its purpose is to excuse a party from performance of a contractual obligation which may have been rendered impossible by some event beyond that party's control. *Force majeure* clauses were widely used long time ago in almost every contract. However, none of the Malaysia's law cases regarding the *force majeure* clause was brought to the court and this bring to the question that is how far the use of *force majeure* clause in the contraction can exclude liability of the parties involved where unforeseen events beyond a party's control prevent the performance of its contractual obligations happen. The issue arises is whether these *force majeure* clauses are applicable to being used in construction contracts, specifically in Malaysia or under similar common law jurisdiction. This is because there is no extensive research regarding the use of *force majeure* clause in the construction contract in Malaysia. The objective of this study is to determine the applicability of *force majeure* clause in construction contract in Malaysia. Studies will be conducted on relevant provision in Standard Forms of Contract used in Malaysia i.e. PWD 203, PAM 2006, CIDB 2000 and provision under Common Law. Besides, the approach adopted in this research is law case methodology assessed from Lexis Nexis. The relevance of the use of *force majeure* clause depends on the unforeseen events and that event must be unforeseen when the contract is made. *Force majeure* includes two other classifying terms in its scope which is 'act of God' and 'vis major'. 'Act of god' is an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against, or more accurately, as an accident due to natural causes. 'Vis major' is includes many things described as the 'act of God' and the events which may be with human intervention. To summarised, the applicability of the *force majeure* clause is depends on the events of *force majeure*. From the analysis of the law cases, it was found that, besides 'act of God', only those events that held under the meaning of *force majeure* can be used in the circumstances of Malaysia's construction industry, such as breakdown of machinery, strikes of labour, government interference. However, there are also other events that held were not under the meaning of *force majeure* clause such as defective materials, error in judgements, the events which are within the control of party relying on *force majeure* and the events which are common or usual events which can be expected to occur in industry. Therefore, it is proved that *force majeure* clause is applicable to be used in the construction contract in Malaysia, but only for the events that were held under the meaning of *force majeure*.

ABSTRAK

Klause *force majeure* diibaratkan sebagai suatu alat pencatutan risiko di dalam sesuatu kontrak. Tujuannya adalah untuk mengelak suatu pihak daripada tanggungjawab melaksana yang tertera di atas kontrak oleh sebab terjadinya kejadian-kejadian di luar jangka. Klause *force majeure* telah digunakan secara meluas sejak zaman dahulu lagi di dalam kebanyakan kontrak. Walaubagaimanapun, tiada kes undang-undang berkenaan penggunaan klause *force majeure* juga dilihat dibawa ke mahkamah Malaysia dan ini membawa kepada persoalan sejauh mana penggunaan klause *force majeure* ini dapat mengecualikan tanggungjawab pihak yang terlibat sekiranya terjadinya kejadian-kejadian diluar jangkaan. Isu yang diperkatakan di dalam kajian ini adalah samada klause *force majeure* boleh digunapakai di dalam kontrak pembinaan, terutama di Malaysia. Hal ini adalah kerana ketiadaan kajian terperinci yang pernah dijalankan ke atas penggunaan klause *force majeure* ini di dalam kontrak pembinaan di Malaysia. Objektif kajian adalah untuk menentukan samada klause *force majeure* ini boleh digunapakai di dalam kontrak pembinaan di Malaysia. Skop kajian merangkumi borang kontrak pembinaan yang digunakan di Malaysia seperti PWD 203, PAM 2006, CIDB 2000 dan peruntukan di bawah *Common Law*. Kes undang-undang berkaitan *force majeure* yang dimuat turun dari Lexis Nexis juga digunakan di dalam kajian ini. Relevannya penggunaan klause *force majeure* ini sebenarnya bergantung kepada kejadian di luar jangkaan pihak-pihak yang terlibat di dalam sesuatu projek pembinaan dan kejadian tersebut mestilah sesuatu yang tidak dapat diramal ketika sesebuah kontrak dibuat. Terdapat dua kejadian di dalam konteks *force majeure* iaitu 'Act of God' dan 'Vis Major'. 'Act of God' merupakan kejadian semulajadi yang tidak dapat diramal akan berlaku dan seterusnya menjadikan sesuatu projek tidak dapat diteruskan. 'Vis Major' pula merangkumi kejadian 'Act of God' dan juga kejadian yang berlaku akibat pengaruh manusia. Di akhir kajian, disimpulkan bahawa klause *force majeure* boleh digunapakai di dalam kontrak pembinaan di Malaysia, namun ianya bergantung kepada kejadian *force majeure* itu sendiri. Daripada analisis yang dibuat, selain 'act of God', hanya beberapa kejadian *force majeure* yang boleh digunakan di dalam industri pembinaan di Malaysia seperti kerosakan mesin, mogokan pekerja, peperangan dan perintah undang-undang. Terdapat juga kejadian bukan di bawah maksud *force majeure* seperti bahan tidak berkualiti, kesilapan di dalam penilaian, kejadian di bawah kawalan sesuatu pihak dan kejadian yang selalu terjadi di dalam industri pembinaan di Malaysia. Oleh itu, kajian ini telah membuktikan bahawa klause *force majeure* boleh digunapakai di dalam kontrak pembinaan di Malaysia tetapi bergantung kepada kejadian di bawah maksud *force majeure*.

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LIST OF ABBREVIATIONS

AC	- Appeal Cases
ALL ER	- All England Law Report Reprint
BLR	- Building Law Reports
ER	- English Report
HL	- House of Lords
KB	- King's Bench
Lloyd's Rep	- Lloyd's List Reports
NSWLR	- New South Wales Law Reports
PAM	- <i>Pertubuhan Arkitek Malaysia</i>
PWD	- Public Works Department
SCR	- Supreme Court Reports
SLR	- Singapore Law Report
QB	- Queen Bench

LIST OF SYMBOLS

£ - A unit of currency, especially the pound sterling

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CHAPTER 1

INTRODUCTION

1.1 Background of the study

Under English Law, if a contract becomes impossible to perform, or is only able to be performed in a manner substantially different from that envisaged by the parties at the outset, then the doctrine of 'frustration' may apply and the contract may be terminated. However, in certain continental jurisdictions, where delay in or failure to perform a contract by a party for reasons beyond its control occurs, then the doctrine of '*force majeure*' may apply. This generally results in the suspension of contractual obligations.¹

Most construction contracts usually have clauses pertaining '*force majeure*'. What is *force majeure*? *Force majeure* is not a phrase native to English or Scots Law, but actually is a French Law term.² *Force majeure* clause is essentially a contractual risk allocation tool. Its purpose is to excuse a party from performance of a contractual obligation which may have been rendered impossible by some event

¹ <http://www.lawofcontract.co.uk/contracthelp/force-majeure.php>

² Turner, D. F. (1987). *Building Contract – A Practical Guide*. 4th. Edition. Essex: Longman Scientific & Technical

beyond that party's control.³ Examples of such clause are in clause 43 and 57 of PWD 203A (2007), clause 23.8 (a) of PAM2006 and clause 24.1(a) of CIDB 2000.

Force majeure (French), also known as *cas fortuit* or *casus fortuitous* (Latin) is a common clause in contract that essentially frees both parties from liability or obligation when an extraordinary event or circumstances beyond the control of the parties happen, such as a war, strike, riot, crime or an event described by the legal term 'act of God' (e.g. flooding, earthquake, volcanic eruption).⁴

Force majeure clause has been widely used long time ago in almost every contract. For example, in the case of *Matsoukis v. Priestman & Co*⁵, the defendant agreed to build a steamer for the plaintiff and to deliver the steamer on a named date. It was a term of the agreement that the defendant would pay the plaintiff 10 pounds for each day delivery was delayed. The steamer was delivered 175 days late to the plaintiff and the plaintiff who had paid the full amount of the contract price claimed 1750 pound for each day delivery was delayed.

The defendants admitted that the steamer was not delivered on the named date, but they denied that any breach of the agreement was committed, and that the delay was wholly due to causes within the exception clause of the contract (i.e. *force majeure* clause), which was as follows:

"If the steamer is not delivered entirely ready to purchaser on or before Feb 28, 1913, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of 10 pounds for each day of delay, and in deduction of the price stipulated in this contract, being excepted only the cause of force majeure, strikes of workmen of the building

³ Article from KensingtonSwan Lawyers. 2008

⁴ http://en.wikipedia.org/wiki/Force_majeure

⁵ [1915] 1 KB 681

yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor. ...”

The defendants claimed that there are events of *force majeure* that caused the delayed of the steamer. The events are general coal strike had dislocated the defendants’ business and had caused a delay of 70 days in the steamer being laid down in the berth. Other causes of the delay were: breakdown of machinery, a shipwrights’ strike, bad weather, the absence of the defendant’s workmen when attending football matches and the funeral of their manager.

Therefore, Bailhache J. was held that,

“(i) As the universal coal strike had completely dislocated all the businesses in the north of England it could come within the reasonable meaning of force majeure...; (ii) breakdown of machinery also came within the force majeure exception, but bad weather and absence of workmen attending football matches and a funeral did not, (iii) the shipwrights’ strike came within the exception relating to strikes...”

Other case that used *force majeure* clause in their contract is the case of *Egham and Staines Electricity Co. Ltd v. Egham Urban District Council*⁶. In that case, the appellant company entered into three contracts to supply electricity to the respondent council for street lighting purposes and to undertake various duties in connection with the street lighting system. The appellant company was paid for these services quarterly at a fixed rate.

⁶ [1944] 1 All ER 107

The contract contain exception clause which was as follows,

“Lastly it is hereby agreed, that no default by the company under this agreement shall render the company liable in damages if and so far as such default shall arise or be occasioned by reason of the fire frost, accident strikes lock-outs or combination of workmen or cessation or restriction of work by workmen or from any other unavoidable cause over which the company has no control. Provided always that all payments under this agreement by the council shall abate in the same proportion as the supply shall be curtailed by reason of any event provided for in this clause”.

The progress went smoothly until the outbreak of war and the Lighting (Restrictions) Order 1939, the Lighting (Restriction) (No. 2) Order 1939 and the Lighting (Restrictions) Order 1940 made the display of lights in the streets was made unlawful from 1 September 1939, and the respondent council therefore ceased to consume the greater proportion of the current hitherto supplied by the appellant company and therefore reduced his payment.

The appellant company continued to perform its duties under the contracts as respects the maintenance of the lighting system and was ready to put it into full operation at short notice. In the action, the appellant company sought to recover a sum of £3,590 5s. due under the contracts, but the respondent council contended that the terms of the contract entitled them to abatement in the price.

The question then arose whether the supply being curtailed in by reason of the Lightening (Restriction) Orders or it had been curtailed by reason of an event provided for in the *force majeure* clause. The council contended that it had been curtailed by such an event and the council entitled to abatement of the payment for the supply.

Therefore, the inability of the company to light the lamps was due to an unavoidable cause (i.e. the lighting orders) was within the meaning of the *force majeure* clause and the liability of the council to pay was suspended until the supply is renewed.

From the law cases discussed before, it is evidently clear that *force majeure* clauses have been successfully to exclude liability where unforeseen events beyond a party's control prevent the performance of its contractual obligation. As a conclusion, enforceability of a *force majeure* clause is determined by the intent of the parties (i.e. the employer and the contractor), which is evidenced by the language in contract. When the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, scope and more important is the effects of *force majeure* clause on a contract.

1.2 Problem Statements

As mentioned before, *force majeure* clause has been widely used long time ago in almost every contract. Besides, it is evidently clear that *force majeure* clauses have been invoked to set aside a contractual party's obligation to perform, however law cases that discussed before only refers to agreements pertaining to the shipping industry and supply contract, but not agreements pertaining to the construction contract. The issue that arises is whether these *force majeure* clauses are applicable to being used in construction contracts, specifically in Malaysia or under similar common law jurisdiction. This research would enable identification of the events considered and applicable in applying for relief from performing a party's contractual obligation in the construction industry.

1.3 Objectives of the Study

The objective of this study is to determine the applicability of *force majeure* clause in construction contract in Malaysia.

1.4 Scope and Limitation

The following are the scopes for this study:-

1. Studies will be conducted on relevant provision in Standard Forms of Contract used in Malaysia i.e. PWD 203, PAM 2006, CIDB 2000 and provision under Common Law.
2. The approach adopted in this research is law case methodology assessed from Lexis Nexis. There are no limitations as for the court cases referred for this study as long as the case is related to *force majeure* clause especially in construction contract.

1.5 Significance of the Study

This research should give a review to the employers and contractors as to the applicability of *force majeure* clause in construction contract in Malaysia. When the parties in the industry are equipped with the knowledge of this issue and its effects on both parties, any problems can be avoided as much as possible.

1.6 Research Methodology

Basically, this research will adopt five steps as a methodology and research process in order to achieve its objectives. The steps are discussed further as follows:

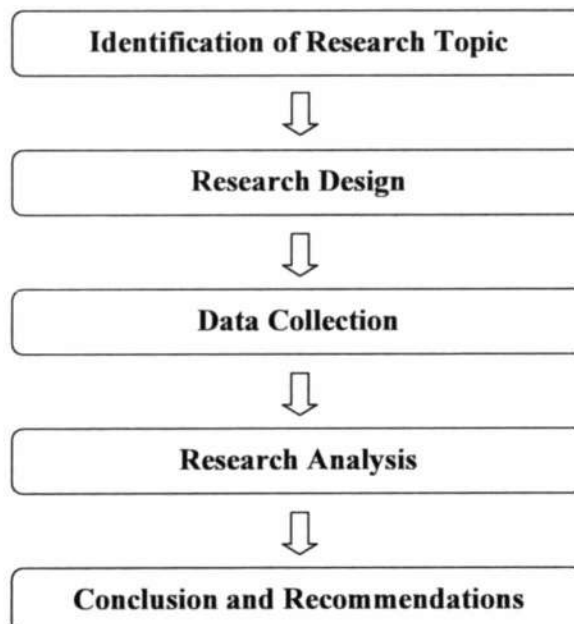


Figure 1: Research Methodology

Step 1: Identification of Research Topic

The first stage is to establish area of research. To finalize the research topic, it involved reviews on the current issues. After having some interesting topic i.e. issue about *force majeure* clause in construction contract, the next step is to formulate suitable objectives and designing a scope of study.

Step 2: Research Design

The second stage is to develop research design. The main purpose of research design is to determine the important element of the topic i.e. the relevance's of *force majeure clause* in construction contract. The main element of thus research is to identify the type of data needed to be collected, sources of the data and the most suitable technique for obtaining the required data and information.

Step 3: Data Collection

The third stage is data collection. Data regarding *force majeure* in construction contract will be collected. Primary sources will be the law cases which collected through the access via Lexis Nexis legal database. The secondary sources are articles, journals, academic books and related websites.

Step 4: Research Analysis

The next step is research analysis stage. In this stage, the selected law cases and all relevant information in the previous stage is converted into data that is useful for the

research. The selected law cases will be carefully reviewed, with special attention on the fact of the cases, issues and judgement by each law cases.

Step 5: Conclusion and Recommendation

The final stage is the conclusion and recommendation. It will conclude and summarize the whole of the research findings. Besides, the objectives shall be achievable as well as making some recommendation to the outcomes.

1.7 Chapter Organization

This report covers five (5) chapters as follows:

Chapter 1: Introduction

Chapter 1 will sets the background of the study, problem statement, objectives of the study, scope and limitation of the study, significance of the study, research methodology and the organization of the chapters.

Chapter 2: *Force Majeure* Events

Chapter 2 will be discussing definition and the history of *force majeure*. Besides, this chapter also provides a general understanding of *force majeure* events.

Chapter 3: Force Majeure Clause

Chapter 3 will cover the purpose, principal elements and the operation of *force majeure* clause. This chapter also cover the detailed provision of *force majeure* clauses in local standard form of construction contract such as PWD Form 203 (Rev. 2007), PAM Contract 2006 and CIDB 2000. Besides, this chapter will be discussing the distinction between *force majeure* clause and a doctrine of frustration.

Chapter 4: Current Status of Force Majeure Clause in Construction Contract

This chapter will analyse legal perspective of *force majeure* clause in any contract from various court cases in order to achieve the objective of this research. The main sources will be law cases which were collected through the access via Lexis Nexis legal database.

Chapter 5: Conclusion and Recommendations

Chapter 5 is the final chapter that summarizes the findings of the research according to the research objectives. This chapter also contains the problems encountered during the research as well as the recommendation for future researches.

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