

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

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## DECLARATION

"I declare that this thesis entitled "Applicability of *Force Majeure* Clause in Construction Contract in Malaysia" is the result of my own research except as cited in the references. The thesis has not been accepted for any degree and is not concurrently submitted in candidature of any other degree.

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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 sekira terjadinya kejadian-kejadian di luar 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*.