

To Work or Not to Work?

The Constraints

Earlier subject to application

Now allowed 24 hr working, 100% workforce but subject to conditions

Important ones

- need to adjust number of workers at the site to allow for social distancing
 - to rearrange work scheduling and sequencing or staggering of workers
 - need to comply with other SOPs issued by Ministry of Health etc
 - social distancing of 1m at all times
 - responsible for medical costs of workers infected by Covid 19

Should You Commence Work?

Earlier only to apply, mitigation issue

Now that is no longer required, **contractual obligation to work**, especially if instructed to do so, unless released by frustration

But:

Cash

Practical problems – cash

Employer only obliged to pay in accordance with the contract. Advance payment to allow remobilisation can only be by agreement. This is interest of Project. Architect can play a role here

EOT

This is a contractual right if the contract is **PAM**, during MCO as a FM event – Clause 23.8(a), or 23.8(w) Suspension by authority w/o contractor's negligence) and during Conditional MCO and after Clause 23.8(p) compliance with conditions imposed by authorities.

If it is a **Government contract** under JKR 203 the Kementerian Kerja Malaysia (KKM) has issued a FAQ seeming to suggest the MCO will be treated as a Force Majeure event under Clauses 43.1(FM) and 58.2(c)(natural catastrophe) of the JKR 203 contract, and for contracts without FM provisions the same procedures will apply

Simple Contract – unlikely to have FM clause

Loss and Expense

On the face of it no, as it is a neutral event(not a breach or prevention by Employer) – but may be bright ideas by Kheng Hoe

Don't Come Back - Released by Frustration?

If I don't come back and sued by owner or main con

Possible Argument onerous conditions such as social distancing make it a very different contract that was entered into with certain assumptions as to productivity, resources required etc being made by the Contractor thereby releasing it from its obligations as a frustrating event, especially if it can be shown that it would be impossible to comply with the conditions imposed in practical terms.

In the Australian case of **Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337**, a construction contract was held to be frustrated where a contractor had planned to

perform its works according to a particular approved programme which involved several shifts per day and weekend work, but after the project commenced the contractor was effectively prevented from working to this programme **by an injunction** to prevent a nuisance from the works where at the time of contracting neither party foresaw the possibility of an injunction being ordered.

However, we would sound a note of caution as the case law to date interpreting **s. 57(2) Contracts Act 1950** provides that in order to render a contract impossible to perform, the event must so significantly change the nature, not merely the expense or onerousness, of the outstanding contractual rights and obligations from what the parties reasonably contemplated at the time of contract

Still – Courts are likely to be sympathetic in this Covid/MCO situation and may agree with the Contractor.

SUMMARY

- Commercial challenges
- Ideal situation – agreement with Employer/Main Con to facilitate return with advance payment, EOT, payment maybe
- Otherwise must weigh risks
- If simply not possible and Employer/Main Con plays hardball and insists on contract, have some arguments on frustration that may succeed.

RAJENDRA NAVARATNAM

Partner, Azman Davidson & Co

Live Webinar



FOCUS GROUP DIALOGUE (VIRTUAL SESSION)

Contract Administration issues due to COVID-19 pandemic and the impact of the Movement Control Order (MCO) and the resumption of work for the construction industry

Saturday | 2nd May 2020 | 9:30am - 11am

Panellists



Rajendra Navaratnam,
Partner at Azman
Davidson & Co



Chan Kheng Hoe,
Founder of Kheng
Hoe Advocates



Sr Ong Hock Tek,
MD, BK Entrusty



Chu Ai Li,
Partner at Azman
Davidson & Co



Karen Ng Yueh Ying,
Partner at Azman
Davidson & Co



Special
Guest Speaker
Ir Harbans Singh KS



Moderator
Oliver Wee
MBAM Vice President
and Chairman of Contracts and
Practices Committee



EXTENSION OF TIME (EOT)

CHU AI LI

Partner, Azman Davidson & Co.

MALAYSIA COVID 19 MOVEMENT CONTROL ORDER (MCO)



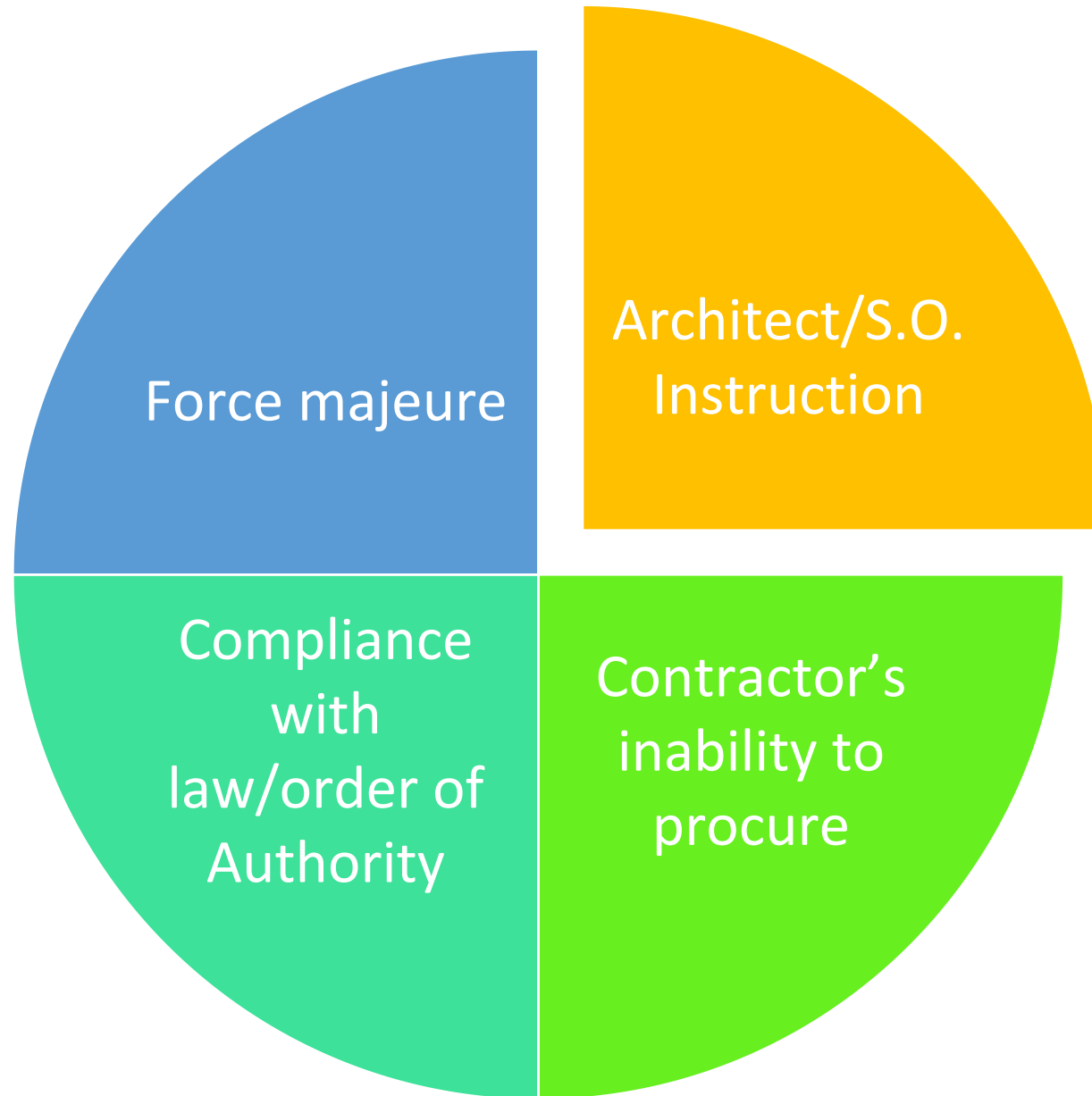
Background

Jan 2020	COVID 19 in Malaysia (initially imported, local clusters in March)
11 March 2020	WHO pandemic declaration
16 March 2020	MCO Phase 1 starts (MCO Phases 1 & 2: construction sector shut down except for critical works)
14 April 2020	MCO Phase 3 starts (MCO Phase 3: construction sector specific work types and projects allowed to operate with MITI approval, subject to SOP)
4 May 2020	Conditional MCO (Construction sector allowed to operate, subject to compliance with MKN SOP)
12 May 2020	MCO scheduled to end (SOP to continue?)

Question:

Is the Contractor entitled to EOT?

Answer :
It depends on
Contract EOT provision



GOVERNMENT PROJECTS PWD 203A FORM Clause 43.1

(a) force majeure

- Clause 58
 - Event beyond control of both Parties
 - “which are”
- Epidemic/pandemic and law/order of Government not included

(i) Inability to secure essential goods, materials, services

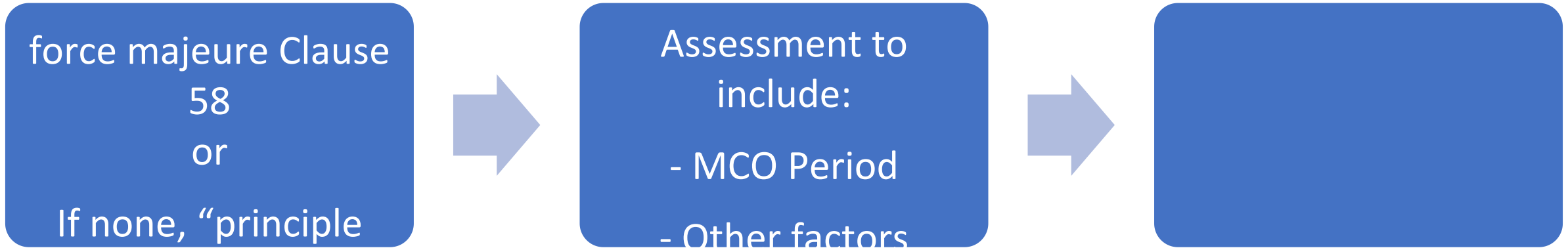
- Reason beyond control
- Could not reasonably foresee at closing of tender

(e) S.O. Instruction

- S.O.I. issued under Clause 5
- Not due to Contractor’s act/negligence/breach

GOVERNMENT PROJECTS

Treasury/Finance Ministry guidance



PRIVATE SECTOR PROJECTS PAM 2006 FORM Clause 23.8

(a) force majeure

- Article 7(ad)
-Circumstances beyond control of Contractor
- “Caused by” Governmental action OR Epidemics

(d) Lockout affecting trades

- Civil commotion, strike or lockout
- Dictionary “lockout” = employer preventing workers from entering workplace until they agree to terms

(p) Compliance with change to law

- changes to law/regulations/by-law/terms of Appropriate Authority

(w) Suspension of Works by Appropriate Authority

- Order of Appropriate Authority
- Provided not due to Contractor negligence/omission/default/breach

(g) Compliance with A.I. under Clause 21.4

- A.I. issued under Clause 21.4 postponement/suspension of work
- Period not exceeding Period of Delay (continuous period of 3 months)

PAM ADVISORY NOTE 18.3.2020

Architect Notice to Comply
with MCO

Clause 4.1



Contractor EOT Application
Clause 23.8(a) force majeure

Note:

- Other Relevant Events
- Need to comply with procedural requirements e.g. Clause 23.1(a) notice of intention within 28 Days of AI or commencement



Architect Decision
Clause 23.4

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Force Majeure & Doctrine of Frustration

By Karen Ng Yueh Ying

Azman
Davidson
& Co

What is force majeure?

There is no general rule as to what constitutes a situation of force majeure.

Whether such a force majeure situation arises would all depend on what the parties, in their contract, have provided for.

Magenta Resources (S) Pte. Ltd. v China Resources (S) Pte. Ltd. [\[1996\] 3 SLR 62](#)

*“What is referred to as force majeure in our law (as opposed to French law from which that term originates) is really no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct performance of the contract. **There can therefore be no general rule as to what constitutes a situation of force majeure. Whether such a (force majeure) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for.**”*

This Singapore case has been referred to in a Malaysian case of *Choot Ewe Hin & Anor v Saujana Triangle Sdn Bhd and another suit* [2017] MLJU 333.

What is the usual intent of a force majeure clause?

- To excuse contracting parties from contractual obligations and liabilities while they are prevented from performance (either completely or sometimes partially) by defined events or circumstances.
- No fixed form of force majeure clause.
- Covid-19 pandemic does not automatically qualify as a force majeure event under a contract.
- Depends on the wordings of a force majeure clause in each particular contract.

Source: Article written by Mr. Wong Hin Loong, partner of Azman Davidson & Co
<http://azmandavidson.com.my/wp-content/uploads/2020/04/legal-update-contract-law-1.pdf>

In short -

- whether your contract contains a force majeure clause;
- whether the force majeure clause is wide enough for the Covid-19 pandemic to be qualified as a force majeure event under the contract;
- Whether your contract allows you to claim for EOT and L&E based on the force majeure event?

What is a Doctrine of Frustration?

- Section 57(2) of the Contracts Act 1950:

“A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

Illustrations:

- A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- A contracts to act at a theatre for 6 months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

Can a contractor or employer claim
that the construction contract has
been frustrated?

3 elements must be present:

- 1st – No provision has been made in the contract for the event upon which the promisor relies as having frustrated the contract.
- 2nd - the event relied upon by the promisor must be one for which he or she is not responsible. - self-induced frustration is ineffective.
- 3rd - the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise.

See: Guan Aik Moh (KL) Sdn Bhd &. Anor v Selangor Properties Bhd [2007] 3 CLJ 695

Take note:

- A contract does not become frustrated merely because it becomes difficult to perform.

See: Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293

- The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for.

See: Kin Nam Development Sdn Bhd v Khau Daw Yauv [1984] 1 CLJ Rep 181

What is the effect if a contract is frustrated?

- The contract would be void and the parties shall be discharged from performing the contract.
- Restitutionary remedy is provided for under section 66 –
“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”



Thank you!

Karen Ng Yueh Ying

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& Co