FORCE MAJEURE IN BUILDING CONTRACT: A COMPARATIVE STUDY OF SAUDI ARABIA AND MALAYSIA

BY

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ABSTRACT

Force majeure literally means "irresistible compulsion or coercion". Under the contract law, force majeure clauses may exempt a party or both parties of the contract from the obligation to perform the contract. The events or circumstances of force majeure generally arise from unforeseen incidents which are beyond the control of the contractual parties and such events prevent the parties from performing their obligations under the contract. The most common example of force majeure events are "act of God" (such as natural disasters, earthquakes, typhoons, big floods) and "act of man", like wars and changes of laws. In Saudi Arabia, the law is based upon *Shari'ah* principles and future circumstances are perceived under Shariah as being neither predictable nor controllable; instead it is God who knows how things will turn out. However, this study highlighted that Shariah recognizes the principle of *pacta sunt servanda* which facilitates the usage of Force under the Islamic law. This study also highlighted that in Malaysia, force majeure clause is recognized under the contract law and has been adopted as a standard clause in the Malaysian standard form of building contracts such as the PWD 203A and PAM. standard form for construction contract. This study looks into the application of force majeure clause in building contracts in two countries, namely Saudi Arabia and Malaysia. This study highlights the similarities and differences between Malaysian and Saudi Arabian laws on force majeure with special reference to its application in standard form building contracts.

خلاصة البحث

القوة القاهرة في المفهوم القانوني تعني وقوع أمر طارئ خارج عن السيطرة. القوة القاهرة تخلص العاقد أوالمتعاقدين جميعا من إتمام العقد. العوامل المؤدية إلى استخدام القوة القاهرة في الغالب هي التي لا طاقة لأحد المتعاقدين أن يمنع وقوعها في أي حال. ومثال ذالك ماكان من قدر الله تعالى من زلزال أو خطر أو ريح عاصف أو سيول, أو أعمال البشر مثل الحروب أو تغيير القوانين. القانون السعودي مستمد من الشريعة الإسلامية وحسب التعليمات الشرعية, أن الله تعالى هو الوحيد الذي يعرف ما سيحدث في المستقبل. هذه الرسالة تلاحظ أن الشريعة الإسلامية تأكد أن العقود ملزمة وأنه لا بد من إيفائها إلا إذا تعذر, ومن هنا يلاحظ البحث أن الشريعة الإسلامية توافق نوعاما على مقصود القوة القاهرة. ويلاحظ البحث أيضا أن القانون الماليزي يوافق على القوة القاهرة عن طريق القانون العقود وقد تم اسخدامه في القوانين الخاصة لعقود البناء الماليزي. هذه الرسالة بحثت عملية القوة القاهرة المتعلقة لعقود البناء في كل من السعودية وماليزيا. و قد تمت عملية التفريق بين أوجه الإتفاق والإختلاف بين البلدين في ما يتعلق بالقوة القاهرة مع النظرة الخاصة إلى تطبيقاتها في القوانين المتعلقة بعقود البناء.

APPROVAL PAGE

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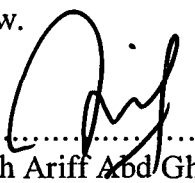

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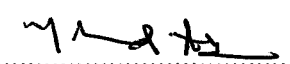

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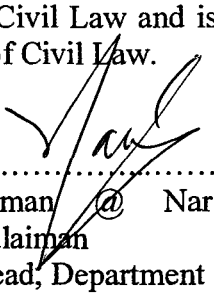

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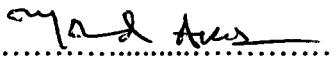

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DECLARATION

I here declare that this dissertation is the result of own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for my other degree at IIUM or other institutions.

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This dissertation is dedicated to my humble child Salih, and all other friends who contributed and supported me while writing this research.

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To my Dearest Mum;
The compassionate heart who taught me the basic writing skill while I was a child; to who put me on her shoulder and encouraged me to continue my studies while I was young; to who helped me while I was overseas to further my studies and took care of my child so that I would not feel his loneliness in my absence.
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My sweetheart, who was there for me, encouraged and motivated me to achieve all my goals.
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My hope in this life, for who I always pray to Allah to guide and be with in all endeavours.
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LIST OF ABBREVIATION

ARCOM	Association of Researchers in Construction Management
BOT	Build-own-and transfer
CIF	Cost insurance and freight
FIDIC	International Federation of Consulting Engineers
MAC	Material Adverse Change
MAE	Material Adverse Effect
PAM	Malaysia Institute of Architects (Pertubuhan Atkitek Malaysia)
PWD	Public Work Department
SPA	Sale Purchase Agreement

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In Saudi Arabia, government contracts for the construction of public works are the fixed-price contract awarded through competitive bidding.[1] During the Seventh National Development Plan (2000-2005), some 10,000 contracts totalling in excess of SR 150 billion were let by the various ministries, corporations, and agencies of the government. The main vehicle for executing those contracts is the contract for public works[2] which represents the first and the only attempt at the standardization of construction contracts in the country. Furthermore, it is well known that Saudi Arabia is unique among the countries in the Middle East to have no "positive laws," since, what is made up of the *Qur'an* and the traditions of the Prophet Mohammad (peace be upon him), is regarded as the law of the land. Other legislative outputs are merely known as 'regulations' instead of 'laws', which are used to address matters in detail and not in substance. With regards to the public work projects, the Saudi government adopted a standard form Public Works Contract in 1998.[3] This standard form is based on the 3rd edition of the FIDIC conditions of contract (1977).[4] The FIDIC condition is actually based on the English Institute of Civil Engineers (ICE) conditions. Thus, all Saudi government public work projects are subject to the Tender Regulations of 1977 and their Rules for implementation.[5]

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[1] Naief T. Ibn Homaid, "An evaluation of Saudi Contract for Public works", *J. King Saud Uni. Saudi Arabia,* (2006), Vol.18 p.1
[2] http://www.library.yale.edu/~llicense/forcegen.shtml @ 12:49PM 11/22/2011
[3] http://www.i-law.com/ilaw/doc/view.htm 129976 @01:20PM 11/22/2011
[4] Ibid.
[5] Ibid.

On the other hand, unlike the public sector, the private sector in Saudi uses several models that were not produced by any professional body.[6] This is to the extent that some even make their own models which aggravated the situation in courts and arbitration bodies due to the great inflow of disputes and claims arising out of the construction.[7]In Malaysia, on the other hand, there are a few standard forms of building contracts which are used in the construction industry. These forms include the CIDB, PWD and PAM Forms. However, out of which, the two main standard form of building contracts which are adopted by parties in the construction industry are the PWD 203A (revised 2007) form for the public sector and the PAM 2006 standard form contract for the private sector.[8] Thus, the discussion in this study refers to these two standard forms.

As regards to force majeure in Saudi Arabia, the judges normally refer to the available principles of the Islamic law in case where they are called to adjudicate on contractual matters. The major difference is noticed in this system particularly when it is compared to Malaysian practices. Thus in Saudi Arabia Islamic sources are not subjected to revision or modification under a traditional approach[9], which makes it unlike Malaysian jurisdiction in this respect. Saudi Arabia does not have a legislative body of the same scale as in Malaysia. Moreover, Saudi court judges are not bound to follow their own previous decisions, nor those of higher courts.[10] It is for these

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[6] M.A Abbas, "The Impact of Construction Contract Models on Construction Claims in Saudi Arabia, Saudi Arabia", in Hughes, W (Ed.), *14th Annual ARCOM Conference,* 9-11 September 1998, University of Reading. Association of Researchers in Construction Management, Vol. 2, 438-46. p.2

[7] Ibid.

[8] Sundra Rajoo, *The PAM 2006 Standard Form of Building Contract*, Petaling Jaya: Lexis Nexis, 2010, at 16

[9] *'Ijtihad'*, however, as the process of further interpretation to fit the present circumstances, was permitted up until the 9th or 10th century, after which no more modern interpretation was permitted, known as "the closing of the gate of independent reasoning', Joseph Schacht, *An Introduction To Islamic Law,* Oxford: Clarendon Press, 1964, p. 69-75.

[10] Samir Shamma, Law and Lawyers in Saudi Arabia, *International and Comparative Law Quarterly.* (1965), 14 pp. 1034- 1035.

reasons that a historical review of Saudi Law is not possible in the same way as it is in the case of other jurisdictions such as English Law and as such, only the guiding principles could be discussed.[11]

In Malaysia, the principle of *force majeure*, as defined below, is accepted as a ground of frustration under the contract law whereby the party could be discharged from performance of the contract.[12] For example, in *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd*, [13] the respondents were importers and stockist of Zanzibar cloves. The appellants entered into a contract with the respondent for the sale of 50 tons of Zanzibar cloves. There is an exception clause in the contract which provides that the contract was 'subject to force majeure and shipment'. Due to shortage of supply, as a result of an insufficient quantity of cloves being shipped by the Zanzibar suppliers, the respondents could not carry out all their commitments and wrote to the appellants to terminate the contract. The trial Judge held that, the respondents were protected from liability by the exceptions clause and as such, that the respondents were under no obligation to supply the cloves to the appellants. The Court of Appeal affirmed the decision of the learned trial Judge and held that the exception clause 'subject to *force majeure* and shipment' must be construed to mean that the contract was (a) conditional upon the sellers not being prevented by circumstances amounting to *force majeure* from carrying it out and (b) conditional upon the sellers being able to procure the shipment of cloves to the quantity and of the description referred to in the contract.

[11] Ibid.
[12] Section 57(2) of Contracts Act 1950.
[13] [1960] 1 MLJ 141

However, under the building contract, *force majeure* is accepted only as a ground to apply for extension of time. Clause 23.8 of PAM 2006 and clause 43.1(a) and 57.0 of PWD clearly state that, the contractor may apply for extension of time on the ground of *force majeure*. In *Ong Kiat Chai V. Bandar Raya Development Bhd*,[14] the plaintiff entered into an agreement with the defendant (a licensed housing developer) whereby the plaintiff bought a piece of land from the defendant together with a house to be constructed thereon by the defendant, at the price of RM94,800. It was agreed that the defendant should complete the building and deliver possession within eighteen months, i.e. not later than 11 September 1975. There was a delay in the completion of the building, and possession was delivered only on 15th December 1977. The plaintiff sued the defendant for damages due to delay. The defendant denied liability and contended that Clause 19 of the SPA provides that if, in the opinion of the Vendor's architect, completion or delivery of vacant possession of the said building is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lock-outs, the acts of the King's enemies, fire, floods or other accident to the works or any other cause beyond the Vendor's control, the Vendor's architect shall make a fair and reasonable extension of time for completion and delivery of vacant possession of the building.

In this case, the court agreed that from the evidence, delay in completion of the building was caused by the delay in the completion of earth-work by a contractor, the delay of the City Hall in giving approval of sewerage plan, shortage of building materials and labour and inclement weather. As such, in accordance with Clause 19 of SPA, the architect had correctly granted a fair and reasonable extension of time for completion and delivery of vacant possession.

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[14] [1984] 2 CLJ 117

However, it was also established that for the event of *force majeure* to have an effect, the event must be unpredictable or could not be overcome by the contractual parties. In *Penang Development Corp v Teoh Eng Huat,*[15] the court held that the problems which arose from the government policy to support bumiputra contractors and caused delay to the completion of the houses were not accepted as *force majeure* as the problem could have been overcome. In *Oxbridge Heights Sdn Bhd v Farah Qurashiyah Armia & Anor,*[16] the applicant was the developer and the respondents were the purchasers. They entered into a sale and purchase agreement dated 22.1.2005 (the SPA) for the sale and purchase of a property. Clause 23 of the SPA provides that, vacant possession was to be delivered within 24 months from the date of the SPA i.e. on or before 21.1.2007. However, the vacant possession was delivered on 26.3.2008. The applicant claimed that the delay was due to factors beyond their control, i.e. the increase in the cost of construction materials, lack of supply of materials such as cement and steel and also the rainy weather. The High Court agreed with decision made by the Tribunal for Homebuyer claims that the reasons given by the appellant did not amount to '*force majeure*' as these factors ought to be within the contemplation of the applicant and were risks that the applicant undertook.

In Saudi Arabia, the country has experienced a major construction boom in the past three decades, which included the construction of major infrastructure of roads, airports, seaports, hospitals, schools and a large number of residential houses and buildings. Many local and foreign designers are involved in this massive construction. In order to minimize conflicts, the establishment of standards which govern all public projects come into being. The Saudi government enacted the Standard Public Works Contract on February 1, 1988. This law specifies the liability of different parties in the

[15] [1992] 1 MLJ 749
[16] [2011] 1 LNS 297

construction process specifically the construction contractors.[17] The Saudi Standard Public Works Contracts does not have a specific clause for *force majeure* but Article (55) provides for 'Special Risks' which refers to war, invasion by enemy forces, military actions and the like.[18] Such circumstances are regarded fit for the event of force majeure under the common law. However, different from the practice in Malaysia, under the Saudi Standard Public Works Contract, contractors are not liable for any damage or destruction of the works which arise from the special risks and they are entitled to claim for the value of the works, when it is established that they are allocated for work, if damage or destruction occurring thereto results from the special risks.

Referring to the above discussion, this study intends to examine the definition, scope and application of *force majeure* in building contracts in Saudi Arabia as it is compared with Malaysia. The study also intends to make a comparative the similarities and differences in the definition, scope and application of the *force majeure* clause in building contracts in Saudi Arabia and in Malaysia.

1.2 STATEMENT OF PROBLEM

a) What are the definitions of *force majeure* under Saudi Arabian and Malaysian law of contracts?

b) What are circumstances of *force majeure* under Saudi Arabian and Malaysian law of contracts?

c) Whether *force majeure* is applied in Saudi Arabian and Malaysian building contracts.

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[17] Sadi A. Assaf and Abdulmohsen Al-Hammad, *Construction Contractors Liability in Saudi Arabia,* London: An Imprint of Chapman and Hall, 1992, p. 250

[18] Article 55 of the Saudi Standard Public Works Contract

d) Whether there are differences and similarities in the application of *force majeure* in the building contracts of these two nations.

1.3 HYPOTHESIS

The principle and practice of *force majeure* in building contracts in Saudi Arabia and Malaysia are different. The differences mainly relate to the applications of *Shari'ah* principles concerning *force majeure*. Although *Shari'ah* has accepted the concept of force majeure, the application is somewhat different from the Malaysian common law perspective. The effect of *force majeure* in building contracts is also different.

1.4 LITERATURE REVIEW

Force majeure has been defined as a common clause in contracts that essentially exempts the parties from liability or obligation due to extraordinary events or circumstances which are beyond the control of the parties.[19] Examples of *force majeure* events are war, strike, riot, crime, or events which are described as "an act of God" (such as flooding, earthquake, or volcanic eruption), and which prevents one or both parties from fulfilling their obligations under the contract. However, *force majeure* is not intended to excuse negligence or other malfeasance of a party, where non-performance is caused by the usual and natural consequences of external forces (for example, predicted rain stops an outdoor event), or where the intervening circumstances are specifically contemplated.[20]

[19] Retrieved from http://en.wikipedia.org/wiki/Force_majeure, 26/03/2011 at 12.33PM
[20] Ibid.

Force majeure is mainly used in commercial and business contracts. A freeze on deepwater drilling is said to most likely trigger a force majeure clause.[21] According to Loweel (2008), the traditional rationale for force majeure clauses involved "unanticipated events" and "impossibility" of performance whilst the more recent practice has been to use *force majeure* provisions as a broader risk allocation tool.[22] *Force majeure* clause can be used to anticipate those risks that are uninsurable, or that render performance merely inconvenient or uneconomical as opposed to impossible. In short, the clauses deal with risks deemed unacceptable by the parties.[23] For example, problems associated with labour disruptions are often addressed through *force majeure* provisions, even though they may fall outside the traditional rationale of such clauses.[24] In this sense, a *force majeure* clause acts as a risk allocation tool in circumstances beyond the traditional "unforeseeable impossibility of performance." According to Treitel (1994) contracting parties are not necessarily confined to events which make performance impossible.[25]

In *Paradine v Jane*,[26] the court held that, supervening events had not discharged a party from the contractual obligation. This decision established the doctrine of discharge by supervening events was adapted and known as the doctrine of frustration.[27] The practical utility of *force majeure* clauses becomes clear when contrasted with the common law doctrine of contractual frustration.[28] *Force majeure* clause and the doctrine of frustration are similar in a sense that, they both deal with occurrences beyond the control

[21] Retrieved from http://contracts.lawyers.com/breach-of-contract/Force-Majeure-A-Gulf-Spill-Ripple-Effect.html at 03:58 12/03/2011
[22] Loweel A. Westerrsund, *Force Majeure Clauses in Construction Contract.* Alberta Canada: MIC Calgary, 2008.
[23] Ibid.
[24] Ibid.
[25] G.H Treitel, Frustration and Force Majeure, London: Sweet & Maxwell, 1994, pp. 3-41.
[26] [1647] EWHC KB J5
[27] G. H. Treitel, *Frustration and Force Majeure*, p.13
[28] Retrived from, http://goliath.ecnext.com

of parties to an agreement.[29] However, frustration requires that the underlying rationale for the contract is to be destroyed.[30] It normally operates to permanently relieve parties from all of their contractual obligations, including those to perform and to pay. Force *majeure clauses*, on the other hand, permit a much greater degree of flexibility.[31] The occurrences giving rise to relief can be defined with greater certainty and the entire subject matter of the contract need not be destroyed in order for *force majeure* to operate.

Force majeure may also be temporary, allowing the parties to maintain their contractual arrangements once the event passes or is remedied. As a term negotiated between parties, a *force majeure* clause can respond to unpreventable occurrences while still maintaining certain contractual obligations, such as those relating to payment, and temporarily suspending certain others, such as the delivery of product. *Force majeure* clauses can also prescribe differing consequences depending on the nature or type of force majeure event, where as the doctrine of frustration is a blunt instrument that permanently ends all contractual obligations, a carefully crafted force majeure clause is capable of responding to the same events in a more predictable and equitable manner, while maintaining the contractual relationship between the parties.[32]

The breadth of parties' discretion in drafting *force majeure* clauses can be circumscribed.[33] A good example in which the Supreme Court of Canada's use of *ejusdem generis* principle to construe a force majeure clause is in *Atlantic Paper Stock Ltd. v. St. Anne-Nackwawic Pulp & Paper Co.*[34] In this case, *force majeure* was claimed by the purchaser of waste paper used in the construction of corrugated medium. The purchaser-manufacturer claimed that its inability to find a profitable market for its finished product

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[29] Retrieved from http://siteresources.worldbank.org/INTINFANDLAW/Resources/Forcemajeure checklist.pdf
[30] Ibid.
[31] Ibid.
[32] Retrieved from www.fmc-law.com/.../0311_Force_Majeure_Clauses_Construction. 04:30PM 12/03/2011
[33] Retrieved from http://goliath.ecnext.com,
[34] [1976]1S.C.R 580

constituted an event of *force majeure* under its purchase contract with its waste paper supplier. The purchase contract in question defined *force majeure* by way of a list of events (i.e. acts of God, war, damage or destruction to production facilities). The list concluded with the phrase 'or the non-availability of markets for pulp or corrugating medium.'

In determining whether the market situation faced by the manufacturer fell within this concluding phrase of the definition, the Court applied the *ejusdem generis* principle to hold that the phrase relied upon must be interpreted so as to limit its application to events like those previously described, "over which the party claiming suspension of the contract exercises no control and which makes performance impossible."[35] Since the market for the products of the purchaser-manufacturer had been found to be materially unchanged from the time of the execution of the contract, the purchaser's claim that the lack of a profitable market for its finished product constituted an event of *force majeure* could not be sustained. The purchaser had simply entered into a business arrangement which at the time of contracting, and at the time of the alleged force majeure, was unprofitable. Therefore, despite the *force majeure* provision, Dickson J. (as he was then) refused to uphold the *force majeure* provision defined by the "non-availability of markets":

> I do not think St. Anne can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude that the whole St. Anne project for the manufacture of corrugating medium was misconceived. The problems which plagued it proceeded, however, not from non-availability of markets for corrugating medium but from [a] lack of an effective marketing plan ... and inordinate operating costs... The project, conceived in ephemeral hopes and not the harsh realities of the market place, resulted in failure for which St. Anne and not changes in the market ... must be held accountable.[36]

In the Atlanta's case, the court circumscribes the effect of *force majeure* provisions through the use of principles of interpretation whilst in *Lebeaupin v. Crispin*

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[35] [1996], 38 Alta. L.R. (3d) 229 (C.A.) [*Atcor*].

[36] *Atlantic Paper v. St. Anne-Nackwawic Pulp & Paper Co.*, [1975], 56 D.L.R. (3d) 409 (S.C.C.) at 411.

& Co.[37] Cardie J. held that the term *force majeure* refers to all circumstances independent of the will of man, and which is not in his power to control. The effect of the clause may vary with each document. In this case, inundations and epidemics are accepted as cases of force majeure.

In the English case of *Matsoukis v Priestman & Co.*[38] the term *force majeure* was held to apply to dislocation of business caused by a nation-wide coal strike and also accidents to machinery. However, according to Bailhache J, *force majeure* did not cover delay caused by bad weather, football matches or a funeral because 'these are the usual incidents interrupting work and the defendants, in making their contract, no doubt took them into account. In *Tennants (Lancashire) Ltd, v. C.S. Wilson & Co. Ltd,*[39] there was a condition (a clause) in the contract which provided that 'deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article is a *force majeure* clause.'[40]

In Malaysia, the court in *Berney v Tronoh Mines Ltd.*[41] held that the contract of service of the plaintiff was discharged by frustration due to Japanese invasion in Malaya and that there was no breach of contract by the defendants. It also held that, the event of the Japanese invasion is an example of force majeure. Syed Ahmad Alsagoff stated that, the court will not hold the parties to further performance of the contract if, in the light of the changed circumstances, there was be a radical change in

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[37] [1920] 2K.B 714
[38] [1915] 1 KB 681. Retrieved from http://www.hbp.usm.my/aziz/FORCE%20MAJEURE.htm 08:46AM 11/20/2011
[39] [1917] A.C 495
[40] Ibid.
[41] (1949) MLJ 4