

Covid-19: Factors Affecting on Awareness Level of the *Force Majeure* Clause in the Construction Contract

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ABSTRACT

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The spread of the Covid-19 had forced the whole world to enforce the lockdown where all the business sectors and daily activities were on hold and new norms adopted since 2020 until now. The construction industry was one of the sectors severely affected by this outbreak, including Malaysia. Various construction-related issues arose, and the construction clause on *Force Majeure* became the talk of the town. Endless discussions and arguments arose regarding determining the Covid-19 impact to the contracting party who plan to seek relief using this clause. Thus, this study aims to evaluate the current awareness and importance of the *Force Majeure* clause in the construction contract in the realm of the Covid-19 outbreak. This pandemic was a new phenomenon, and there were limited law references that can be referred to in determining the best way to deal with its contractual effects. This study was carried out using a mixed methodology. Semi-structured interviews were conducted with 12 respondents, mainly the contract administration. Questionnaire surveys were distributed to 47 respondents. Interviewed data were analyzed using *Atlas-ti 9* software to produce more scientific and well-grounded results, and descriptive analyses were conducted for the questionnaire survey. Finding from this paper reveals that there was a varying level of awareness of the *Force Majeure* clause, mainly due to a lack of experience in dealing with *Force Majeure*. There was a significantly different understanding of the actual *Force Majeure* definition and how the clause can be evoked. The respondents were also unsure how the clause could provide complete protection to the contracting parties. This study also concluded some recommendations to improve the enforcement of the *Force Majeure* clause for future declaration.

Keywords: *Force Majeure*, Covid-19, Construction Industry, Contractual issues, Awareness level

INTRODUCTION

The pandemic of Spanish flu infection in 1918 had infected 500 million populations and claimed over 50 million life. One hundred years later, in 2019, the world is confronted by Coronavirus (Covid-19) outbreak. Up to July 2021, the pandemic had infected over 182 million of the world population, with over 3.9 million death cases (WHO,2020). To curb the pandemic, the Malaysian government had enforced the Movement Control Order (MCO) on the 18th of March 2020. Unknowingly it will be prolonged until July 2021. This lockdown caused an extensive delay to the project and contributed to the massive financial losses, including materials damage, site abandonment, and spike increase in the global material market price.

Due to these circumstances, the *Force Majeure* clause suddenly becomes a critical point of discussion among the industry practitioners considering the impact to the contracting party that seeks to rely on this provision to seek relief for the unfulfilled obligation. The argument was mainly because the event was beyond everybody's control (Hansen,2020). Despite our local construction industry that has adopted several types of contract form, it became crucial when the *Force Majeure* clause was not written in Malaysian law. However, it can be invoked if it was expressly incorporated into the contract, and it needs to be read together with other provisions (Windston&Strawn,2020). This uncertainty over the *Force Majeure* clause leads to confusion between the contracting party when *Force Majeure* is invoked., which includes, including nevertheless, the level of understanding of the context remains

Covid-19: Factors Affecting on Awareness Level of the *Force Majeure* Clause in the Construction Contract crucial among the industry people. It became an issue where the parties were unsure how to rely on the Force Majeure clause and its actual role. Therefore, this paper investigated the factors affecting the level of awareness among the construction practitioners on the Force Majeure provision and the importance to the contracting parties to fill the knowledge gap.

LITERATURE REVIEW

***Force Majeure* Definition**

According to Mathew (2020), the concept of *Force Majeure* originates from the French civil law system means ‘a superior force’. Thus, invoking the *Force Majeure* event requires special justification. In general, the Covid-19 outbreak has met the criteria to gather the *Force Majeure*: ‘act of God,’ ‘act of Government’ (Lexology,2020), unforeseen, unavoidable, and beyond the party’s control (M Zin et al.,2021). Enforcement of MCO to deter infection chain within the community had made the project ‘unlawful’ to be performed during the lockdown period. Therefore, the Movement Control Order (MCO) announced in conjunction with the COVID-19 scenario in Malaysia; *Force Majeure* is applicable under the event of ‘act of Government.’ Meanwhile, the COVID-19 outbreak can be constituted as an ‘act of God’ due to this pandemic beyond humanity’s control. But again, due to the rare invocation of the *Force Majeure* clause, the question arises whether the contracting parties are aware of the cause and effect of such request.

Interpretation of *Force Majeure*

The presence of Covid-19 in the world has yet to establish any clarity case law review regarding the construction disputes. This could be due to the continuity argument on the Covid-19 outbreak whether it can be constituted under *Force Majeure* or not. It is not surprising as the interpretation of the *Force Majeure* clause has been a prolonged debate even before the pandemic. All construction practitioners (developers, contractors, suppliers, and consultants, including Architects, Engineer, Landscape Architects, and surveyors) need to understand the function of the *Force Majeure* clause. The recent court case of *Mission Richmark Sdn Bhd v Capitol Avenue Development Sdn Bhd [2020] MLJU 1264* shows the miscomprehension by the defendant on the actual function of *Force Majeure* in a contractual context where the court decision has denied the defendants to seek protection under the provision due to the misinterpreting on the *Force Majeure* definition.

Haack et al. (2020) once mentioned that different laws and jurisdictions take different approaches. In other explanation, *Force Majeure* is a concept widely understood and accepted worldwide. However, the definition and interpretation of the events constituting *Force Majeure* and their consequences vary from one jurisdiction to another (Hewl et al., 2018). Thus, this could be why force Majeure clauses are hard to interpret and lead to confusion, as the challenge of determining what is impracticable or when a contract becomes void is still left to the determination of the presiding judge (Haack et al., 2020). The closest example we can refer to is the local Standard Form of Contract, where the Force Majeure clause may vary in how it has been drafted. It is either the clause been drafted in very specific by establishing the exhaustive list of supervening events, or in a very surface definition.

Covid-19 to invoke *Force Majeure*

The covid-19 outbreak was declared the worst pandemic in history, at least after the Spanish flu pandemic in 1918 (Feehan & Apostolopoulos, 2021). Therefore, *Force Majeure* may be considered as something novel within the industry. This is because the “pandemic” term appears to be absent from the *Force Majeure* clause in any contract from either local or internationally (Schwartz,2020). Covid-19 was declared as a “pandemic” by World Health Organization (WHO) on 11th March 2020 (WHO,2020). Developed countries like Japan and Australia were more prepared to overcome issues

relating to *Force Majeure*. It is fair to say that the Covid-19 outbreak was an eye-opener to Malaysians; however, as a field that generally fulfills with qualified workforce and professionals, an unforeseen risk such as *Force Majeure* still becoming moot in any contractual construction context.

METHODOLOGY

A mixed-method research design approach was utilized, including a semi-structured interview and questionnaire survey. A mixed-method design approach was used in this study to receive an extensive answer from the perspectives of both expertise and industry practitioners. In this study, convergent parallel design mixed-method was adopted to provide a comprehensive analysis of the research problem (Creswell,2013).

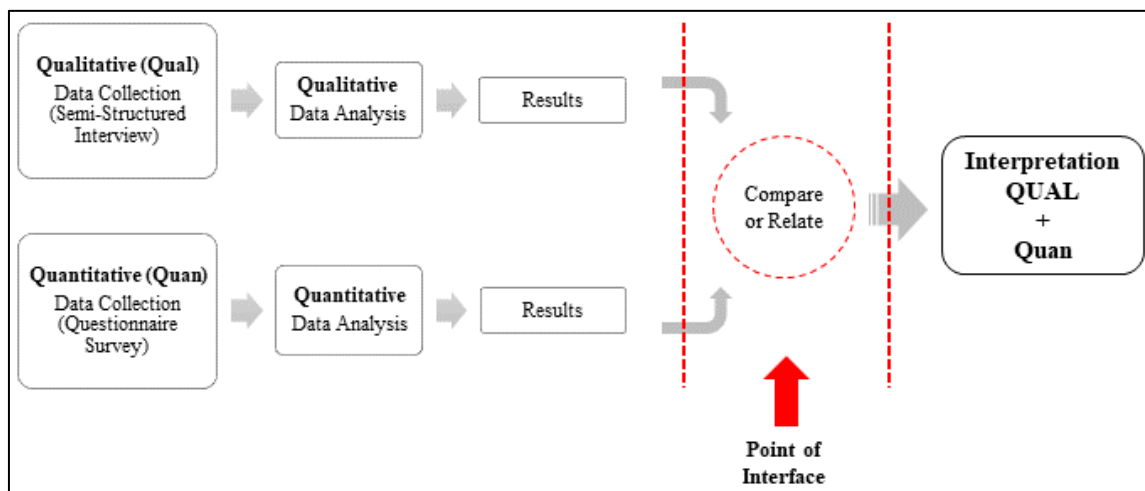


Figure 1: Diagram of Convergent Parallel Mixed-Methods

For the qualitative method, a semi-structured interview was adopted to explore the matter from the expertise directly involved with the contract administration in the construction project. The purposive sampling technique was used to select the respondents in this study based on their experiences and knowledge relevant to the research topic. This approach successfully received an extensive answers from 12 respondents from various backgrounds such as Professional Architect, Professional Engineer, Contract Expertise, Projects Manager, and Company Director who actively involved in the contract administration process. In the realm of a pandemic outbreak, face-to-face interview session has to be limited with the strict SOP to be followed. The author maintained five (5) face-to-face interview sessions in this study. Had produced a ‘networking map’ which created a ‘netIn comparison, the remaining seven (7) interview sessions were conducted virtually using various online platforms such as Zoom and Google Meet applications. Steps. The coherence analysis process via *Atlas-ti 9* software meanwhile, questionnaires were distributed to over 50 personnel for the quantitative method, with the final results received from 47 respondents. Questionnaire survey questions were distributed randomly through social media platforms such as LinkedIn and Facebook. The selection of respondents with good experience in contract management was necessary for this study because *Force Majeure* was not an event that happens regularly in Malaysia. Thus, the author carefully observed the respondent's background before the questionnaires were distributed. Both methods' data collections were finalized within one month and a half despite the stress on the time constraint due to the slow responses received for the questionnaire survey process.

RESULTS AND DISCUSSION

In general, both semi-structured interviews and questionnaire surveys received the highest number of respondents from both private and public sectors practitioners who hold the position of Superintendent Officer (SO) with four (4) and ten (10) response, respectively. The data from both design research methodology was then analyzed via *Atlas-ti 9* software to obtain an extensive and scientific result. Both interview and questionnaire survey had revealed the inconsistency in the level of awareness on the *Force Majeure* clause among the construction practitioners. Both methods show that over half of the respondents have never encountered the *Force Majeure* event during their whole involvement in the construction industry. The results are shown in Table 1.

Table 1: Involvement with *Force Majeure*

Description	Number	Percentage (%)
Semi-Structured Interview Analysis		
Experience with <i>Force Majeure</i>		
Got Experience	3	25%
No Experience	9	75%
Total	12	100%
Questionnaire Survey Analysis		
Experience with <i>Force Majeure</i>		
Got Experience	12	25.5%
No Experience	35	74.5%
Total	47	100%

Through the semi-structured interviews session conducted, all the collected data was documented by transcribing and summarizing in tabulation before importing it into *Atlas-ti 9* software for the following analysis steps. The coherence analysis process via *Atlas-ti 9* software produced a 'networking map' consisting of all the essential inputs emphasized from the respondent's answer. The primary codes were labeled in a brown box composed of eight (8) codes from the coding networking. Each of the direct principles then established a relationship with more sub-codes. These semantic networks showed how the research outcome could be achieved by connecting all the information collected. For this paper, the author focuses on the two (2) principal codes that determined the level of awareness on the *Force Majeure* clause among the construction practitioners, which are; (i) challenges in interpreting *Force Majeure* and (ii) contract condition. The determination of these two (2) codes was frequently assigned to the transcribed data collected through the analysis using *Atlas-ti 9*. These codes aligned with the highlighted issues based on the previous literature review.

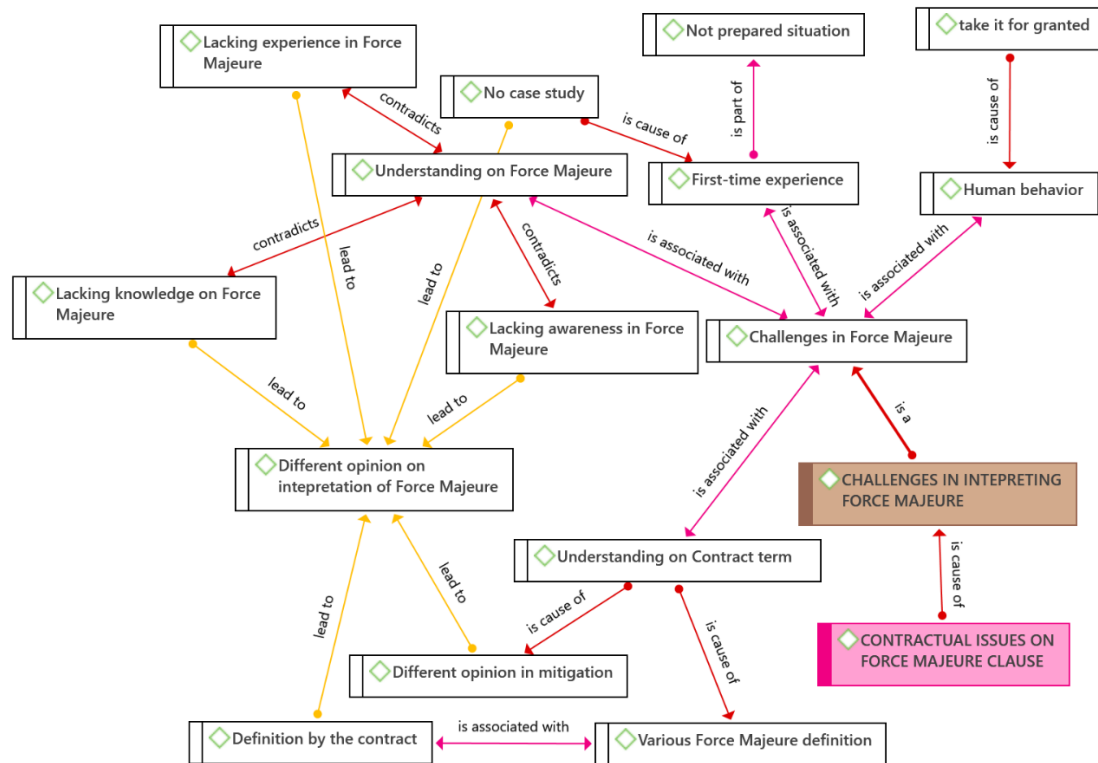


Figure 2: Challenges in Interpreting Force Majeure Network Map

Figure 2 shows challenges in *Force Majeure* mainly caused by the level of ‘understanding’ either on the contract term, especially on *Force Majeure* clause. The participants were unaware of the actual potential due to a lack of understanding and experience of the *Force Majeure* clause. It also creates different opinions in interpreting of *Force Majeure* clause. *Force Majeure* was mainly an unfamiliar clause among the industry players. There were not many people who were well versed with the clause provision, and thus it caused contradicting views even among construction contract administration experts. The results above show that the miscomprehension of the *Force Majeure* definition may be caused by its various purposes given in multiple forms of contract. As the *Force Majeure* clause was not implied by any statutory under Malaysian law, *Force Majeure* will have to rely on the definition stated in the individual contract. Thus, it can be said that the clause had been abandoned due to the rarity of its usage.

Besides that, lacking awareness of the *Force Majeure* clause also could be due to the lacking of knowledge on the contractual provisions. Secondly, the lack of awareness among the construction practitioners was probably due to their lacking understanding of the importance of this *Force Majeure* clause towards contracting parties. Figure 3 shows the contract condition was associated with the benefit of the *Force Majeure* clause, which required a committed responsibility by the contract parties for everybody to receive proper protection under this provision

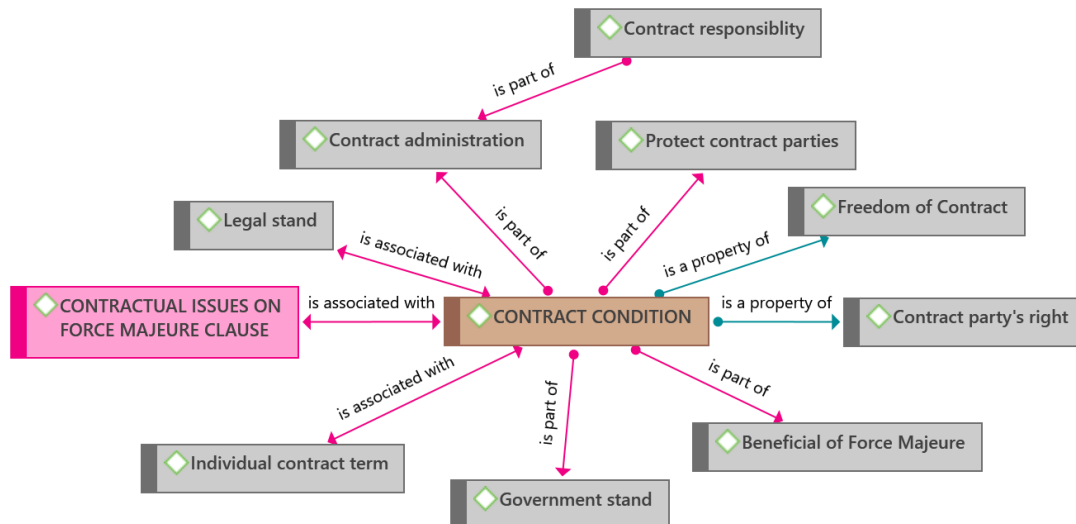


Figure 3: Contract Condition Network Map

It was shown that contract responsibility was part of the contract condition. Thus, there was no excuse for the contract parties for not being aware of the contract terms and conditions that they were involved in. Failure to comprehend the clause causes further consequences such as different opinions on the interpretation of *Force Majeure*. This, in turn, cause dispute that will eventually be expensive to solve. Meanwhile, the author summarized the results in ranking tabulation to better understand the questionnaire survey, as shown in Table 2.

Table 2: Common Factor Constitute Contractual Issues on *Force Majeure*

No	Description	Score	Rank
A	No preparation in terms of documentation due to the sudden occurrence of Covid-19	36/47	2
B	Lack of awareness on <i>Force Majeure</i> visibility in the contract.	33/47	4
C	Lack of understanding of <i>Force Majeure</i> function during circumstances.	38/47	1
D	There is confusion on the consequences of invoking the <i>Force Majeure</i> provision.	38/47	1
E	No knowledge on how <i>Force Majeure</i> should be implied.	36/47	2
F	Wrong interpretation of <i>Force Majeure</i> events.	36/47	2
G	Absence of <i>Force Majeure</i> provision in the contract.	24/47	5
H	Contract party's argument and false determination.	35/47	3

Table 2 shows that most respondents were found that lacking understanding of the *Force Majeure* clause and the confusion on the consequences of invoking the *Force Majeure* provision has become the main factors contributing to the contractual issues regarding this clause. Failure to understand the condition may hinder the contracting parties from receiving the clause's better protection. This reinforced the researcher's conclusion that most construction players enter into a contract without understanding the clauses. This technically justifies why the items 'E' and 'A' have been second positions. Item 'A' shows how the recklessness of the industry player in regards to providing substantial contract documentation had brought them into a worst-case scenario, where logically, during this hectic time, most of the parties will try to either escape from the obligation or minimize their loss by pushing the ball to other's people court. Therefore, it was suggested that understanding the contract terms, conditions, and proper documentation must be in the mind of all contracting parties to avoid problems when an unexpected event such as Covid-19 occurs.

CONCLUSION AND RECOMMENDATION

The survey findings had shown the hidden hesitancy among the industry player on the actual function of the *Force Majeure*. The researcher also found that the reluctance had restricted industry players from receiving substantial protection from the *Force Majeure* clause, particularly during the Covid-19 outbreak. Fundamentally, the respondents understand the basic knowledge of the *Force Majeure* and the importance of the clause. However, due to the lack of experience on the actual *Force Majeure* event and the rareness application, it misinterpreted the clause. It has been established that even an experienced person with good contract administration background was not familiar with *Force Majeure* provision. The researcher found that these issues arose due to the clause's weakness, where there is inconsistency on the *Force Majeure* definition in the contract form. This Covid-19 outbreak acted as a lesson learned to the Malaysian construction industry. It shows that the pearls of wisdom of the parties are highly needed to be put forward to prepare for the future *Force Majeure* declaration.

Understanding the actual meaning, wording, and how the *Force Majeure* should protect the contract parties. It is supported by Giarretta's (2020) statement that the *Force Majeure* is commonly known as boilerplate clauses where it will be added at the end of the contract, without further thought on how they might operate in practice. According to Alshammari *et al.* (2017), *Force Majeure* poses incredible difficulty to practitioners in construction issues such as resolving delay-related claims. The parties in the contract need to be aware of the fundamental aspects of *Force Majeure's* impact on delay and how it should be compensated. For our local construction industry, *Force Majeure* consisted of the construction risk and was mainly involved with progress delays (Nguyen & Nguyen, 2020) (Kumar & Asadi, 2017). Even though the term *Force Majeure* was a standard clause in construction contracts, the parties often pay less attention to the actual performance of these provisions until the supervening events occur. Therefore, one of this paper's significant contributions was to provide insights on the importance of this *Force Majeure* clause to the local construction industry. This study's findings could also reflect the need to formulate a more appropriate *Force Majeure* definition in the Malaysian practice standard form of contracts. In the case of the Covid-19 outbreak, understanding on *Force Majeure* clause will help the relying parties to justify their failure to perform the obligation due to the condition that met with the criteria that invoke the *Force Majeure*, and this could be achieved with a better draft on the *Force Majeure* clause in the contract provision.

Hence, further research should collect data from a broader group of industry players, not only top management. This is because the contract and project responsibility should fall within every party involved in the construction project. Besides that, the data comparison can be collected between small and large projects because both will have different understanding and experiences on the *Force Majeure* clause. This is best to measure the impact of the *Force Majeure* on the other project scales and how this will affect the contracting parties if the *Force Majeure* provision was absent from the contract term.

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