

December 2019



QSCOMM

Issue No. 1 Session 2019/2020

DARE TO BE BOLD

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Binti Ibrahim

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AND ADAPT OR ...**

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**QS PATH IN
MALAYSIA**

EMPOWERING THE PROFESSION



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Chief Editor's Note

Sr Dr. Saipol Bari bin Abd Karim

Greetings from the Chief Editor!

Welcome to the inaugural issue of QSComm, a platform for information and knowledge sharing to members of RISM and also to non-members.

Previously known as Berita QS, the rebranding of this twice-yearly newsletter epitomized the enthusiasm of promoting the QS profession. "Comm" is an abbreviation for communication, which denotes the importance of not only communication itself but connection and association to the QS profession in general.

The editorial committee would like to thank the Vice President, Sr Lim Kok Sang and the QS Divisional Committee for the mandate given to us.

As the theme suggests, 'Empowering the Profession' focuses on highlighting the core of QS and the importance of uplifting the image of our profession to the general public as a whole. We have also steered at enhancing our visibility by sharing this QS.Comm to secondary schools, in promoting QS as their future professional career.

With this inaugural issue, we do hope that the readers will benefit the most out of its contents.

Introducing

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MySMM WORKSHOP
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2/2019 & 3/2019





FEATURED ARTICLE

CORONAVIRUS OR COVID-19 ~ A FORCE MAJEURE EVENT?

Sr Ong Hock Tek
Director, BK Entrusty

Note : This is an update of the article uploaded in RISM Website 19 March 2020 and presentation in the RISM Webinar Conferencing on 8 April 2020 by Sr HT Ong.

Introduction

On 30 Jan 2020, World Health Organization ('WHO') has declared the Coronavirus outbreak or COVID-19 in Wuhan, China a Public Health Emergency of International Concern ('PHEIC') following the rampant spreading and rising confirmed cases and death tolls reported in many countries. The term PHEIC is defined in the International Health Regulations (2005) as "an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response".

The China's isolation started with the Chinese President Xi Jinping order for transportation blockage around central Hubei province on 23 Jan 2020 to stop the outbreak from its originating province capital, Wuhan. This was followed by the suspension of flight service including air shipments to China, a mandatory 14 days quarantine upon arrival for people who have visited China, the lockdown of several major cities and shut down of offices and factories in China, all these have inevitably caused disruptions and delay to domestic and international trades of China. China is one of the major global player, as it is the largest exports destination for 33 nations and the largest source of imports for 65 nations from an analysis based on 186 countries (McKinsey Global Institute's report July 2019).

With such magnitude of freeze in operation, production and logistics, including the quarantine of residents in major cities of China, the delays or failures to fulfil commercial and/ or contractual obligations amongst many organisations, in particular China corporations are increasingly apparent and have impacted the global supply chains extensively. In this exceptional and unfortunate situation, are the contracting parties protected from liabilities of non-performance due to the measures taken by China, Malaysia and other countries in stopping the virus outbreak under the Force Majeure clause in their construction contracts? Is the Coronavirus or Covid-19 outbreak one of the triggering events under Force Majeure claim? What other relevant contractual provisions can the contracting parties rely on for claims and entitlement under construction contracts ?

This article discuss and review the applicability and possibility of the said virus outbreak as a Force Majeure event for time and/or cost claims and their entitlement, particularly under FIDIC and the commonly used Malaysian standard forms of contract, as well as serves as a guide to readers in their preliminary risk assessment when dealing with such unforeseen and unfortunate event.

Force Majeure Clauses And Events

Force Majeure is a common clause or provision in construction contracts drafted to protect the parties from liabilities in the event of a party being prevented from performing its contractual obligations by circumstances beyond their control. It is usually distinctive as there can be no implied Force Majeure definition. Hence, to justify whether Coronavirus outbreak is a Force Majeure event in a construction contract, the claiming party first need to prove that the event is within the criteria and/or list of occurring events. Therefore, it is in the contracting parties' interest to broaden or narrow the scope, criteria and extent of such triggering events in their contract negotiation and agreement at the outset as it forms part of the risk allocation under most construction contracts. Close attention would need to be given to the contractual wording as the effects and impacts of such clause, which often vary depending on the forms of contract.

Some contracts expressly define Force Majeure whilst others list events qualifying as Force Majeure by defining inclusively or exclusively, as follows (Ong, 2009, p. 90);

An **inclusive** definition sets out the criteria in which they **must be satisfied together with a non-exhaustive list** of examples of such event, leaving the parties free to interpret or add on events not included in the list.

An **exclusive** definition, on the other hand, sets out an **exhaustive list of force majeure events**. Only those listed events can be construed as force majeure events, which is not open to the parties to interpret or add on any events as force majeure events.

A sample of 'Inclusive Definition' and 'Exclusive Definition' for Force Majeure clause can be found in the international standard form of contract, FIDIC (Yellow/Red* book, 1999) and the local standard forms of contract, PAM (2006/2018) and JKR 203A (2007/2010), both definitions are tabulated below:

INCLUSIVE DEFINITION		EXCLUSIVE DEFINITION	
FIDIC (Yellow/Red* book, 1999)		PAM (2006/2018)	JKR 203A (2007/2010)
<p>Clause 8.4/8.5* Extension of Time for Completion Clause 8.4/8.5 (d) 'Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.'</p>		<p>Clause 23.0 Extension of Time Clause 23.8 'The following are the Relevant Event referred to in Clause 23.0: 23.8(a) Force Majeure'</p>	<p>Clause 43.0 Delay and Extension of Time Clause 43.1 (a) 'force majeure as provided under clause 57' Clause 43.1 (i) 'the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods, materials and/ or services as are essential to the proper carrying out of the Works.'</p>
<p>Clause 19/18* Force Majeure Clause 19.1/18.1* 'In this Clause, "Force Majeure" means an exceptional event or circumstance: (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.</p> <p>Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied: (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors, (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.'</p>		<p>Article 7 (ad) 'Force Majeure means any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters.'</p>	<p>Clause 57.0 Effect of Force Majeure (*Clause 58 in JKR 203A (2010)) Clause 57.2 'An "Event of Force Majeure" is an event beyond the control of both Parties which are: (a) war (whether declared or not), hostilities, invasion, act of foreign enemies; (b) insurrection, revolution, rebellion, military or usurped power, civil war, terrorism; (c) natural catastrophe including but not limited to earthquakes, floods, subterranean spontaneous combustion or any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions; (d) nuclear explosion, radioactive or chemical contamination or radiation (unless caused by the negligence act, omission or default of the Contractor, its agents or personnel); (e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and (f) riot, commotion or disorder, unless solely restricted to employees of the Contractor or its personnel, servants or agents.'</p>

Applicability Of Coronavirus Outbreak As Force Majeure Event

The "inclusive definition" of Force Majeure as in FIDIC (1999) enables party to add on events not included in the list, so long as the criteria set out in such clause are satisfied. This includes exceptional events or circumstances:-

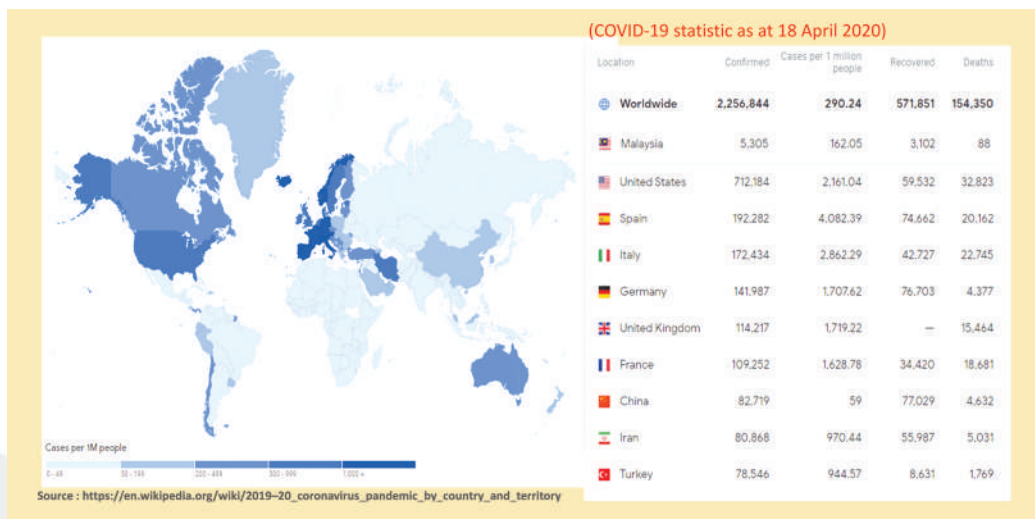
- (a) beyond a Party's control;
- (b) Party could not reasonably have provided before entering into the contract;
- (c) Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party.

By the aforesaid criteria, Coronavirus outbreak is a likely eligible event under Force Majeure in FIDIC (1999) as the criteria (a) to (d) are satisfied.

However, in "exclusive definition" of Force Majeure under PAM (2006/2018) and JKR 203A (2007/2010), the provisions are comparatively more stringent than FIDIC (1999). In PAM 2006/2018 the fulfilment of criteria 'circumstances beyond the control of the Contractor' is not sufficient as a Force Majeure event. It must be one of the specific events listed. Amongst all, the most akin event relating to Coronavirus outbreak is an 'epidemic', which is defined as 'an outbreak or unusually high occurrence of a disease or illness in a population or area' (The American Heritage Stedman's Medical Dictionary, 2002) or 'a widespread occurrence of an infectious disease in a community at a particular time' (Oxford Dictionary).

The World Health Organisation (2020) has recently updated the Coronavirus in the list of "Pandemic, epidemic diseases", which can be found in its website page of Emergencies and subpage under Disease Outbreaks. As of January 2020, there are a total of twenty diseases in the list of pandemic and epidemic, which include Ebola virus disease, plague, SARS, MERS-CoV, etc. Contrarily, there are occasions where the declaration is not so definite or precise, and the term 'epidemic' may not be determinative or certain such as SARS outbreak in 2003. WHO has referred SARS as 'communicable disease outbreak' instead of 'infectious epidemic' which has indeed created an argument as to what is the threshold to constitute an 'epidemic'. However, at the Media Briefing in Geneva on 11 March 2020, WHO Director-General has made an assessment that the Coronavirus (named as COVID-19 on 11 Feb 2020) can be characterised as 'pandemic'. This is the first time the WHO has called such an outbreak pandemic, not since the H1N1 "swine flu" in 2009. In view of the declaration from WHO, the identification of Coronavirus outbreak is apparently equivalent, if not more expansive than the term 'epidemic' defined in PAM 2006/2018. An epidemic becomes a pandemic when it spreads over a wide geographical areas and affects a large proportion of the population, not only at national level but also globally.

The following is a worldwide statistics showing the extensive spread of coronavirus pandemic by country and cases confirmed, recovered and death, as at 18 April 2020.



The same rule can apply to justify COVID-19 as a Force Majeure event under JKR 203A (2007/2010). Regrettably the list of Force Majeure events does not include any of the expressed terms like 'outbreak', 'disease', 'epidemic' or 'acts of government' which may fit well as a triggering event to the said virus outbreak. It is unlikely for the party to exclude liability from non-performance affected by such outbreak using the Force Majeure provision. However, it is interesting to note that under its clause 77 – Epidemics and Medical Attendance, JKR form provides for any outbreak of illness of an epidemic nature and requires the Contractor to carry out and comply with the regulations, orders and requirements made by the Government, medical or health authorities for the purposes of dealing with and overcoming them. Further, its extension of time clause 43.1(i) 'Contractor's inability to secure such goods, materials and/ or services that are essential to the proper carrying out of the Works for reason beyond his control unforeseeable at the date of closing of tender of this Contract' can be alternatives as opposed to a direct claim under Force Majeure.

In other words, the said virus outbreak is likely to succeed under Force Majeure event (a relevant event under Extension of Time provision) in PAM (2006/2018) but not in JKR 203A (2007/2010), unless pursued under the aforesaid provisions. On the contrary, under FIDIC (1999), cost claim is allowed for specific Force Majeure events, as evident from its cl. 19.4(b), abstracted below;

"If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 (Notice of Force Majeure) and suffer delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 (Contractor's Claims) to:

An extension of time for any of such delay, if completion is or will be delayed, under Sub-Clause 8.4 (Extension of Time for Completion), and

If the event or circumstance is of the kind described in sub-paragraph (i) to (iv) of Sub-Clause 19.1 (Definition of Force Majeure) and in the case of sub-paragraph (ii) to (iv) of Sub-Clause 19.1 (Definition of Force Majeure) and in the case of sub-paragraph (ii) to (iv) of Sub-Clause 19.1 (Definition of Force Majeure), Payment of any such Cost. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 (Deferment) to agree or determine these matters."

Under FIDIC (1999), both EOT (cl. 8.4/8.5) and Force Majeure (cl. 19.1/18.1) provisions can be relied on, but preference would depend on contractual and commercial considerations and priority by party relying on them.

It is important to note that, any event relied upon as Force Majeure must be an event which party is unable to perform its obligations under the contract, either temporary or permanently impossible. In the event of temporary non-performance, an extension of time for the performance delay may be considered, whereas in permanent non-performance, the contract may be frustrated and can be voidable (see Contract Act 1950 Section 57(2) and Section 66).

Whilst a Force Majeure event usually entitles a party to be excused from performance liability by entitlement to extension of time, it is not the case in loss and/ or expense, as it is often considered as a neutral event where both contracting parties bear the cost risk. There are exception to this, example in FIDIC (1999) contract, cost claim is allowed for specific Force Majeure events, as expressly stated under its sub-clause 19.4(b), as abstracted above.

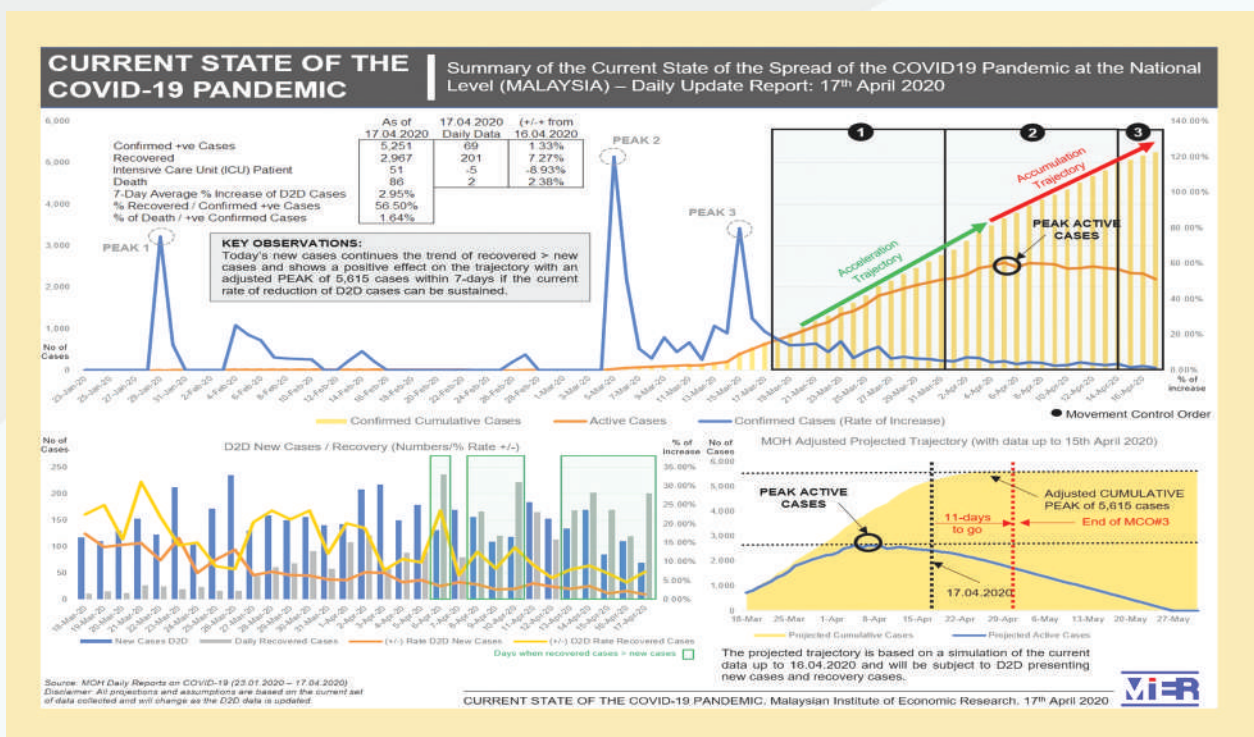
In justifying a Force Majeure event, China has move a step forward by issuing the Force Majeure certificate to enterprises who have been affected and unable to perform due to the Coronavirus outbreak since 2nd February 2020. This certificate is issued by the credible China Council for the Promotion of International Trade ('CCPIT' also named as the China Chamber of International Commerce since 1988), as follows;

"The Deputy Director-General of CCPIT Commercial Certification Center said that force majeure certificates have been recognized by governments, customs, chambers of commerce and enterprises in more than 200 countries and regions around the world, and it is widely accepted overseas." (CCPIT, Feb 2020)

The certificate is a factual and documentary proof to enable those enterprises to safeguarding their legitimate contractual rights and interests by minimizing liabilities in contracts which they are unable to fulfil accordingly due to the said virus outbreak.

On 16th March 2020, in an effort to slow down and contained the said Covid-19 virus spread across the whole country, the Malaysian Government has announced the implementation of a partial lockdown or its Movement Control Order ("MCO") issued under Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 and related Regulations (Measures within the Local Infected Areas) Regulations 2020, effective from 18th to 31st March 2020 countrywide (further extended to 14th April 2020, and again extended to 28 April 2020) enforced under Prevention and Control of Infectious Diseases Act 2988 and Police Act 1967 ("PCIDA"). In compliance to this Order, all government and private premises are required to be closed down with exception to those involve in essential services. This meant all construction activities, except those affecting public safety or cause public hazards, in Malaysia are suspended under the said Government or Authority's Order and related MCO extensions.

The seriousness and management ("flattening of the curve") of the Covid-19 pandemic in Malaysia can be shown in the following comparison between MIER projected and actual trajectory for the period (24 March to 18 April 2020) below.



Notification, Causal Linkage And Mitigation

Most Force Majeure provisions have prescribed contractual procedures, often a formal notice to be served by the claiming party becomes aware of a potential Force Majeure event or a statutory order, provided it is not due to the default of the party relying on it. Such party further owes a duty to mitigate or minimize the impact of such event before exclusion from its contractual liability.

If COVID-19 pandemic is found to be a triggering event which satisfied the Force Majeure criteria, the party relying on such contract provision to exclude its contractual liability would then need to demonstrate its causation and ensuing effect/s. Its success will depend on the wordings of the Force Majeure provision, which must be read in conjunction with other related provisions under the contract as a whole.

Furthermore, procedural compliance is pertinent, as non-compliance can jeopardise a claim under most Force Majeure clauses, such as in the standard forms of contract below.

Description	Relevant Contract Clauses		
	PAM (2006/ 2018)	JKR 203A (2007/2010)	FIDIC (1999)
Force Majeure	23.1(a)	43.1(a)/ 58.0	19.0/18.0
Notice of Claim	23.1	43.1/ 58.3	19.2/18.2
Duty to Mitigate/ Minimize	23.6	43.1	19.3/18.3

In this regard, it is interesting to note that PAM had issued an Advisory Note dated 19 March 2020 to its members advising those Principal Submitting Person ("PSP"), amongst others, on statutory duties, to "...formally notify the Client, Contractor and all Consultants to adhere to the Movement Control Order.....and to remind the Contractor to take necessary action to always ensure the good order of the works, security and safety at site." It further stated that, "...if a notice or instruction for temporary suspension of works is issued by the PSP to the Contractor, a copy of the same is required to be sent to the local authority."

On interim valuation and certification issuance schedule, PAM further advised its PSP "...to contact and agree on an alternative schedule with the Contractor, Employer and relevant Consultants to minimise any disagreements, further delays or disruptions to the Contractor's cash flow."

In so far as contractual duties under PAM Form 2006/2018, the Contractors are reminded to comply with the statutory order and stated that, "Should any Contractor be of the opinion that his progress of works has been affected and delayed by the temporary suspension, he is at liberty, under the terms of the Contract, to submit his claims for an Extension of Time and/or for any loss and additional expense arising.", and to assess the claims fairly.

Hence, the claiming party may be able to rely on PAM 2006/2018 sub-clause 23.8(w)/(x) and 24.3(n)/(o) for its entitlement to both time and loss/ expense claims respectively, which are more direct and accommodating compensating event clauses as compared to the Force Majeure clause, which usually is considered a neutral event for entitlement to extension of time only. The said relevant provisions are tabulated below.

PAM 06/18 cl. 23.1

If the Contractor is of the opinion that the completion of the Works is or will be delayed beyond the Completion Date by any of the Relevant Events stated in Clause 23.8, he may apply for an extension of time provided always that

PAM 06/18 cl. 23.8

The following are the Relevant Events referred to in Clause 23.0:

PAM 06 cl. 23.8(w) / PAM 18 cl. 23.8 (x)

suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractors; and

PAM 06/18 cl. 24.1

Where the regular progress of the Works or any section of the Works has been or is likely to be materially affected by any of the matters expressly referred to in Clause 24.3, and the Contractor has incurred or is likely to incur loss and/or expense which could not be reimbursed by a payment made under any other provision in the Contract, the Contractor may make a claim for such loss and/or expense provided always that

PAM 06/18 cl. 24.3

The following are the matters referred to in Clause 24.1:

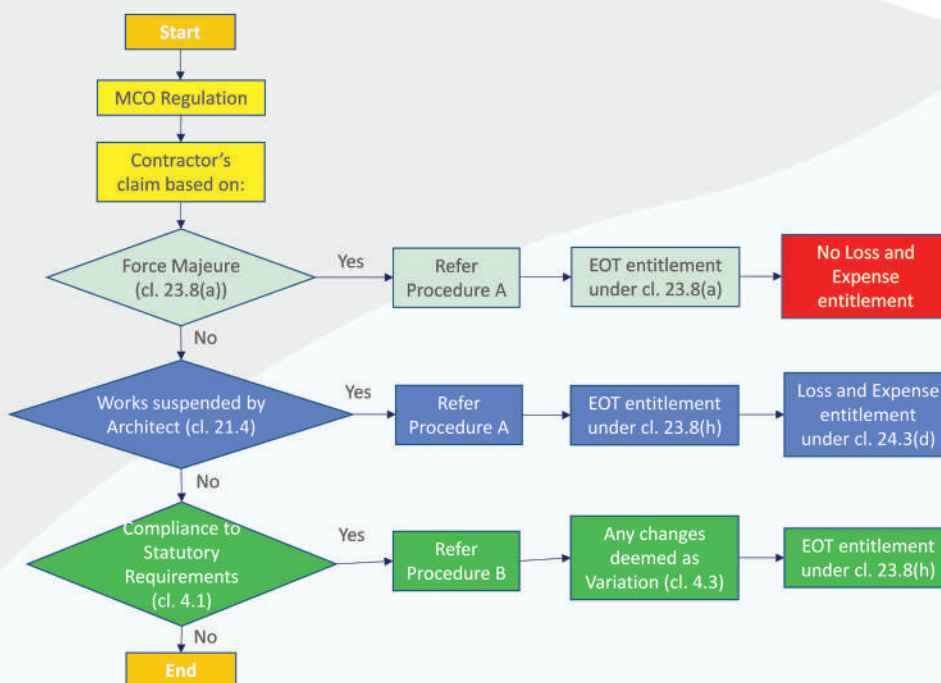
PAM 06 cl. 24.3(n) / PAM 18 cl. 24.3 (o)

suspension of the whole or part of the Works by order of an Appropriate Authority provided always that the same is due to negligence or omission on the part of the Employer, Architect or Consultant.

In so far as to the issuance of an Architect's Instruction and/or compliance with statutory requirements in respect of complying and conforming with laws, regulations and terms and conditions of any Appropriate Authority under the said PAM forms, the related claims and entitlement under other relevant provisions are, as tabulated below.

Cl. 4.1 - Statutory Requirements	Cl. 23.8 - Relevant Events (Extension of Time)
<i>The Contractor shall comply with and submit all notices required by any laws, regulations, by-laws, terms and conditions of any Appropriate Authority and Service Provider in respect of the execution of the Works and all temporary works</i>	<i>The following are the Relevant Events in Clause 23.0:</i> a) <i>Force Majeure; ...</i> h) <i>compliance with AI issued by the Architect under Clauses 1.4, 11.2 and 21.4; ...</i> q) <i>compliance with any changes to any law, regulations, by-law or terms and conditions of any Appropriate Authority and Service Provider;</i> x) <i>suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractors; and</i> y) <i>any other ground for extension of time expressly stated in the Contract.</i>
Cl. 4.3 - Conforming to Statutory Obligations	Cl. 24.3 - Matters materially affecting the regular progress of the Works (Loss and/or Expense)
<i>If within seven (7) Days of having given written notice to the Architect, the Contractor does not receive any AI in regard to the matters specified in Clause 4.2, he shall proceed with the work to conform to such laws, regulations, by-laws, terms and conditions of any Appropriate Authority and Service Provider. Any changes so necessitated shall be deemed to be a Variation required by the Architect.</i>	
Cl. 11.3 - Issue of Variations after Practical Completion	<i>The following are the matters referred to in Clause 24.1: ...</i> d) <i>compliance with a written instruction issued by the Architect in regard to the postponement or suspension of all or any part of the Works to be executed under Clause 21.4;</i> e) <i>suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence or omission on the part of the Employer, Architect or Consultant;</i>
Cl. 21.4 - Postponement or Suspension of the Works	
<i>The Architect may issue an AI in regard to the postponement or suspension of all or any part of the Works to be executed under the Contract for a continuous period not exceeding the Period of Delay stated in the Appendix. If the insurance is covered by the Contractor under Clauses 19.0 and 20.A, the Contractor shall ensure full insurance coverage for the whole period of postponement or suspension or if the insurance is covered by the Employer under Clause 20.B or 20.C, the Employer shall ensure similar insurance coverage.</i>	

In simplifying the routes for claims and entitlement under the PAM Form of Contract following the Covid-19 pandemic and Movement Control Order, below is a flow chart illustrating the events and procedures for time and loss/expense claims and entitlement.



Procedure A (cl. 23.1) Contractor to:-

- i. Give written notice within 28 days of the event (condition precedent) with initial estimate of EOT supported by particular of delay cause.
- ii. Within 28 days of end of delay event, submit his EOT final claim with all particulars.
- iii. Use best endeavor to prevent delay.

Procedure B (cl. 4.2 & 4.3), Contractor to:-

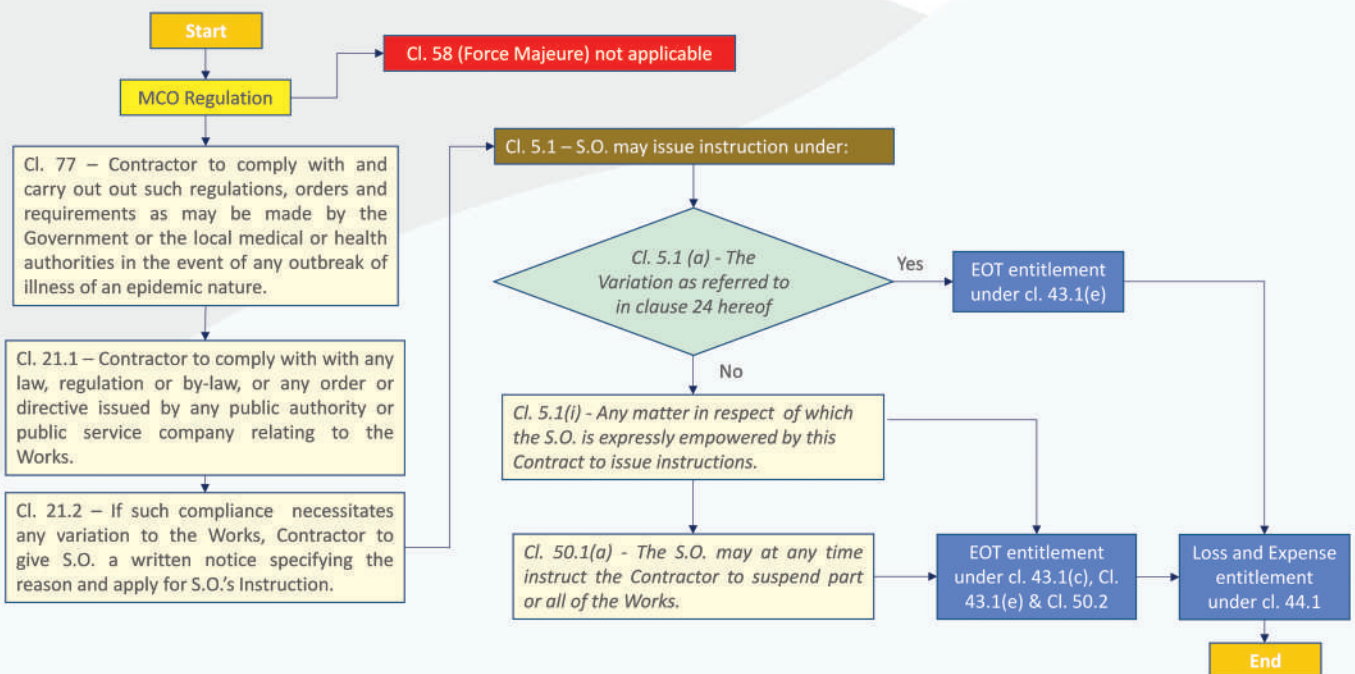
- i. Immediately give written notice to Architect;
- ii. Proceed with the works to conform with any laws, regulations, by-laws, term and conditions of any Appropriate Authority and Service Provider, if Architect did not issue any AI within 7 days.

Whilst PAM issued its Advisory Note, the Works Ministry or Kementerian Kerja Raya Malaysia (“KKR”) issued its Circular on Frequently Asked Questions (“FAQ”) on 18 March, updated 24 March 2020, to provide the answers to frequently asked questions, amongst which concerning critical works and claims arising from the MCO. In respect of loss/expense claims, the Government is not responsible for whatever losses due to the said virus epidemic is beyond its control, and for extension of time, it will depend on the provisions in the contract executed. Likewise, under the Finance Ministry or Kementerian Kewangan Malaysia (“KKM”) guidelines, projects that are either postponed or suspended via its Superintending Officer or Contract Administrator instruction, shall be in line with the force majeure clause contained in the contract. If there is no such clause, then similar principle and procedure should apply, accordingly.

In addition to the aforesaid KKR Circular and Cl.77 – Epidemic and Medical Attendance provision under the JKR 203A Form of Contract, there are other relevant provisions as tabulated below, that claims and entitlement are recognised under the said contract.

<p>Cl. 77 – Epidemic and Medical Attendance</p> <p>The Contractor shall maintain the Site in clean and sanitary condition and shall comply with all requirements of the Government Health and Sanitary Authorities. In the event of any outbreak of illness of an epidemic nature, the Contractor shall comply with and carry out such regulations, orders and requirements as may be made by the Government or the local medical or health authorities for the purpose of dealing with and overcoming the same.</p>	<p>Cl. 43 - Delay and Extension of Time</p> <p>Cl. 43.1 : Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the S.O. as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and calculation of the length of delay. If in the opinion of the S.O. the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix 1 or beyond any extended Date for Completion previously fixed under this Clause due to any or more of the following events:</p> <p>a) Force majeure as provided under clause 58;</p> <p>...</p> <p>c) Suspension of Works under clause 50;</p> <p>...</p> <p>e) S.O.'s instructions issued under clause 5 hereof, PROVIDED THAT such instructions are not issued due to any act, negligence, default or breach of this Contract by the Contractor of any sub-contractor, nominated or otherwise.</p> <p>...</p>
<p>Cl. 21 – Compliance with The Law</p> <p>Cl. 21.1 - The Contractor shall comply in all respects (including the giving of all notices and the paying of all fees required) with any law, regulation or by-law, or any order or directive issued by any public authority or public service company (hereinafter referred to as "Statutory Requirements"), relating to the Works or,.....</p> <p>Cl.21.2 – If after the Date of tender (as specified in Appendix), there is any change or amendment in any written law, regulations and by-laws which necessitates any variation to the Works, the Contractor shall, before making such variation, give to the S.O. a written notice specifying and giving the reason for such variation and apply for the S.O. instruction in respect of the matter.</p>	<p>Cl. 44 – Claims for Loss and Expense</p> <p>Cl. 44.1 – If at any time during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under clause 43.1 (c), (d), (e), (f) and (h), and the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any provision in this Contract, then the Contractor shall within thirty (30) days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject to clause 44.2 hereof</p>
<p>Cl. 5 – S.O.'s Instruction</p> <p>5.1: The S.O. may from time to time issue further drawings, details and/or written instructions (all of which are hereafter collectively referred to as "S.O.'s Instructions") in regard to:</p> <p>a) The Variation as referred to in clause 24 hereof;</p> <p>...</p> <p>i) Any matter in respect of which the S.O. is expressly empowered by this Contract to issue instructions</p>	
<p>Cl. 50 – Suspension of Works</p> <p>Cl. 50.1 – Suspension and Resumption of Works</p> <p>a) The S.O. may at any time instruct the Contractor to suspend part or all of the Works.</p> <p>...</p> <p>Cl. 50.2 – If the Contractor suffers delay and/or incurs expenses in complying with the instruction under clause 50.1(a), and in resumption of the Works, and if such delay and/or expense was not foreseeable by the Contractor, the Contractor shall give notice extension of time under clause 43 and the provisions thereof shall apply accordingly. ...</p>	

Likewise, the simplified routes for claims and entitlement under the JKR Form of Contract arising from the Covid-19 pandemic and Movement Control Order, can be illustrated through a flow chart of events and procedures for time and loss/expense claims and entitlement, below.



In addition to the above relevant contract provisions relating to claims and entitlement, certain parties have suggested to rely on insurance provisions and/or policies to claim for the said MCO by relying on the words such as "lockout" and "order of any government de jure or de facto" or "by public authority". It must be noted that there is a distinction between "lockout" and "lockdown", which often mistakenly taken as the same. The former, normally applies to personnel or workers of the contractor and/or its subcontractors disallowed to enter into the project site by the Employer and/or its representative, whilst the latter, which usually not apply to construction projects, but apply when there is a serious event like a disease outbreak, whereby no one can go in and/or out of the premises, unless with special or authorised permission. Unless any of these events are specifically included in the Contractor's All Risks policy via special endorsement/s, these events are often amongst the many generally excluded events and the Insurers will not indemnify the Insured in respect of loss, damage or liability directly or indirectly caused by or arising out of such events.

Summary/ Conclusion

The measures initiated by China and many other countries including Malaysia in overcoming Coronavirus outbreak or COVID-19 pandemic have apparent adverse impact on the global supply chains and disrupted millions of workforce, not to mention thousands in death toll. Almost every business industries, including the construction industry have been affected by it.

The said virus outbreak, now a pandemic, is unforeseen and an apparent event beyond reasonable control of the contracting parties. In justifying a Force Majeure event would be dependent on its definition in the contract as it is not a default protection clause to the non-performing party. Since there is no imply default protection for such event, absence of specific provision in the contract will not excuse a party from liability due to events beyond their control. Further, the wordings adopted in the provision can lead to a different claim entitlement and outcome. Hence, specific wordings is a major consideration in drafting and relying on such provision. Essentially, being prevented or impossible for the party to perform its contractual obligations, accordingly.

In the context of COVID-19, Force Majeure claims that are likely to succeed are those where the contract provisions expressly stating as 'epidemic', 'acts of government' and/or criteria compliance e.g. event beyond the party's control. Alternatively, specific provisions such as the PAM clauses on authority's order, may be relied on for claims under such unfortunate event. In addition, compliance to contractual claim procedures, mitigation efforts and document substantiation to prove a direct causal link between the causal event and its effect/s are pertinent for such claims to succeed.

Consultants who are responsible to assess/evaluate such claims must exercise their professionalism and fairness in determining a fair and reasonable outcome for the contracting parties so as to avoid any unnecessary dispute resolution reference.

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DARE TO BE BOLD

QUANTITY SURVEYORS: CHANGE AND ADAPT OR ...

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Across the world, Quantity Surveyor (QS) has been acknowledged as the cost estimator, cost engineer, cost consultant and even commercial manager. In the construction industry, QS are assumed to take after an accountant that will keep track of the account and cost of a project. Despite being labelled with the designation that relates more to cost and money, little does the world discern that QS is also fundamentally and relatively pertinent to the contract matters between parties involved in a construction project. Therefore, public are inclined to relate QS to cost rather than complicates it with the stronger and more tangible qualities as a contract administrator or a contract coordinator.

In Malaysia, moving in the direction of the era of Industry Revolution 4.0 or IR4.0 that has been predicted to change the way people live and work, QS need to change their perspectives on the way they do their work. Even though, it has been noted that from the past two decades, most QS has changed their method in doing measurements. Bills of Quantities (BQ) and Estimating have been prepared with the help of computer's softwares like Buildsoft, Cubit Pro, CostX, Masterbill, QSCAD and DimensionX. These software efficiently made QS's life easier. But bear in mind, this come with dangerous peril to the profession as well. Accordingly, QS need to move forwards and at the same time equip themselves with other important knowledge and skills. Expanding and diversify their scope of services is important to stay relevant to the needs of the construction industries.

Historically, we have learned that individual QS may specialise, but this does not mean that the profession itself cease to exist. Building Information Modelling or BIM may appear as the prime threat that will remove QS as the taker off for BQ preparation. However, with limited knowledge on the Standard Method of Measurement and the software itself, other professions will have a minor chance to take over QS's task. Conversely, if other professions are expanding into the QS role they are evolving to survive too.

Therefore, QS must reminisce that the adaptation of new technologies and technique is basically part and parcel of human and profession development; that is to evolve and survive in this ever-challenging world.

Giving the latest scenario in the construction industry, clients and the stakeholders are keen towards the process of understanding the management of construction contract en bloc, including the process of disputes resolution, risk management and value management/ value engineering. It is essential to be noted that, in the early establishment of the payment act regime in the United Kingdom, Australia, Singapore and New Zealand, the role of QS has evolved and gradually leaning towards disputes resolution process. Whilst QS cannot provide legal advice on contractual disputes, they can always provide general contract advice. As the contract administrator, QS has vast experience to identify contentious contract issues and resolve them without incurring further expense and delay that will cause further damage to the project. Accordingly, this has been a great deal of diversity of opportunity that needs to be grasped and conquered by QS. Hence, giving relevant and worthy guidance on contract will help the parties to meet the expectation set in the contract. In addition, when QS manages the contract, the end-to-end knowledge of the contract will keep the project works smoothly and under control.

Arguably, due to trust issues and the limitation of opportunities given by the client or the Superintending Officer (SO), the role of QS has been depleted over the years. Nevertheless, QSs in Malaysia have fared to stay strong since we are safeguarded by the Quantity Surveyors Act 1967. QSs must change the way they do their task and most importantly marketing their specialised skill to the max; adapting to the evolving and ever-changing landscape of the construction industry. Robust and immediate action plan need to be workout. Looking back to the role of the QS in the construction industry 30 or 40 years ago, we will find a vivid shift in the role. It shows that QS as a profession has immensely evolved in the amount of services that can be offered to the construction industry. Finally, stay calm; do not go on a maleficent mission. QS must respond to the challenges and opportunities. With the collaborative effort between the QS servicing in both the government and private practices, the Board of Quantity Surveyors, the Quantity Surveying Division in RISM and the universities that offered QS courses, the profession will forever stay alive and kicking.

DARE TO BE BOLD

GLOBALISATION: FRIEND, FOE OR FOLLY

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Malaysia construction industry has witnessed the intensity of globalisation in the past decade with the proliferation of international construction players. Malaysia construction industry usually involve the aspect of planning, design, renovation, conversation, demolition and all types of civil engineering works, just to name a few. During eight years from 1989-1996, Malaysia construction industry has recorded an unprecedented double digit growth rates, in which quite impossible to replicate in this era of globalisation as shown in the figure 1.0 below.

Construction output in Malaysia recorded a dismal growth of 0.6 percent year-on-year in the latest figure released by the department of statistic, the weakest growth since the second quarter 2011 after a 0.8 percent growth in the preceding three months. The residential building activity registered an alarming shrinkage of -2.7 percent. This is a contrast to the world's construction industry. Global construction industry is slowly beginning to have a fast rate of growth after a period of decline due to global financial crisis. An expected 3.4 percent annual growth with the value of USD 20 trillion is predicted.

The economics of Malaysia construction industry is considered unique from other industry due to its large scale and its chain effect on the other industry as well. This is considered normal for a developing nation due to its rapid economic development. The industry sits in a central role of meeting basic needs and realizing the nation inspirations. Realizing this, the government of Malaysia has embarked in the construction of infrastructure in achieving a developed status nation. The industry however requires good economic conditions and stable to be able to have the capital and cash flow sufficient to launch all these construction of infrastructure projects.

Introduction

Malaysia construction industry has gone through extensive development in housing, industry, transport and city development that followed the advent modern construction method brought by the globalisation. But, what actions can Malaysia construction industry take to benefit from globalisation? Could intra-industry diffusion of technologies and knowledge enhance the benefit of globalisation to local players?

Malaysia Construction Industry

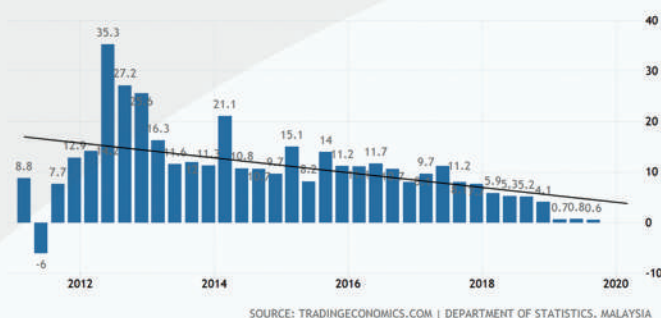


Figure 1.0 : Malaysia current construction industry output in relation to GDP.

Globalisation

Ridderstrale and Nordstorm (2007) mentioned globalisation is an ongoing revolution. Revolution begets rule breaking in making it a success. The success of globalisation requires the player to break the old rules and making new one that suits them. Globalisation can be argued as one of main forces-

that have shaped Malaysia politics, economies and society. Held & Mc Grew (1999) defines globalisation through four main changes, primarily in the eradication of borders as result of economic, social and political behaviour. This subsequently links the growth between trade flows and investment. The globalisation also leads to the intensification of the combination of consumer preference, ideas, goods, information, capital and people. The impacts on the local development have on other economics, perhaps resulting in global consequences. This makes globalisation is remarkably fluid in nature.

In the Beginning

Malaysia has been a WTO member since 1 January 1995 and a member of GATT since 24 October 1957 (WTO, 2020). World Trade Organisation (WTO) classified construction sector under service industry through General Agreement on Trade Service (GATS) framework. GATS has six elements by the consensus of WTO members. This includes sectoral coverage, most favoured nation treatment, national treatment, market access, transparency, and denial of benefit.

Thus, it is difficult to restrict access of international construction companies into Malaysia or even to create a barrier in the form of border tariffs or taxes. The only effective way is by controlling using government regulations (Lewis, 2007). This is very important in order to safeguard the local industry from the predatory transnational company who sees globalisation as an efficient, low cost method in taking advantage of low taxes, weak regulations and vulnerable labour of developing countries like Malaysia.

Globalisation 4.0

Globalisation main trust is to ensure the competitive market. Transnational companies should participate in order for them to exploit their positions of comparative advantage by using their natural assets to produce what they are best at making. The natural assets can be categorised as physical, human, technological or financial. By exchange their natural assets with the other countries, in theory, will create a fair and equitable trade. While open markets and increased competition certainly produce winners and losers in the industry, these may be having an even more pronounced effect on inequality at the national level. Case to the point, CIDB has noted that Chinese and Japanese contractors were the top two foreign players in the country in terms of number of contractors involved and value of projects awarded, with 153 and 189 projects bagged respectively between the years 2008 and 2015, where Malaysian contractors has been relegated to become the sub-contractors to this foreign companies (Ramli, 2017). The market share also has shrunk from 94 percent in 2006 to alarming 78 percent in 2014.

The recent advances in data integration heralds the new phases of industrial revolution that focuses heavily on interconnectivity, automation, machine learning and real time data, which can be termed as Industrial Revolution 4.0. These integrated developments are ushering in a new era of construction globalization. Whether it will improve the Malaysia construction industry will depend on whether corporate, local, national, and international governance can adapt in time.

The Reality

Normally, construction projects provide a much needed source of short-term employment to the society, especially to the marginalised and less skilled group. With the foreign construction will usually bring their labour in executing the construction project in Malaysia. Some evidence suggests that the foreign construction companies use indentured-type labour on oversea project to minimise the cost (Lewis, 2007). To make it worst, the large international construction companies have vast physical, technical, financial and human resources that Malaysia construction companies can dream of. In order to penetrate the international market, the international construction companies received significant organisational and financial support from their home government in form of trade promotions, export credit guarantees, tax relief and other financial subsidies – none of which available to the local companies. On the other hand, due to the shrinking local market, several international construction companies or consultants took small job in Malaysia in order to get a foothold in a new market and they even take those jobs at cost or even at loss, for strategic reason.

Most of Malaysia construction companies find it difficult to venture outside of their home region due to its limited size and shortages of resources. Even our largest construction company is considered relatively small by international standard. Therefore, there is little to gain for Malaysian construction companies from the open market due to the globalisation of construction industry.

However, Malaysia construction industry is lagging in incorporating these innovative technologies into its business strategy despite the obvious advantages in their future engagements. Construction IR4.0 will rely heavily on mechanized automation interconnected through technological advancements to operate and share information without the need of humans which will improve the efficiency.

Numerous challenges exist from multiple aspects which prevent the engagement of IR 4.0 within the construction industry. The challenge due mainly to the entire construction value chain involves multiple fragmented counterparts from all levels with a diverse background to cater the specific needs and uniqueness of each project. This phenomenon has increased the difficulty of execution and further limits the ability for small and medium-sized enterprises (SMEs) to invest in new technologies

The fast pace of technological change means our construction industry will be completely transformed. Managing that change will require not just new frameworks for national and multinational cooperation, but also a new model of business strategy in dealing with the shrinking local market.

The Way Forward

The construction industry would have to rely on government in aiding them towards these implementations of IR4.0 through funding programs and also collaborative partnership. The employment of innovative technology of IR4.0 is detrimental to the construction companies' cash flow and it is further worsened by the uncertainty of a return of investment. Other unseen costs such as training and equipment maintenance would also add up to the list making it harder to implement. However, the spill over effect of equipping Malaysia local construction companies with IR4.0 capabilities will enhance their competitiveness on a global scale with the most cutting-edge technologies to deliver upmost product quality and results. The enhanced system would ensure little to no errors, increasing quality assurance. Reliable decisions could be made to achieve more effective results through sufficient information. These approaches will create a tremendous multiplier effect and also the spin-off of upstream and downstream inter-industry expenditures, not to mention the enhancement of technical and managerial skills to Malaysia construction related companies.

Our construction players should not confine to activities on site per se but should have the ability of design to material to construction to finance. More specifically, the ability of innovating according to ever changing customer expectation such as higher quality, lower costs and improved environmental sensitivity. The ability to create a new market by looking for new business ideas and customers by providing among others, environmental sustainability, one-stop shopping, intelligent buildings, PPPs and innovative linkages to other industries. This correspond to Hawk (2006) vision of ushering a new globalised construction player which will be more matured in moving away from traditional, small scale and low technology service industry to interconnected small autonomous groups to efficiently function within large companies to link the operational advantages of smallness to the symbiotic advantages of integration.

Globalisation 4.0 has only just begun, but our construction industry vastly underprepared for it. Clinging to an outdated mindset and tinkering with our existing processes and institutions will not do. Rather, we need to redesign them from the ground up, so that we can capitalize on the new opportunities that await us, while avoiding the kind of disruptions that we are witnessing today.

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GLOBALISATION: FRIEND, FOE OR FOLLY

NASCENT*For those aspiring to become a QS...*

QS Path In Malaysia



Why do you want to become a QS?

Quantity Surveying (QS) is an exciting career path. QS position not only focuses on site measurement and price estimation of a project but also incorporates strategic methods to make the project more viable financially for the client. Project diversity is another reason why QS is an exciting career path. No two projects are identical, which means that the QS will face many new challenges when measuring sites and calculating project cost for clients. This means that there is no standard formula for every project. No straight forward questions such as $1 + 1 = 2$. You will experience different perspective if you are working for a developer, contractor or consultant. With a developer, you are the pay master, which enables you to regulate the construction players. While with the contractor, you ought to be cautious with every measurement performed in order to avoid any financial dispute and at the same time be aware that the consultant's QS will try to optimize the overall financial cost. For the position of consultant QS, you will need to prudently check whatever claims submitted by the contractor's QS. QS job is certainly interesting from different perspective. In summary, a professional QS will place utmost importance on measurement accuracy and unyielding professional ethics in all the tasks assigned to a QS.

Is it a glamorous job?

Similar to any other jobs, QS can be a very interesting job. Apart from meeting many fascinating people from all walks of life, QS job has an additional benefit in terms of job title. For example, upon completing all the pre-requisites required by the Board of Quantity Surveyors Malaysia (BQSM) and the Royal Institution of Surveyors Malaysia (RISM), a QS will be honoured with a designation/prefix of "Sr" in front of his/her name. The title of 'Sr' is widely admired and held in a high esteem similar to other professional titles such as Ar, Ir, TPr and etc.

Bear in mind, if you want to excel as a QS, make sure you know two main professional QS bodies which are BQSM and RISM.

Is it a high paying job?

When there is a will there is a way. Every job can be rewarding. An individual career's path depends on his/her own willingness to learn and excel in the job. But, we can assure you, a QS job can be both fulfilling in terms of monetary as well as personal satisfaction if you really work hard on it with sincerity.

For more information on QS, please log on to the BQSM's website at <https://www.bqsm.gov.my>. Subsequently, you can explore more on how to register as a QS.

To be a successful QS, attention to detail will go a long way in determining your success. For example, will you be willing to spend much time to find the difference in 0.01 m, m² or m³ ? If you like such meticulous job, bravo, you are in the right field.

You do not have to be a world class mathematician to excel as a QS. Nevertheless, a solid foundation of basic mathematic skills is very important. As a QS, we have our own ways to solve mathematical problems with QS's method. Join us if you want to know more. Welcome to QS!!!

Criteria to become a QS?

QS Path In Malaysia

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