

THE EXCLUSION CLAUSE IN GOVERNMENT STANDARD FORM OF
CONSTRUCTION CONTRACTS

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*To my beloved parents, wife, daughters, and friends
for their endless love, care and support.....*

Thank you so much. I love you.

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ABSTRACT

One of the functions of contract is to set out the rights, duties and liabilities of the parties to the contract. When a party fails to perform his duty, he is liable to pay damages to the innocent party. However, it is quite a normal practice for a party to expressly exclude liability in such eventuality. Such a term is generally known as exclusion clause. It essentially means that if he fails to perform the duty that he is expressly or impliedly bound to carry out under the contract, he is not liable to the other party. Exclusion in performing obligations in the event of breach of contract is an issue that often creates a dispute between the contracting parties. It is even more crucial when the contract is wholly drafted only by one party. Exclusion clauses are also found in standard forms of construction contracts. But they are worded in such a way that it is very difficult to determine with certainty that they are in fact exclusion clauses. They normally exclude the liability of the employers and thus create inequality and unfairness between the contracting parties. Therefore, the objective of this study is to identify the exclusion clauses and their effectiveness in excluding the employers' liabilities. The scope of this study is limited to the Public Works Department standard forms of contracts. The study was carried out by analyzing the standard contract forms. The effectiveness was evaluated by examining the relevant court cases and opinions of experts. The analysis of the standard forms revealed sixteen exclusion clauses. In term of their effectiveness, by and large, the research found that, not all the exclusion clauses were effective to exclude the government's liability to the contractor in the event of such failure of performance.

ABSTRAK

Salah satu fungsi didalam kontrak adalah untuk menentukan hak dan tanggungjawab pihak yang terlibat didalam kontrak. Apabila satu pihak gagal melaksanakan kewajipannya, dia bertanggungjawab untuk membayar ganti rugi kepada pihak yang menanggung kerugian. Walau bagaimanapun, adalah satu amalan yang biasa apabila satu pihak bertegas untuk menafikan tanggungjawabnya apabila berlaku sesuatu perkara. Terma ini dikenali sebagai klausa penafian. Ia bermaksud apabila satu pihak gagal melaksanakan kewajipannya di dalam kontrak, secara langsung atau tersirat ia tidak akan bertanggungjawab terhadap kerugian pihak yang satu lagi. Pengecualian didalam melaksanakan kewajipan apabila berlaku satu kemungkiran kontrak, biasanya akan mengakibatkan berlaku pertelingkahan diantara pihak-pihak yang berkontrak. Ia akan menjadi lebih kritikal apabila kontrak tersebut didaftarkan oleh satu pihak sahaja. Klausa penafian ini juga boleh di dapati didalam borang piawai kontrak pembinaan. Walau bagaimanapun, ia ditulis melalui satu kaedah yang amat sukar untuk dikenalpasti yang mana ia adalah merupakan satu klausa penafian. Biasanya ia mengecualikan tanggungjawab majikan dan secara tidak langsung ia menimbulkan satu keadaan yang tidak samarata dan tidak adil diantara pihak-pihak yang berkontrak. Oleh yang demikian, objektif kajian ini adalah untuk mengenalpasti klausa-klausa penafian dan keberkesanan penggunaannya untuk pengecualian tanggungjawab majikan. Skop kajian hanya terhad kepada borang kontrak piawai yang dikeluarkan oleh Jabatan Kerja Raya Malaysia. Kajian dilaksanakan dengan menganalisa borang kontrak piawai tersebut bagi mengkaji keberkesanannya melalui kes-kes mahkamah yang berkaitan dan pandangan dari pakar-pakar didalam bidang ini. Sebanyak enam belas klausa penafian telah dikenalpasti daripada borang kontrak piawai ini. Dari segi keberkesanannya, secara keseluruhannya, didapati tidak semua klausa penafian ini berkesan untuk mengecualikan tanggungjawab kerajaan terhadap kontraktor apabila berlaku kegagalan didalam pelaksanaan kontrak.