



The Effect of Irrelevance of Pisang Island Lighthouse to the 1900 Agreement Between Sultan of Johor and Straits Settlement Government

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ABSTRACT

The agreement on the establishment of lighthouse on Pisang Island by British was initiated subsequent to the agreement between Sultan of Johor and Strait Settlement Government in February 1885. The agreement gives right and possession to the Strait Settlement Government to operate the lighthouse perpetuity. The agreement inherited by Singapore. Malaysia has full sovereignty over Pisang Island and was acknowledged by the Parliament of Singapore in 2003. GNSS carriage onboard commercial vessels has turned the lighthouse as irrelevant for the current navigational needs. Furthermore, radar tower is required to support the VTIS operation in the Strait of Malacca. The objective of research is to identify whether the irrelevancy of existing lighthouse will affect the contract between Malaysia and Singapore by looking into the principle of contract law. In addition, the research aims to identify the available solutions for Malaysia to gain possession on the lighthouse's site without jeopardizing the right of Singapore. In achieving the objective and solution of research, the paper discusses and examines the situation by referring to the main sources of law such as statutes, cases, and principles under the law of contract and other related laws. It is doctrinal research that descriptive in nature.

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1. Background.

The agreement on construction and establishment of lighthouse on Pisang Island by British was initiated subsequent to the agreement between Sultan of Johor and Strait Settlement government in February 1885 which come into operation on June 30, 1886. This agreement has been formalized by an agreement entered and signed by Sultan Sir Ibrahim on behalf of the Johor state government and Sir James Alexander Swettenham on behalf of the British on 6th October 1900. The agree-

ment is continued after Singapore's Independence until today. (Yong, 2008)

Malaysia has full sovereignty over Pisang Island since it is located within the territorial water of Malaysia. It was acknowledged in 2003 by the minister for foreign affairs of Singapore, Professor S. Jayakumar when he told the Parliament of Singapore that the sovereignty over Pisang Island was with Malaysia. Singapore had never disputed Malaysia's sovereignty over Pisang Island (Mohd Hazmi Mohd Rusli and Rahmat Mohamad, 2013; Yong, 2008). In addition, the maintenance worker of Singapore or any Singaporean are prohibited to enter into the island without obtaining permission Custom, Immigration and Quarantine Complex in Pontian (I. Malaysia, 2013).

Therefore, since Malaysia possess full sovereignty over the island, the relationship between Malaysia and Singapore regarding the island is solely base on the agreement or contract agreed by the State of Johor and British. In the agreement, the state of Johor granted to the Straits Settlement a plot of land in perpetuity provided that the Straits government continue to operate and maintain the lighthouse (Yong, 2008). In addition,

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taking into consideration the parties to the agreement (British and Government of Johor), the governing law or the choice of law which is a provision in a contract that allows the parties to agree that a particular state's laws will be used to interpret the agreement (Richard Stim, n.d.) should be English Common Law. Moreover, English Common Law still available until today and become the foundation for law and legislation in Malaysia and Singapore (Law, Commission, The, & Of, 2015; C. of L. R. Malaysia, 2006). Thus, we can say that, the law govern for the Pisang Island's agreement is the common law under the principle law of contract, and it excludes the possibilities of Singapore to gain sovereignty over the island by referring to the doctrine of effective control on disputed island on overlapping area as held in the case of Pulau Batu Puteh or known as Pedra Branca (Court, 2015).

2. Problem Statement and Objective.

The proposal of construction of radar tower will replace the existing function of lighthouse and its light on Pisang Island and render its existence irrelevance (Ahmad Faizal, Mohd Sharifuddin, Mohd Naim, & Noor Apandi, 2017) Regarding to the fact that, the lighthouse function as complimentary to the ship's electronic navigation becomes greater in a situation of malfunction of the system (Yong, 2008), this function has been substituted by the huge and illumined radar tower that visible to ship operator. The tower which will be marked by AIS would be illuminated in order it to be detected from a certain range for visual reference at night or low visibility. The tower can be a visual reference for both day and night due to its conspicuous structure and marked by light at night time. The main role of the new tower is to support the traffic management, safety and security of navigation in Straits of Malacca will render the existing lighthouse become no relevance anymore. (Ahmad Faizal et al., 2017)

The objective of research is to identify whether the irrelevancy of existing lighthouse and its light will affect the contract between Malaysia and Singapore by looking into the principle of contract law.

3. Is the Irrelevancy of Pisang Island Lighthouse Will Amount to Discharge by Frustration, Performance Becomes and Breach?.

The main question whether the irrelevancy of lighthouse on Pisang Island will discharge the contract by frustration? According to the law, the contract is considered as frustrated when there is a change in the circumstances which render a contract legally or physically impossible of performance. In the other words, a contract may be discharged if after the formation of a contract, the supervene event occur making it performance become impossible or illegal (G.H Treitel, 1995; Prof. Roger Brownsword, 2009).

For example, in the case of *Jackson v Union Marine Insurance Co Ltd (1874-75) L.R 10 C.P 125* the contract to ship goods to destination in the prescribed time become impossible

to be performed when the ship ran aground and took many days to recover. The event occurs had caused the contract impossible to be performed. (Law report, 1874; Prof. Roger Brownsword, 2009) The doctrine of frustration also applies in a situation where the occurrence of event that destroys the fundamental foundation of contract that makes the performance of the contract radically different from what that has been agreed in the contract. (David Oughton and Martis Davis, 1996)

In addition, In the case of *Paal Wilsons & Co [1983] 1 A.C 854*, the lord Brandon opines that the first essential factor is that there must be some outside event or extraneous change of situation, not foreseen that make the contract become impossible to perform. The second factor to be a valid application of doctrine of frustration is the supervening event must not occur by the act of either party to the contract. (Geoffrey Samuel, 2017). It differentiate with the doctrine of mistake when it caused or induced by either party to the contract (Geoffrey Samuel, 2017).

In relation to the case of the lighthouse on Pisang Island, the supervene event is a fact that the existing of the lighthouse is become no relevance anymore due to invention and application of modern navigation system i.e radar system. (Ahmad Faizal et al., 2017). However, 1900's agreement still possible to be carried out by Singapore since the lighthouse still could be maintained and operated. In the other word, despite the fact that the establishment of radar system is derived from the needs of modern and efficient navigation system and it is not induce by Malaysia as party to contract, the agreement is still possible to be carried out. The lighthouse is still there and is operated and maintained by Singapore. therefore, the agreement between Malaysia and Singapore on the matter of lighthouse on Pisang Island still continue as the day it was agreed as long as Singapore continues to maintain and operate the lighthouse (Yong, 2008).

In addition, the irrelevancy of the lighthouse will not deteriorate the formation of contract as a matter of consideration since it is considered as valid and legal back the year 1900 when the contract was agreed and signed. In addition, if there is any possible room to argue on the matter of consideration, it is clear that the consideration does not need to be adequate to be valid. As long as both parties agree and in the absence of anything that renders the contract void such as fraud, it considers as a complete and valid agreement. (David Oughton and Martis Davis, 1996; G.H Treitel, 1995; Geoffrey Samuel, 2017; Prof. Roger Brownsword, 2009).

Therefore, by referring to the above discussion, it leads to another question whether Malaysia and Singapore need to continue with the 1900's agreement despite irrelevancy of the subject matter? In addition, Malaysia after gaining independence in 1957 has an ability to manage the lighthouse and navigation system in its territory by itself. It could be shown by the list of lighthouses under the operation of Malaysia such as Pulau Undan lighthouse located in Malacca and Tanjung Piai lighthouse, located at Tanjung Piai Johor (Wikipedia, n.d.). Should the agreement of Pisang Island be reviewed to rectify Malaysia's sovereignty and the control over the lighthouse be handed over to Marine Department of Malaysia? (Mohd Hazmi Mohd Rusli and Rahmat Mohamad, 2013) or should both

4. Solution Available Under the Law of Contract.

The solution pertaining to lighthouse on Pisang Island relatively depends on the will and reaction of parties toward the irrelevancy of lighthouse on Pisang Island. For the Government of Malaysia, it can expressly declare its intention not to follow the whole agreement and render the agreement repudiated. On the other hand, the Government of Singapore is entitled for the remedy and damages which is provided under the law. (David Oughton and Martis Davis, 1996; G.H Treitel, 1995; Geoffrey Samuel, 2017; John N. Adam and Roger Brownsword, 2007; Mindy Chen-Wishart, 2010; Prof. Roger Brownsword, 2009)

However, according to the case of *Freeth v Burr (1874)LR9 C.P 208* it is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract (208, 1874; Krishnan Arjunan, 2008). Therefore, the act of Government of Malaysia by developing the other area on Pisang Island to rectify sovereignty over the island will not affect the 1900s agreement but rather to show control and sovereignty which never ever been disputed by Government of Singapore (Mohd Hazmi Mohd Rusli and Rahmat Mohamad, 2013). In order to end the agreement, it must be expressly declare to show the absolute intention not carry on the contract. (David Oughton and Martis Davis, 1996; G.H Treitel, 1995; Geoffrey Samuel, 2017; Prof. Roger Brownsword, 2009). The clear way to disclose the intention could be by sending a notice or a letter to show the intention with reasonable reason and preparing for the damages accordingly.

In the case of *Universal Cargo Carrier v Citati [1957] 2QB401* at page 401 and *Heyman Darwins Ltd [1942] AC 356* at p 397, repudiation of contract could occur in situation when the party repudiate before the contract is due for performance and during the performance of contract. The repudiation could also occur by an impossibility created by one party before it is due for performance and repudiation by impossibility created by one party during performance of the contract (Krishnan Arjunan, 2008). It is shown that the agreement is possible to be ended provided that, the law post-breach or post-repudiation of contract be observed and comply in other to provide justice to the parties of contract.

The Government of Singapore entitles for remedies available under the law of contract in a situation where the Government of Malaysia decides to end the contract. The remedies available are damages and specific performance which include injunction. (David Oughton and Martis Davis, 1996; Furmston, 2012; G.H Treitel, 1995; Geoffrey Samuel, 2017; Krishnan Arjunan, 2008; Prof. Roger Brownsword, 2009). However, it is common to the fact that in situation of breach and repudiation of contract, English law does not usually enforce the contract in the sense of compelling the parties to carry out their primary obligation but to pay the adequate compensation to the injured party. In addition, even though, in equity there exist the remedies of specific performance and injunction, there are only exceptional granted by the Court. In practice, the injured party's remedy is commonly an action for damages to compensate him

for the breach of contract. (Furmston, 2012). In a case of equity and trust, the order of specific performance will arise only in situation where the common law remedy of damages is inadequate (Furmston, 2012).

4.1. Factors that relate to the repudiation of Agreement of Pisang Island.

There are several facts that need to put into consideration regarding the agreement of lighthouse on Pisang Island between Malaysia and Singapore. These factors will form the justification of repudiation of the agreement and adequate remedies for the affected party. Firstly, the fact that the establishment of a radar tower will take over the primary and complimentary function of light and lighthouse on Pisang Island. The existence of lighthouse on the island will become irrelevance and it defeats the purpose of the 1900's agreement to serve the make light-house as the main reference of navigation. (Ahmad Faizal et al., 2017).

Secondly, the fact that Malaysia has its own capacity to manage its own navigation system on its own land. The existence of the others lighthouse and radar tower all over Malaysia is the proof to Malaysia capability to manage navigation system (Wikipedia, n.d.). The competency of Malaysia to manage and operate the navigation system on the island will not prejudice and jeopardy the navigational system on Straits of Malacca especially the traffic system pertaining the movement of ships to enter and exit to the Port belongs to Singapore.

Thirdly, the repudiation of 1900's agreement is considered as rectification on the sovereignty of Malaysia over the Pisang Island. The island should be managed by the Government of Malaysia inclusive the lighthouse (Mohd Hazmi Mohd Rusli and Rahmat Mohamad, 2013).

Fourthly, repudiation of the contract will affect and change the owner of the lighthouse and not the navigation system on the island. The establishment of a radar system on the peak of island will improve the navigation system. Therefore, it will not jeopardize the interest of Singapore to use the lighthouse on the Pisang Island as the reference with Raffles Lighthouse at Pulau Satumu to assist the ship to enter its port. (Ong wee Jin, 2015) This fact also will influence the amount of damages. In addition, Singapore does not need to maintain the lighthouse and the system on the island but fully enjoy the navigation system.

Therefore, the termination of the contract is considered as a win-win situation for both parties and will restore full sovereignty to the state and uphold respect and honor.

Conclusions and Recommendation.

The termination of the 1900 agreement between the government of Johor and representative of British is symbolic of restoring sovereignty to Malaysia and a pride action by the Government of Singapore. Unlike a situation on Pulau Batu Puteh which located at the overlapping area, Pisang Island is without a doubt under the sovereignty of Malaysia and should be treated

as it is. The management and administration on the island regarding navigation system should be handled by Malaysia (Marine Department). On top of all, it more on the matter of respect other than matter of law.

References

- 208, L. 9 C. Freeth v Burr (1874).
- Ahmad Faizal, A. F., Mohd Sharifuddin, A., Mohd Naim, F., & Noor Apandi, O. (2017). The Utilisation of Pisang Island as a Platform to Support the Current Safety and Security Needs of Marine Navigation in the Straits of Malacca. *International Journal of E-Navigation and Maritime Economy*, 7, 11–18. <https://doi.org/10.1016/j.enavi.2017.06.002>
- Court, I. (2015). *International Court of Justice* (Vol. 31). <https://doi.org/10.1093/yiel/yvs126>
- David Oughton and Martis Davis. (1996). *Sourcebook on Contract Law* (1st editio). Great Britain: Cavendish Publishing Limited.
- Furmston, M. P. (2012). *Cheshire, Fifoot and Furmston's Law of Contract* (16th editi). Oxford University Press.
- G.H Treitel. (1995). *The Law of Contract* (9th editio). London: Sweet & Maxwell.
- Geoffrey Samuel. (2017). *Contract Law: Cases and Material* (1st editio). London: Sweet & Maxwell.
- John N. Adam and Roger Brownsword. (2007). *Understanding Contract Law* (5th editio). London: Sweet & Maxwell.
- Krishnan Arjunan, A. M. bin N. B. (2008). *Contract Law in Malaysia*. Lexis Nexis.
- Law, T. H. E., Commission, R., The, U., & Of, A. (2015). *THE STATUTES OF THE REPUBLIC OF SINGAPORE Civil Aviation Authority of Singapore Act, 2014*(May 2014).
- Law report. *Jackson v Union Marine Insurance Co Ltd* (1874).Malaysia, C. of L. R. (2006). Act 67 CIVIL LAW ACT 1956 UNDER THE AUTHORITY OF THE REVISION OF LAWS ACT 1968. ReVision, (January), 1–38.
- Malaysia, I. (2013). Pisang Island to be gazetted as part of Johor. Retrieved from <http://iskandarmalaysia.com.my/news-20100712-6/>
- Mindy Chen-Wishart. (2010). *Contract Law* (3rd editio). Oxford University Press.
- Mohd Hazmi Mohd Rusli and Rahmat Mohamad. (2013, August 4). S'pore lighthouse on our island. *The Sun Daily*. Retrieved from <http://www.thesundaily.my/node/217352>
- Ong wee Jin. (2015, December 3). Keepers of the lighthouse. *The Straits Times*. Retrieved from <http://www.straitstimes.com/singapore/keepers-of-the-lighthouse>
- Prof. Roger Brownsword. (2009). *Smith and Thomas a Case Book on Contract*. SWEET & MAXWELL.
- Richard Stim, A. (n.d.). *Choice of Law Provisions in Contracts* | Nolo.com. Retrieved from <http://www.nolo.com/legal-encyclopedia/choice-of-law-provisions-contracts-33357.html>
- Wikipedia. (n.d.). *List of Lighthouses in Malaysia*. Retrieved August 19, 2017, from https://en.wikipedia.org/wiki/List_of_lighthouses_in_Malaysia
- Yong, J. A. (2008). A taste of life at Pisang Island Lighthouse. *The Straits Times*, (October 2008). Retrieved from file:///C:/Users/T410/Desktop/Pisang Island paper/bar council.pdf