

UNIVERSITY OF HONG KONG  
FACULTY OF LAW

JDOC1002 LAW OF CONTRACT II  
2024-2025 SEMESTER 2

SEMINAR QUESTIONS: FRUSTRATION

**Question 1**

Balmoral Towers is a castle built into the cliff of an outlying island. Due to the uneven and rocky terrain, Balmoral Towers is accessible to the outside world only by sea. Visitors must disembark at a quay before crossing an old limestone bridge that takes them to the gates of the castle. A landmark of great cultural value, Balmoral Towers was sorely in need of restoration.

On 2 January 2024, Cooper Construction was engaged by the Trident Foundation to refurbish Balmoral Towers. The contract sum was \$8,000,000 and the time for completion, six months. Cooper was paid a deposit of \$2,000,000 on 2 January 2024, the remainder to be disbursed in stages as the works progressed. The agreement provided for liquidated damages of \$30,000 per week in case of delay.

The agreement also contained an inclement weather clause that automatically extended the deadline by “the number of days of inclement weather”. Inclement weather was defined as the “existence of rain or abnormal climatic conditions, whether they be those of hail, snow, cold, high wind, extreme high temperature or the like or any combination thereof, by virtue of which it is either not reasonable or not safe for persons exposed thereto to continue working whilst the same prevail”.

In addition, the agreement included a force majeure clause that gave Cooper the right to withdraw from the contract at any time before completion in the event of force majeure. A force majeure event was defined as “anything outside the reasonable control of the contractor, including earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity”. To invoke the clause, Cooper had to give written notice of its intent to withdraw within five days of the force majeure event. Both parties would be entitled to whatever benefits they had already received under the agreement; no further sums or performance would be due.

Equipment had to be transported to the site before any work could begin. Unbeknownst to anyone, however, on the night of 4 January 2024, a massive typhoon hit the seas around Balmoral Towers. By the morning of 5 January 2024, the quay was completely destroyed. The damage was only discovered on 6 January 2024 when Cooper tried to ship their materials and tools to Balmoral Towers. Cooper spent \$50,000 on the wasted trip.

Best estimates were that the earliest time for completion of repairs to the quay by authorities would be mid-2025. But the authorities declined to give any definitive timeframe as to when the quay would be operational again.

On 7 January 2024, Cooper wrote to the Foundation to invoke the force majeure clause. The Foundation replied the next day proposing an indefinite postponement of the restoration. Cooper rebuffed the suggestion and kept the deposit.

Advise the Foundation on its legal options.

## **Question 2**

Please read pages 83 to 106 of Richard Posner and Andrew Rosenfield, “Impossibility and Related Doctrines in Contract Law: An Economic Analysis”, stopping before the discussion of contracts for the supply of agricultural products. Then answer the following questions.

- (a) Why do Posner and Rosenfield believe it analytically unhelpful to categorize cases into physical impossibility, extreme impracticability and frustration of purpose?
- (b) According to Posner and Rosenfield, how do courts in the United States decide when a promisor should be excused from performance?
- (c) Do you find Posner and Rosenfield’s account of impossibility and related doctrines convincing? Does it explain the cases they describe and the cases we have read? Should courts formally adopt the principle formulated by Posner and Rosenfield?