

AMBIGUITIES IN STANDARD FORM OF CONTRACT

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DEDICATION

Here I am back again to atone my defeat previously made in 2018. But still, everything I did is for myself, not anyone else. And you made it dear self!

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ABSTRACT

The Standard Form of Contract serves to control contractual obligations and expectations especially during contract administration. It lays up the general conditions or rules that the contracting parties must follow. Additionally, convenient documentation donates a clear agreement for the contracting parties. Thus, the clarity of the documents in interpreting the needs and requirements contained in the agreement will be critical to effective interpretation and comprehension of contractual duties. Looking at this, a contract should be clearly drafted and understandable, therefore can mitigate a dispute by having a sense of party liability. A clear and understandable contract is vital during project execution because there will be a lot of matter arise in regards of each of party obligation. Following of this event, the court will take place in order to crystallise the event. The dispute is commonly caused by the legal understanding and explanation of the clause. This is because the failure of understanding for such clauses will cause confusion for contractual matter. In regards, the contract must be in clear and readable for any party so that it will not be any ambiguous issue later. This shows how crucial it is for the contract to be clear and understood by the parties. Thus, it is important to identify the ambiguity that exist in standard form of contract at once can mitigate a dispute. This study is focus for a case law that occurred in Malaysia particularly in JKR and PAM Contract. This study was carried out by reviewing a case law using online database for example LexisNexis, Research Gate and other online web page. There were four situations or type of ambiguities that exist in standard form of contract. The ambiguities include in the situations when a contract participant does not understand the clause in the contract, when there is ambiguity in word/clause in contract, when arbitrator/ adjudicator erroneously in his decision and when there is a dispute in construction of contract. Hence, a clarity should be considered in future contract design in order to facilitate understanding of standard forms and, as a result, to help avoid disputes. This study can also give a guide for a party to prevent to use any vague phrase that could lead for a dispute arise. Furthermore, it can give a better understanding on what situation can classified as uncertainties.

ABSTRAK

Borang Kontrak Standard berfungsi untuk mengawal kewajipan dan jangkaan kontrak terutamanya semasa pentadbiran kontrak. Ia menetapkan syarat atau peraturan am yang mesti dipatuhi oleh pihak yang berkontrak. Selain itu, dokumentasi yang mudah menyumbangkan perjanjian yang jelas untuk pihak yang berkontrak. Oleh itu, kejelasan dokumen dalam mentafsir keperluan dan keperluan yang terkandung dalam perjanjian akan menjadi kritikal untuk tafsiran dan pemahaman yang berkesan terhadap tugas kontrak. Melihat kepada ini, kontrak harus dirangka dengan jelas dan boleh difahami. Kontrak yang jelas dan boleh difahami adalah penting semasa pelaksanaan projek kerana akan ada banyak perkara yang timbul berhubung setiap kewajipan pihak. Susulan daripada ini, mahkamah akan berlangsung untuk menjernihkan acara tersebut. Pertikaian itu biasanya disebabkan oleh pemahaman undang-undang dan penjelasan klausa. Ini kerana kegagalan pemahaman bagi klausa tersebut akan menimbulkan kekeliruan bagi urusan kontrak. Sehubungan dengan itu, kontrak mestilah jelas dan boleh dibaca oleh mana-mana pihak supaya tidak menjadi isu yang samar-samar nanti. Ini menunjukkan betapa pentingnya kontrak itu jelas dan difahami oleh pihak-pihak. Oleh itu, adalah penting untuk mengenal pasti kekaburan yang wujud dalam bentuk kontrak standard sekaligus boleh mengurangkan pertikaian. Kajian ini memberi tumpuan kepada undang-undang kes yang berlaku di Malaysia khususnya dalam Kontrak JKR dan PAM. Kajian ini dijalankan dengan mengkaji undang-undang kes menggunakan pangkalan data dalam talian contohnya LexisNexis, Research Gate dan laman web dalam talian yang lain. Terdapat empat situasi atau jenis kesamaran yang wujud dalam bentuk kontrak standard. Kekaburan tersebut termasuk dalam situasi apabila peserta kontrak tidak memahami klausa dalam kontrak, apabila terdapat kekaburan dalam perkataan/klausa dalam kontrak, apabila penimbang tara/adjudikator tersilap dalam keputusannya dan apabila terdapat pertikaian dalam pembinaan kontrak. Oleh itu, kejelasan harus dipertimbangkan dalam reka bentuk kontrak masa hadapan untuk memudahkan pemahaman tentang borang standard dan, sebagai hasilnya, untuk membantu mengelakkan pertikaian. Kajian ini juga boleh memberi panduan kepada sesuatu pihak untuk mencegah daripada menggunakan mana-mana frasa yang tidak jelas yang boleh membawa kepada timbulnya pertikaian.

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LIST OF ABBREVIATIONS

PAM	-	Persatuan Arkitek Malaysia
JKR	-	Jabatan Kerja Raya
CIDB	-	Construction Industry Development Board
CoC	-	Condition of Contract

CHAPTER 1

INTRODUCTION

1.1 Introduction

In construction industry, physical development is a process that involves a wide range of steps to projecting a nation. The steps include a process of pre-construction stage, construction stage, and post-construction stage. There were many parties were involved throughout this process in exchange for a propriety development. Speaking of which, each of the contracting parties was bound with a written agreement acknowledged by them that defines their relationships and obligations for a particular project (Chong, H.Y., Balamuralithara, B., & Chong, 2011). Thus, a standard form of contract serves to control contractual obligations and expectations especially during contract administration process.

Standard form of contract or the Condition of Contract (CoC) is a portion of project document that cross the construction party for the construction project. It lays up the general conditions or rules that the contracting parties, namely the client and the main contractor must follow, as well as the roles of individuals who will be governed by the rules. Additionally, CoC issued by a recognized organization to develop the contract administrative procedure to ensure the seamless execution of the project as well as to establish a legal framework for distinguishing the contracting parties' rights, obligations, and responsibilities.

On the contrary, a convenient documentation donates a clear agreement for the contracting parties. According to Mohamad Ibrahim Mohamad, Zulkifli Madon, Rosli Zin, Shaiful Amri Mansur (2008) , the clarity of the documents in interpreting the needs and requirements contained in the agreement will be critical to effective interpretation and comprehension of contractual duties. This is because different

interpretations of the contracts may result in unwanted contractual problems such as conflicts, unnecessary claims, reworks, sloppy work, and even litigation due to a lack of knowledge of the documents. Furthermore, the contracting parties especially, the contractors were unfamiliar with the jargon or legalese phrases used in contract negotiations. Hence, it will potentially lead to the contractor's confusion and hamper the construction process mainly, on the claim and payment issue. Thus, misinterpretation between contracting parties were occurred. Commonly, there are public and private sector in Malaysia that issue the CoC. The former oversaw issuing PWD contracts, while the latter oversaw issuing PAM contracts. However, for international projects, FIDIC and JCT are the common standard form of contract that usually used.

The issue relating to interpretation and understanding of construction contract have been bring out over the years. Conflicts or disagreements between the contracting parties on their contractual rights and job scope descriptions eventually lead to this contractual dispute. The term ambiguous is means to hold more than one likely meaning, sometimes, purposely (Cambridge Dictionary, 2022) For example, “to have a good grammar in writing is important, else it will give an ambiguous meaning”. In contrast, ambiguous contract would consider ambiguous if it owned more than one interpretation. Thus, it will sound unclear for the intended party. After all, an ambiguous contract is defined as a vague or unclear in term, phrase, word or definition (Legal Match, no date). Clearly, the word ambiguous itself brings an uncertain meaning. It became crucial when it deals with legal interpretation which resulting for law intervention as well as court execution.

In making an agreement, a contract is a vital document that consist most of important item including terms and condition. A contract must fulfil an element before it can legally enforce for court proceeding. Among its elements are, an offer, acceptance, and consideration (Singh KS, 2011). Apart from that, a contract must be legally binding between the party involved by means it is a mutual agree. In construction industry, a standard practice is to use a standard form of contract in which it specifically described a terms and agreement between contracting parties (Abdullah, 2019). Apart from that, a contract document is a pertinent document, especially when a dispute arises. This is because, a contract document will be used as a reference in

case of any dispute in future. Thus, everything that contain inside the contract must be clear and understandable. However, what if the contract become ambiguous? What if the terms in contract itself not stated as it should interpret?

1.2 Problem Statement

Generally, in Malaysia, in order to mitigate a dispute, the application of standard form of contract is applied especially for traditional method (Zakaria *et al.*, 2013). There is numerous Standard Form of Contract that is commonly used in Malaysia. For example, Pertubuhan Arkitek Malaysia (PAM), Public Work Department (PWD) and International Federation of Consulting Engineers (FIDIC). These are the most common standard form that are use depending on the nature of the project. Standard form of contract also known as condition of contract is a portion of contract document which served as guidance for construction stakeholder during project execution (Haron *et al.*, 2020). It is also containing a contractual obligation for each of the party in a contract that interpreted by terms and contents stated in the document.

Additionally, there were many terms and conditions for such contract, especially in construction contract, whereby such term may interpret differently for different people. This will be resulting a dispute particularly in contractual obligations and expectation between contract participant (Chong and Zin, 2010). These obligations will be in questionable state if the understanding of terms and interpretation of contract documents is not fully appreciated (Mohamad Ibrahim *et al.*, 2008). Looking at this, a contract should be clearly drafted and understandable, therefore can mitigate a dispute by having a sense of party liability. A clear and understandable contract is vital during project execution because there will be a lot of matter arise in regards of each of party obligation.

Clearly, there will be an issue concerning of contract clarify especially when there is a presence of ambiguity. This is because the contract was not drafted as what is intended at once will deviate from the real purpose. Looking at this, the most

pertinent issue was then discovered concerning of contract clarity. Firstly, in a matter of contractual language. According to Mohamad Ibrahim Mohamad et al., (2008) a contractual language and its judicial interpretation may lead to the misinterpretation and misunderstanding of the truth in contract obligations. Equally important, the understanding of contract document is vital otherwise the risk can occur (Thomas, Smith, Mellot, 1994). Thus, a better understanding of contract document particularly in terms and words of contract clause will hinder for dispute arise.

Secondly, the difficulty of contract documents also donating a contract to become disputes. In the presence of difficulties means the existence of contract ambiguity. According to Mohamad Ibrahim and Zulkifli, (2006), the contract document is clarity when there is no difficulty. In contrary, the contract documents are considered unclear when the difficulty exist. Clearly, this will affect the contract participant especially the contractor during project execution. In line with (Zakaria *et al.*, (2013) most of the contractor in Malaysia was not really familiar with the clauses provided under their contract. Therefore, they may mistakenly interpret for any such term as ambiguous because of their lack knowledge for the contract itself. Looking at this situation, a contract player still has an issue in understanding the contract document even though it is clear, hence what if the contract is in an ambiguous state? Clearly, this will be resulting a contract dispute.

Following of this event, the court will take place in order to crystallise the event. According to (Martin, 1993) the dispute is commonly caused by the legal understanding and explanation of the clauses (Cheung, 1999). This is because the failure of understanding for such clauses will cause confusion for contractual matter. In regards, the contract must be in clear and readable for any party so that it wont be any ambiguous issue later. This shows how crucial it is for the contract to be clear and understood by the partis. However, it is not a new thing for a contract became ambiguous, yet there were a several ways how the term been interpreted by courts in which they developed a rules in order to interpret for such condition (Stimmel, Stimmel & Roeser, 2021).

After all, the dispute is especially on a matter of contractual obligation. In sum, a contract must be clear and unambiguous stated in order to mitigate a dispute at once to become crystallize in adversarial. Thus, it is important to identify the type of ambiguity that exist in standard form of contract at once can mitigate a dispute. This can be done through drafting a construction contract while consider any possible ambiguity. Hence, a question arises what types of ambiguities exists in contract document especially in standard form of contract?

1.3 Research Question

The research question that intended to answer in this study is what are the types of ambiguities in standard form of contract?

1.4 Research Objectives

The objective of the research is:

- (a) To identify the Types of Ambiguities in Standard Form of Contract

1.5 Importance of the Research

This study is to identify the types of ambiguities that exist in standard form of contract. There are many ambiguous terms that are probably stated in contract. Thus, how does the court decide to interpret something uncertain, what is the type of ambiguity and what situation can be classified as ambiguity? In contrast, this study can give a guide for a party to prevent to use any vague phrase that could lead for a dispute arise. Furthermore, it can give a better understanding on what situation can classified as uncertain. Hence, a party can be more careful when enter a contract at once can mitigate the dispute.

1.6 Scope of Research

This study is focus for a case law that occurred in Malaysia particularly in PWD and PAM Contract. The PWD Contract and the PAM Contract are the most common and widely utilized in Malaysia, in which, the former being used by government agencies and the latter by private entities. By having this standard form of contract in this study, an actual overview can be obtain concerning a conflict that often occurs among contracting parties especially, the contractor. Overall, this research can give an explanation on a situation that classified as ambiguous at once provide guidance in the future for similar situation.

1.7 Research Methodology

This research will be conduct through a case law study. Case study is fall on qualitative methods. Qualitative method is focusing on individual/ group interview, participatory research, ethnographic study, and documents analysis. In this research, a document analysis will be taking place. The previous case law will be analyst in order to achieve the objective. Since the research period is short, this method is chosen.

1.8 Organization of Thesis

The research is contained 5 chapters in total. Chapter 1 is the introductory chapter to the whole study whereby it consists of background of the study, problem statement, research objectives of the study, significance of study, scope of research and research methodology.

In the next chapter, Chapter 2 will include a discussion on the nature of legal rules and construction scenario. This chapter shown an example of case law concerning of dispute in contract in relation to ambiguity.

Chapter 3 provides the methodology used to perform the research. The methodology employed is library-based, and it includes a case law analysis. This chapter also discussed the research design, research methodology, data collection, data analysis as well as research framework.

Chapter 4 explained the analysis that has been done after the data gathered. To achieve the objective of this research, the legal analysis of case law is conducted as a part of research methodology process which is to identify the types of ambiguities exists in standard form of contract.

Chapter 5 describes the overall conclusion of the study that has been conducted and is the last chapter in the study. This chapter also describes the problems encountered throughout this study and there are further suggestions for this study as a guide in the future.

1.9 Conclusion

All in all, this chapter introduce the overview of the research by discussing a background of the study, problem statement, research question, objectives of the study, significance of study and chapter organization. Through this, the essence of the research can be determined throughout this study. In the next chapter, chapter 2 a literature study will emphasize on legal rules and construction scenario.

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