

DISPUTE RESOLUTION IN RELATION TO DELAY OF CONSTRUCTION  
PROJECT

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*To my beloved Wife, Chia Mei Lai,  
Family and Colleagues.*

Love is patient, love is kind.  
It does not envy, it does not boast.  
It is not proud, it is not rude.  
It is not self-seeking.  
It is not easily angered.  
It keeps no record of wrongs.

Love does not delight in evil, but rejoices with the truth.  
Love always protects, always trust, always hopes, always preserves.  
Love bears all things, believes all things, hope all things, endures all things.

Love Never End.

Love Never Fails.

*Thank you for your support, encouragement and everything.*

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## ABSTRACT

Time has been a major constraint in the project undertaking in Malaysia. Hence, proper works scheduling need to be planned. However, there are always unexpected circumstances out of parties' control for the project processes slipping over its planned schedule and end-up with disputes on delay issues. Usually, people always look for more economical and time saving method for dispute settlement. But there are still a portion of people choose to settle via litigation proceeding. This problem brought to this study which aims to investigate the origin of disputes settlement via litigation proceeding that contributed by delay in project undertaking. The objectives of the study include the analysis of taxonomy of delay and review of the available dispute resolution techniques. Analysis on the trend of delay dispute resolution by litigation in the selected cases is made. Third objective was set where the outline for dispute avoidance is formulated. This study is restricted to the cases within Malaysia. Analysis shows that the main causes of the delay are the mostly defaulted by the proprietor; the executors were showed as the majority party in filing the court suit among which they obtained high percentage in winning the award. The study shows that delay dispute settlement via litigation proceeding generally occurred when the financial conflict between parties take place. In order to avoid the settlement of dispute via litigation, measures of dispute avoidance are proposed. The findings are expected to be useful as further references for parties in facilitate the execution of their construction work.

## ABSTRAK

Masa sering menjadi kekangan utama dalam industry pembinaan di Malaysia kini. Oleh itu, penjadualan masa yang ketat perlu dirancang. Namun, terdapat keadaan terjadi di luar jangkaan pihak-pihak yang terlibat. Perkara luar jangkaan boleh mengakibatkan kelewatan masa projek yang telah dirancang dan boleh membawa kepada pertikaian antara pihak-pihak yang terlibat. Lazimnya, penyelesaian yang lebih ekonomik dan menjimatkan masa akan ditimbang. Namun, masih ada sebahagian pihak yang memilih untuk menyelesaikan isu-isu pertikaian melalui proses perbicaraan di mahkamah. Apakah yang menyebabkan hal ini berlaku? Kajian ini dibuat bertujuan untuk meninjau asal-usul penyelesaian termasuk proses litigasi yang digunakan untuk menangani pertelingkahan dalam kelewatan menjalankan projek. Kajian ini juga meliputi analisis taksonomi kelewatan dan juga teknik-teknik penyelesaian yang terlibat dengan isu-isu pertelingkahan. Analisis bagi kecenderungan penyelesaian pertikaian secara proses litigasi yang disebabkan oleh kelewatan dalam kes-kes yang dipilih juga dibuat. Akhir sekali, garis panduan untuk mengelakkan perselisihan juga dicadangkan. Kajian kes-kes dipilih ini menunjukkan bahawa punca-punca utama kelewatan yang membawa kepada pertikaian antara pihak dan penyelesaian di mahkamah majoritinya disebabkan oleh kesalahan yang disebabkan oleh pihak pemilik; kontraktor pula merupakan pihak majoriti yang mengemukakan tuntutan mahkamah dan juga antara pihak sering menang dalam kebanyakan perbicaraan kes-kes yang dipilih. Penemuan kajian ini telah menunjukkan bahawa penyelesaian diajukan melalui litigasi ekoran penangguhan atau kelewatan bila terjadinya konflik kewangan di antara pihak-pihak yang terlibat. Untuk mengelakkan penyelesaian menerusi cara perbicaraan litigasi, tindakan pencegahan pertikaian dicadangkan. Mudah-mudahan, harap kajian ini dapat dijadikan bahan rujukan kepada pihak dalam memudahkan pelaksanaan kerja kontrak pada masa akan datang.

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## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background Studies**

The construction industry in Malaysia plays an important role in the nation economy growth. The industry acts as catalyst for the economy through the creation of wealth to other industries such as education, financial, manufacture, services and etc.. Although it contributes only 2.5% of the nation gross domestic product in 2007, it has been eminence as inauguration path to many other sectors namely manufacturing, education, financial, services and etc. Recent scenario shows that production of the industry has been boost, following by the allocation from Government to the expedition of 9<sup>th</sup> Malaysia Plan's projects in 2007; an average growth of the industry on that particular year was 4.6% after experiencing three consecutive years of declines (2004, -0.9%), (2005, -1.5%), (2006, -0.5%).<sup>1</sup> Continual progression is expected for coming years.

In recent decades, construction projects have tended to become time constrained.<sup>2</sup> Ex-Minister of Work, Y.B. Dato' Seri Samy Vellu (2007) quoted: "The construction industry of today is not alike the construction industry in the past. The challenges faced by the industry in the demanding world of today are manifold and the constraints are ever increasing. It is no longer sufficient to deliver what proprietor wants cost-effectively as it used in the past. We, in the construction industry, must deliver our product not only cost-efficiently but in shortest time possible, with high quality attainable, as safely as deemed acceptable, without upsetting the ecological balance in order to remain sustainable."

Consequences to the above, industry players have given more emphasis to the time related issues as early as during the contract binding stage. This was achieved through the employment of Forms of Contract which form the bulk of many engineering / construction contract let-out. The formation of the Form of Contract is on the basis of the agreement between the parties; and the type of the Form of Contract which commonly used in the industry are Standard Form of Contract, modified Standard Form of Contract and *as hoc* or 'bespoke' Forms of Contract. Among the above, Standard Form of Contract are the most eminent in this industry. Several provisions have been drafted into the contract condition of Form of Contract which time interrelated requirements were drafted for the conduct of trade of the industry.

Alike other country, Malaysia possesses quite a number of Standard Form of Contract in engineering / construction sector; PWD 203A and PAM are among the famous Form of Contracts which are widely used in the government and public sector respectively in this industry. Other than that, some are practicing Standard Form of Contract like IEM Form, CIDB Form, JCT Form, IEEE Form, FIDIC Form, ICE Form, IMechE Form, modified PWD Form, and etc for the execution of contract exercises. Whilst there are other Standard Form of Contract which involving particular industries and some specific employers, namely oil and gas, power plant, highways, TNB, PETRONAS and etc.

Under the Standard Form of Contract, time frame required were specified for some particular conduct of trade which is agreed upon between parties and it were practiced over the projects; it applied either from the initial project planning stage, project execution stage and project utilization stage. Under clause 78, PWD 203A Rev. 2007, it was written that "time whenever mentioned shall be of the essence of this Agreement", underlined the need to emphasize on 'time'. There are also numbers of clauses under both PWD 203A form and PAM form where executors are required to use their best endeavor to execute the project within the time frame and avoid the delay a project.

As a developing country, Malaysia construction project have been increase in size as well as complexities in its nature result from the mammoth requirement of infrastructure and advancement in technologies. Prevailing Standard Form of Contract became further ambiguities eventually make it become more complex and causing adversarial impacts especially increase in number and frequency of disputes.

## **1.2 Problems Statement**

“Time is essence” is the vital philosophy in construction industry nowadays. The issue of time scheduling has hassle the industry since the beginning. It has been acknowledged by many construction researchers and industry practitioners as one of the most important performance criteria of a successful project. When time is believed overrun beyond completion date specified in the contract or beyond the date the parties agreed upon for the delivery of one project task, time delay issue arise.

The issue of time delay in the industry is not only commonly understood but accepted to be the norm. It is not just restricted as global phenomena but also no exception and is common in Malaysia’s construction industry. The industry practitioners, proprietors and executors alike are very sensitive to changes to the agreed completion date and even time frame of its project; both want their projects delivered on time. To the proprietor, time delay denoted loss of revenue as consequential from lack of productivity. Many of proprietors would consider these extra expected losses to be wasted. From executors’ points of view, time delay means occurring of extra overhead cost due to the longer working time as well as higher risk to the fluctuating of material and labor cost. Hence, when time-related conflicts arise; either party will try to overcome their losses by imposing claims to each other’s.

‘Time is revenue’ is closer to the reality of construction industry; with shorter time, profit margin can be increased. With regard to the fact that construction industry is also part of the business, earning more profit also mean the success of the project. To complete the projects on time and within schedule is an essential benchmark for both proprietors and executors. But there are always unexpected

circumstances out of both proprietor's and executor's control for the project processes slipping over its planned schedule. These processes subjected to many variables and unexpected factors, which caused by many sources such as performance and involvement by parties, resources availability, contractual relation, environmental condition.

Construction project often experience delays, it can happened in whatever path along the course of contract process. The argument that arises when a construction project has been delayed is whether the proprietor or executor can recover damages from either party for the delay. Normally, when the projects are delayed, they are either extended or accelerated and therefore, incur additional cost. Even though, the normal practices usually allow a provision in the project cost as contingency allowance in the contract price,<sup>3</sup> but in reality, those provisions are actually not sufficient when the time delay issue really took place.

High on the list causes of serious construction disputes is delay and time extension. These disputes contribute to incessant increase in the number of cases pending in various courts. Approach in resolving the disputes are usually defined by the terms of the construction contract which outlines the obligations and duties of the proprietors and executors of the project. It provides the provision of remedies if one of the parties does not perform as promised. Such disputes can be very costly not only due to the high cost directly related to the disputes settlement processes such as arbitration or litigation, but can also be very costly related to the delays and possible shut down of the project while disputes are being settled.<sup>4</sup>

Efforts from varies parties like PWD, PAM, IEM, CIDB and even Federal government on the establishing of rules and standards on works execution to encounter the delay issue can be seen from the introduction of various Standard Form of Contract and also with the existence of Contract Act 1950. There are clauses provided in Standard Form of Contract such as PWD 203A form, PAM form, and etc. as well as Contract Art 1950 in relation to time factor which attempted to evade the occurrence of disputes.

With the increasing complexity in contracts, the situation is expected to further worsen; numbers of disputes has been added to the existing un-settled cases and caused further delay to the settlement of un-going disputes. Involved parties will felt frustrated because of the delay in the dispute settlement which are actually time consuming. Those delays in dispute settlement have manifold effects as below:

- It contributes to the cost and time overruns;
- It jeopardizes the project progress if the dispute arise during course of construction; and
- It is detrimental to the relationship between executors and proprietors.

In disputes settlement, the involved parties will most probably try to look for more convenient method to overcome the above-mentioned effects. Many of disputes resolution methods are available and it is depend on what extend the parties can accept the method and how they need those disputes to be resolved. Among those available, litigation proceeding are well known to be the most time and cost consuming disputes resolution method. But there is still growing tendency to the disputed parties to take the dispute the court. What are the factors that bring them come to this extend?

### **1.3 Aim of Project**

This aim of study is to investigate the origin of disputes settlement that contributed by delay in project undertaking and how litigation deals with the issue in selected cases. Through this study, the parties to the contracts in construction industry may able to have better understanding on concept and their legal positions in a delay disputes settlement especially through the process of litigation proceeding.



#### **1.4 Objectives of Project**

The above aim of research is supported with the following objectives:

- i. To study the taxonomy of delay and the available dispute resolution techniques in construction projects;
- ii. To analyze the trend of delay dispute resolution by litigation in the selected cases, and
- iii. To formulate an outline for better delay dispute avoidance.

#### **1.5 Scope of Study**

Scope of this study covers on the delay disputes related issue and cases in Malaysia construction industry and it is attempted to link with Standard Form of Contract. The reference of Standard Form of Contract will be concentrated on PWD 203A (83)/2007 and PAM 1998/2006 (with quantities) which are well known and commonly used standard form of contract in Malaysia.

All cases attended to in this study are representing disputes that are resorting to litigation rather than arbitration or other alternative dispute resolution; although the use of mediation which is one of the alternative disputes resolution method to resolve commercial disputes can be said to be the continuing international trend (Oon Chee Kheng, 2006), however, this study is not going to debate on that area.

#### **1.6 Brief Project Methodology**

The methodologies of this study has been separated into few steps, namely identifying the research issue, literature review, data collection, research analysis, and conclusion and recommendation. This approach is to ensure that the collection of the information and the data analyzing can be precisely implemented.

### **1.6.1 Initial Study and Identifying the Research Issue**

The overview of concept for the study was obtained through initial intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the National Library, The Institution of Engineers, Malaysia's Library and UTM's Library. Related information concerning current scenario of construction industry in Malaysia and the contract issues in the industry were referred. From the research issue, the objectives of the study are identified.

### **1.6.2 Literature Review**

Various documentation and literature review regarding to the time delay in construction related issue are collected to achieve the research objectives. Books, journals, research papers, reports, newspaper as well as sources from the internet are referred. References were obtained from libraries in The Institution of Engineers, Malaysia, Selangor Branch, and Nation Library, Kuala Lumpur.

### **1.6.3 Data Collection**

Legal cases based on previous court cases, journals, papers, reports which are related to the time delay disputes in construction industry are collected from Malayan Law Journals via UTM library collection and electronic database. Primary data: electronic database, secondary data: books, act, articles, seminar papers and etc.

### **1.6.4 Research Analysis**

Once the data are collected, case study is conducted on the related legal cases. All the fact of the cases are reviewed and clarified. The focus of the analysis is on disputes associated with the time delay in construction which is referred to the court

and the consequences of time delay disputes towards the parties involved in the contract. Further to this, discussion and comparison would be done. The most frequent disputes associated with the time delay in construction which are referred to the court author are compared and identified. The same also would be done for the consequences of the time delay disputes toward the parties involved.

### **1.6.5 Conclusion and Recommendations**

Conclusion and recommendations are made based on the findings during the stage of analysis.

## **CHAPTER 2**

### **CONSTRUCTION CONTRACT**

#### **2.1 Introduction**

This chapter deals with the literature review on construction contract. Discussion is focused on the chronology of the origin for construction contract law as well as application of various type of standard form of contract. This is followed by the deliberation to the types and causes of the delay in the project undertaking and then the disputes settlement in regard to the above mentioned delay issue. This chapter serves as an introduction and understanding to the matters related to delay dispute in Malaysia construction industry as to achieve the objectives laid in chapter 1.

#### **2.2 History of Construction Contract Law**

The law application to contractual transaction in Malaysia is at present governed by the Contract Act 1950 (Act 136) (Revised 1974). Prior to the extension of the Contract Act to the various component states of Malaysia, there were two systems of law regulating contracts which were applicable to Malaysia: the common law of England applied to Penang, Malacca, Sabah, and Sarawak, while the Contract (Malay States) Ordinance 1950 applied to the remaining nine states of Malaysia. Contract Act was later extended to all states of Malaysia in 1974.

Before the coming of the British, Malay legal codes together with customary and Islamic law governed contracts in Malaya. English law was then introduced into Malaya on 1807 through the First Charter of Justice after acquired Penang in 1786. Later in 1826, through the Second Charter of Justice by British, Provision of English Law was applied to Malacca, together with Singapore. Sabah and Sarawak were British Protectorates before their cession in 1946. The Law of Sarawak Ordinance 1928 received English law. The Civil law Ordinance 1938 provided for the reception of English law in Sabah.

In 1872, the British enacted the Indian Contract Act, codifying the English law principles relating to contract. By 1899, the British extended the Indian Contract Act 1872, with minor modification, to Federated Malay States, comprising Pahang, Perak, Selangor and Negeri Sembilan as the Contract Enactment 1899.

In 23<sup>rd</sup> May 1950, the enactment became the Contract (Malay States) Ordinance when the Federal Legislative Council of Malaya formally passed it and made it applicable also to the Un-federated Malay States of Johore, Kedah, Kelantan, Perlis and Terengggau. The revised Contract (Malay States) Ordinance 1950 became an Act in 1<sup>st</sup> July 1974 and extended to all the component states of Malaysia including Penang, Malacca, Sabah, and Sarawak.

The Language of the Contract Act 1950 does not provided for the Act to apply retrospectively.<sup>5</sup> Therefore, the provisions of the Act do not apply to contracts entered into before the coming into force of the Act. In the other words, application of Contract Act 1950 taking place only after it enforcement.

The governance of contract in Malaysia is through the application of standard form of contract. In construction industry, there are various forms available. The matter is dealt in the following section.

### 2.3 Standard Form of Contract

Standard Forms of Contract have been extensively used in recent trend of construction industry. Practitioners on Standard Forms of Contract has sparked the debate about the traditional bargaining process which as an essential process in the formation of a contract of the past. The elimination of the process denoted that executors and proprietors may no longer meet to negotiate and bargain freely for the terms and strike a deal<sup>6</sup>; executors become the weaker party in the contracting process and legislation is seen to move toward the trend to protect weak party from intimidate by proprietor with the application of Standard Forms of Contract.

However, it was the advantage to all involved party that the Standard Form of Contracts have accumulated a body of case law and judicial pronouncements over the years as to the interpretation of the various provisions and stipulations which leads to certainty in their implementation<sup>7</sup>. Most of Standard Forms of Contract are time tested and applicants are aware of their workability, limitation and drawbacks. This familiarity could leads to administrative and cost efficiency and minimizes possible claims and disputes.

Besides, Standard Forms of Contract provide the basic legal frame work evidencing the legal relationship between the parties; identify the right, obligation and duties. It might as well furnish a mechanism for regulating the conduct of the commercial relationship between the parties and put in place the administrative procedures necessary to affect the legal and commercial relationship between parties for achieving the purpose of the contract. Hence Standard Forms of contract are actually multifold governing not only legalities but also mundane administrative issue to ensure that both parties are able to discharge and can actually discharge their side of the bargain through full performance.

Lord Diplock (1974)<sup>8</sup> has identified that there are two major kinds of Standard Forms of Contract employed in the industry:

Type 1: Forms where ‘the standard clauses ... have been settled over the years by negotiation by representative of the commercial interest involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers ... If fairness or reasonableness were relevant to their enforceability, the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable’; and

Type 2: Form where ‘the terms ... have not been the subject of negotiation between the parties to it, or approved by other organization representing the interest of the weaker party .... To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.’

Meanwhile, according to Nayagam and Pathmavathy (2005), “Standard Form of construction contracts provide a basic legal frame work identifying the right, obligations, and duties of the parties, establish the ambit of the powers and duties of the contract administrator”.

When we pursue through the histories, the initial version of Standard Forms was drafted by various government agencies for works in the public sector. PWD forms is the example where the earlier version of PWD Standard Form of Contract modeled on the Royal Institute of British Architects, RIBA Form of Contract 1931<sup>9</sup> and made a revision on year 1983 and latest by year 2007 to keep up with the current political and industrial development.

From the rapid progress of development projects, many other professional bodies published their own version of standard form to suit the current development and modernization and variation of procurement method; IEM form was first published in 1989 and PAM form in 1969 (Lian, Im and Kheng, 2000)

As view in Contract Act 1950, there is always party delivering the standard form of contract and try to insert certain clauses in the contract unfairly exempting them from certain liabilities at common law. The Contract Act 1950 contains no provision dealing with exempting clauses. The Malaysian courts have followed English common law when considering this aspect of the law. The courts have tried to protect the position of the recipient of form containing exempting clauses by:

- Requiring certain standard of notice in respect of the onerous terms; and
- Construing the form, whenever possible, in favor of the party receiving it.

### **2.3.1 PWD 203A Standard Form of Contract**

PWD 203A Standard Form of Contract is the most commonly used contract form for the government project. There are several types which have been widely used for both engineering and building work undertaken on the basis of traditional general contracting. These are:

- PWD Form 203A (83)/2007: Condition of Contract to be used where bills of quantities form part of the contract;
- PWD Form 203 (83)/2007: Condition of Contract to be used for contract based on drawings and specifications;
- PWD Form 203N (83)/2007: form of contract to be used for nominated sub-contractor where the main contract is based upon PWD Form 203 and PWD Form 203A;
- PWD Form 203P (83)/2007: form of contract to be used for nominated suppliers where the main contract is based upon PWD Form 203 and PWD Form 203A
- PWD Form DB/T (2000 Edn): Condition of Contract for works being let out on the 'Turnkey/Design and Build' method of contract procurement.

Other than types as above described, there are no standard form established by PWD for others contracts' procurement like management contracts, domestic sub-contracts, serial contracts and continuation contract.



### **2.3.2 PAM Standard Form of Contract**

Rather than developing and drafting a new standard form on its own, PAM in collaboration with the Institute of Surveyors Malaysia, ISM in 1969 adopted 1963 Joint Contracts Tribunal, JCT Standard Form of Building Contractor (Reprinted 1968) with modifications to be used for private sector building works through traditional general contracting contract procurement method comprised:

- PAM (with quantities) (98)/2006: Standard Form of Building Contract With Quantities;
- PAM (without quantities) (98)/2006: Standard Form of Building Contract Without Quantities;
- PAM NSC (98)/2006: Standard Form of Contract for Nominated Sub-contractors to be used with PAM (98)/2006.

Similar to PWD form, PAM form as well not establish any standard for other type of contracts' procurement which also included Turnkey types of contracts and engineering type of contract.

### **2.3.3 Other Standard Form of Contract**

CIDB Standard Form of Contract is the other type of government form of contract which drafted and published by Construction Industry Development Board. It is for building works undertaken under the traditional general contracting with the 'CIDB Standard Form of Contract For Building Works (2000 Edition)' being the first such form and will soon be joined by the Standard Form of Contract for Nominated Sub-contractors.

The Institute of Engineers, Malaysia (IEM) have stepped in to rectify the seemingly confusing situation created by those widely used common standard form and addressed the lacuna in this area of the industry by drafting and publishing a

series of Standard Forms for engineering works procured by way of traditional general contracting.

Three main forms have been published by IEM which include the following:

- IEM.CE 1/89: IEM Conditions of Contract for Work mainly of Civil Engineering Construction (Reprinted on September 1994);
- IEM.CES 1/90: IEM Standard Conditions of Sub-contract for use in conjunction with the IEM Conditions of Contract for Civil Engineering Works (Reprinted on September 1994);
- IEM.ME 1/94: IEM Conditions of Contract for Mechanical and Electrical works.

Other than above mentioned so-called 'local' Standard Form of Contract, the employment of foreign origin Standard Form of Contract can be seen from various projects nowadays. The reasons for such usage are mainly because of the involvement of international parties either in term of funding or participating. The typical types of international Standard Form of Contract are listed below:

- FIDIC Standard Forms of Contract;
- JCT Standard Forms of Contract;
- ICE Standard Form of Contract; and
- IMechE and IEE Standard Forms of Contract.

The standard form of contract deals with matters that need serious attention as these may lead to disputes. Amongst these is delay. The subsequent discussion will look into delay.

## **2.4 Delay**

Delay in construction industry contracting can be both psychologically and financially destructive, just as they are in everyday life. Whether the delay results

from an act of God, breach of contract by one of the party, or differing site conditions, its impact on construction contracts is often catastrophic. The old adage, “time is money”, is definitely true in these situations.

“Time is of the essence” has become a common statement contained in the construction prime contract and subcontracts. Its appearance mean that contract performance be started promptly and continue without interruption until completion within specified time period. It was also shown in PWD 203A 2007 Standard Form of Contract clause 78. The words mean that the contractor or subcontractor has an absolute duty to perform all contract requirements with no delay whatsoever and is in material breach of contract for failing to complete the contract work within the contractually specified time. Same to the proprietor that, these words also suggest that if proprietor does not promptly review and approve shop drawings or promptly perform other contractually specified duties has materially breach the contract.

Nevertheless, the common judicial view is not quite stringent. Court usually applies the time-is-of-the-essence concept only to delays in performance that are unreasonable. In this view, construction contracts, by their very nature, are so fraught with the possibility of delay that delay is almost inevitable. The clauses are sometime interpreted to mean that the executor is required to achieve the time deadlines, but not for proprietor. Nevertheless, constructors, subcontractors and proprietors would be well advised to act as though time-is-of-the-essence requirement will be strictly enforced with respect to their commitments to others.

As far as the claim is concerned, issue that we should assess in the first place is the date on which work supposed to be completed. Executor usually specify the performance period either by setting forth commencement and completion dates or by starting that work should be completed within some number of days after notice to proceed or commencement of the project. Many contracts also include interim milestone dates, which specify the dates on which certain stages of the project are to be completed. An inability to meet interim dates may provide the basic for actual or liquidated delay damages, termination of the contract, or an acceleration directive. All parties should take great care to clear define these time period, and the

consequences for the failure to meet any dates, to avoid misunderstanding and disputes.

Where a contract contains a specific date for the commencement of work, the proprietor may be deemed to have warranted that the project site would be in sufficient state of readiness so the executor could begin the project on that day. If the executor is not allowed to commence work on that date, the proprietor may be liable for the delay damages. Proprietors often include a statement in the contract that the specified commencement date is not only a projection or estimate in an attempt to avoid liability for any delay.

#### **2.4.1 Studies on Causes and Effects of Delay**

From construction industry perspective, delays are mainly occurred due to the issue of mismanaged the project. Success projects always been defined as meeting goals and objectives as prescribed in the project plan. It means that the project has accomplished its technical performance, maintained its schedule, and remained within budgetary cost.

Many studies and articles conducted on causes of delay in construction project, both locally and internationally have been reviewed. Chan and Kumaraswamy<sup>10</sup> conducted a survey to determine and evaluate the relative important of the significant factors causing delays in Hong Kong construction projects. They analyzed and ranked main reasons for delays and classified them into two groups: the role of the parties in the local construction industry, whether are proprietor, consultants or contractors, and the type of project. They ended up with result that five major causes of delays were: poor site management and supervision, unforeseen group conditions, low speed of decision making involving all project teams, proprietor initiated variation and necessary variation of works.

Ogunlana and Promkuntong<sup>11</sup> conducted a study on construction delays in Thailand. They found that the causes of delay in construction industry of Thailand

could be shortage or inadequacies in industry infrastructure, main supply of resources, caused by proprietors and consultants, and causes by executor's incompetence/inadequacies. They recommended that there should be concerted effort by economy managers and construction industry associations to provide the necessary infrastructure for efficient project management.

Al-Ghafly<sup>12</sup> has discussed the delay in Saudi Arabia's projects. Sixty causes were identified and classified. He found that the delay occurred frequently in medium and large size projects, and considered severe in small projects. Causes of delay have been emphasized on the proprietor involvement, executor performance, and the early planning and design of the project. Important causes are financial problems, changes in the design and scope, delay in making decisions and approvals by proprietor, and coordination and communication problems.

Kaming et al.<sup>13</sup> studied influencing factors on 31 high-rise projects in Indonesia and found out that project cost overruns occur more frequently and are more severe problem than time overruns. In the time overrun prospect, the most important factors causing delays are design changes, poor labor productivity, inadequate planning, and resource shortages.

Noulmanee et al.<sup>14</sup> investigated causes of delays in highway construction in Thailand and concluded that delays can be caused by all parties involved in projects. However, main causes come from inadequacy of sub-constructors, organization that lacks of sufficient resources, incomplete and unclear drawings and deficiencies between consultants and executors. They suggested that delay can be minimized by discussions that lead to understanding.

Ibnu Abbas Majib<sup>15</sup> in his studies on causes and effects of delay in Aceh construction industry has identified fifty seven factors that causes delays and among the most important causes are: insufficient numbers of equipment; inaccurate time estimate; monthly payment difficulties; changes orders; inaccurate cost estimate; poor site management and supervision; inadequate modern equipment; shortage of the construction material; incompetent project team; improper planning and scheduling; and executor's financial difficulties. Effects from the delay have been

group as six factors which include: time overruns cost overrun, disputes, arbitration, total abandonment; and litigation. Time overrun and cost overrun were the two most common effects of delays in construction project.

Locally, Murali Sambasivan and Yau Wen Soon<sup>16</sup> have conduct studies in Malaysia construction industry's delay by addressing its causes and effects. They have identified 10 most important causes of delay from a list of 28 different causes and 6 different effects of delay. Those important causes are executor's poor management, inadequate executor experience, executor improper planning, inadequate proprietors' financial and payments for completed work, problems with subcontractors, shortage in material, labor supply, equipment availability and failure, lack of communication between parties, and mistakes during the construction stage. While the six main effects of delay were: time overrun, cost overrun, disputes, arbitration, litigation, and total abandonment.

#### **2.4.2 Type of Delay**

Numerous types of delay causes can be categorized depending on the stages of project execution when the delay took place and its consequences such as impose of various type of damages claim. This defines the criticality of the delay in the overall project completion and its impact thereafter. The delays are accordingly classified as 'critical delays' and 'non-critical delays'. Contract defines obligations of parties to meet the project performance including schedule and also the recourse in the event of failing to meet such obligations.

The recourse is generally asking for compensation for the delay by the affected party from the other party and thus it is the choice of the affected party. In certain cases, the affected party may be excused (i.e., he may not levy compensation for the delay) while in some other cases not. The consideration to excuse or not to excuse would depend on several factors such as whether a party can or cannot foresee the situation causing delay at the time of entering the contract; and the impact of delay on project performance. This leads to classify delays as 'excusable' or 'non-

excusable'. However on certain situations when both parties are equally or partially responsible for the delay, the delay is called as 'concurrent' and analysis of actual damage due to delay with respect to levels of obligations stated in the contract and that actually performed helps in apportioning the quantum of losses to be shared by parties.

Once the time has lost, a threshold question is whether the delay is compensable or excusable; that is whether the executor will be paid, or made whole, for the extra costs incurred as a result of the delay or whether only an extension of contract time will be granted.

#### **2.4.2.1 Compensable Delays**

A compensable delay entitles the executor to both a time extension and to compensation for the extra costs caused by the delay. Unless the contract contains an enforceable no-damages-for-delay clause, a proprietor-caused delay is compensable delay. It is possible that some delays that would normally be excusable only may become compensable if they flow from the earlier compensable delay.

An example is a case where a proprietor-caused delay caused follow-on work to be performed at time in the year when weather-related delay occurred, when that work would have been completed prior to the inclement weather had the proprietor-caused delay not occurred. In this case, the extra costs insulating from performing in the inclement weather, although normally not compensable, become compensable. Other examples are changes in the work, access to the site, and site conditions differ materially from those specified in the contract. Most of Standard Form of Contract have provide provisions on this compensable delay claim under claim for loss and expense as stated in PWD form 203A Rev.2007, clause 44 and PAM form Rev.2006, clause 24.

Specific court cases have established some delays as "compensable"; these are:

- Delay caused by the owner improper inspection procedures [Gannon Company v. United states, 189 Ct. Cl. 328 (1969)]

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