

**WHAT CONSTITUTE A VARIATION IN CONSTRUCTION
FROM LEGAL PERSPECTIVE**

LIM CHENG SIM

UNIVERSITI TEKNOLOGI MALAYSIA

DEDICATION

To my beloved husband,
sister Chin Mooi,
daughters: Ee Chien, Ee Xuan, Ee Han & Ee Lin

.....Thanks for everything.

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ABSTRACT

Construction projects are complex thus the requirement for changes to be made before they are completed is inevitable. Construction contracts commonly include variations clauses to enable the employer's design team to vary the design and specification. Various forms of construction contract defined the variation differently and different standard forms of contract have different wordings for it. The variation clauses are usually drafted in very wide terms and appeared to be all embracing. Although the descriptions are clear but it is difficult to determine the point where it is 'variation' or 'new work', and it is not clear from the ambit of these clauses as to how extensive a variation may be and still be binding. Thus variation clauses often give rise to argument, debate and litigation. The main objective of this study is to determine what constitute a variation in construction from legal perspective. The scopes of this study are (1) contractual provisions in the three major and popular forms of construction contract in Malaysia, namely PAM 98 Form, PWD Form 203A (Rev. 10/83) and CIDB 2000, and (2) Legal cases reported in Lexis Nexis in relation to variations in Malaysia and other Commonwealth countries. The research methodology adopted for this report consists of 4 stages. Stage 1: initial study and finding the research topic, objective, scope and outline; Stage 2: collecting data and research design; Stage 3: analyzing and interpreting data and Stage 4: writing-up. This report covers five (5) chapters. Chapter 1 sets the background of the study, problem statement, objective of the study, scope and limitation of the study, research methodology and the organization of the chapters. Chapter 2 discusses some basic terminologies and provides a general understanding of variation, contractual terms and contract interpretation on variation. Chapter 3 examines the detailed provision of variation clauses in relation to 'definition of variation' and 'valuation of variation' of the most commonly used local standard forms, i.e. PAM 98 Form, PWD 203A (Rev. 10/83) and CIDB Form 2000. Chapter 4 analyses legal perspective of 'what constitute a variation' in construction of the various court cases chosen in order to achieve the objective of this project report. Chapter 5 summarises the findings of the research according to the research objective. The finding derived from the analysis of the court cases is that there is no single legal perspective regarding what constitute a variation in construction. However, based on the cases analysed, the most common issue is whether the extra over of the changes fall under reasonable scope and nature of the original work; but what is reasonable under the circumstances will be a matter for the courts to establish on the facts of the particular case.

ABSTRAK

Projek-projek binaan adalah kompleks, dengan demikian perubahan kepadanya sebelum ia dilengkapkan tidak dapat dielakkan. Kontrak binaan biasanya mempunyai klausa-klausa perubahan untuk membolehkan kumpulan reka bentuk majikan membuat perubahan pada reka bentuk dan spesifikasi. Pelbagai kontrak binaan mempunyai taktif yang berbeza untuk 'perubahan' dan kontrak yang berlainan menggunakan perkataan yang berlainan untuknya. Klausa-klausa perubahan biasanya didrafkan dalam frasa yang sangat luas and kelihatan merangkumi. Walaupun gambaran kata-katanya jelas tetapi sukar untuk menentukan bila ia adalah 'perubahan' dan bilanya 'kerja baru', dan tidak jelasnya sebesar mana perubahan boleh dibenarkan. Oleh kerana itu, klausa-klausa perubahan sentiasa menyebabkan pertelingkahan, penghujahan dan tindakan undang-undang. Objektif utama pengajian ini ialah untuk menetapkan 'apa yang merupakan perubahan dalam binaan dari segi pandangan undang-undang'. Skop kajian ini adalah: (1) peruntukan kontrak dalam tiga form kontrak umum yang utama iaitu PAM 98 Form, PWD Form 203A(Rev 10/83) dan CIDB 2000, dan (2) kes-kes mahkamah yang dilaporkan di Lexis Nexis mengenai perubahan binaan di Malaysia dan negara-negara Komanwel. Kajian in mempunyai 4 peringkat. Peringkat 1: kajian yang pertama dan pencarian topik kajian, objektif, skop dan garis luar. Peringkat 2: Pengumpulan data dan reka bentuk kajian. Peringkat 3: Analisis data dan Peringkat 4: Penulisan. Laporan ini mengandungi lima (5) bab. Bab 1 menceritakan latar belakang kajian, pernyataan masalah, objektif kajian, skop dan pembatasan kajian, perkaedahan kajian dan susunan bab. Bab 2 membincangkan peristilahan asas dan mengemukakan perfahaman untuk perubahan binaan. Bab 3 periksa secara teliti klausa-klausa 'definasi perubahan' dan 'cara-cara penilaian perubahan' diperolehi dalam PAM 98 Form, PWD Form 203A(Rev 10/83) dan CIDB 2000. Bab 4 menganalisis pandangan undang terhadap 'apa yang merupakan perubahan dalam binaan' berdasarkan kes-kes mahkamah terpilih. Bab 5 membuat ringkasan untuk hasil penyiasatan pengajian mengikuti objektif pengajian. Hasil penyiasatan pengajian ini menunjukkan bahawa tiada satu pandangan undang-undang yang tunggal terhadap apa yang merupakan perubahan dalam binaan'. Walaupun demikian, berdasarkan kes-kes yang dikajikan, isu lazimnya adalah sama ada tambahan perubahan jatuh dalam skop yang munasabah; tetapi apa adalah munasabah adalah terpulang pada mahkamah untuk ditetapkan berdasar fakta-fakta satu-satu kes itu.

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LIST OF ABBREVIATIONS

CIDB	Construction Industry Development Board
CIPAA	Construction Industry Payment and Adjudication Act
FIDIC	Federation Internationale de Ingenieurs Conseils
HGCR	Housing Grants, Construction and Regeneration
ICE	The Institution of Civil Engineers, UK
ISM	The Institution of Surveyors, Malaysia
JCT	Joint Contract Tribunal
PAM	Persatuan Arkitek Malaysia
PWD	Public Work Department
RIBA	Royal Institute of British Architects
SMM	Standard Method of Measurement
SO	Superintending Officer
VO	Variation Order

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Construction projects are complex thus the requirement for changes to be made before they are completed is inevitable. There are three ways in which a variation might occur. Firstly, clients may change their minds about what they asked for before the work is complete. Secondly, designers may not have finished all of the design and specification work before the contract was let. Thirdly, changes in legislation and other external factors may force changes upon the project. Although these three origins are very different, construction contracts tend to ignore these differences and deal with all variations in the same way.¹

Construction contracts commonly include variations clauses to enable the employer's design team to vary the design and specification. This is to avoid the problem that a contract would, in principle, have to be re-negotiated due to the change of specification of the work. The purpose of the variations clauses is to allow such changes to be made, and also to permit any consequential changes to be made to the

¹ Murdoch, J., Hughes, W.. *Construction Contracts- Law and Management*, Spon Press, London (2000), p.200.

contract sum. Each standard or tailored form of construction contract will have a form of words attempting to address the question of ‘What is a variation?’ Some attempted definitions are prescriptive, i.e. “You will do anything I tell you to do, or shown on drawings issued to you by the Architect, and there will be no change in price or time unless I have previously agreed the extra money and time.” Such a unilateral definition can work, either by mutual reasonableness or by the contractor taking an equally robust attitude – “If you want me to do that, you will agree my price and my additional time before I will even order the materials.” Mutual reasonableness cannot be relied on and disputes will have to be referred to a “Third Party Umpire”. In UK, the trend of the adjudicator as a “Third Party Umpire” which was formally given statutory status by the Housing Grants, Construction and Regeneration (HGCR) Act 1996 to make the pre-agreement of variations becoming the “norm”.² However, this is quite impossible to be a scenario in Malaysia in near future in view of the enactment of the proposed Construction Industry Payment and Adjudication Act (CIPAA) is still ‘on the way’.

The provision of variation clauses in construction contracts compels the contractor to obey instructions issued by the contract administrators. However, a variation order may be issued in terms which contradict the terms of the power and thus will be an invalid variation.

The issue of a variation order triggers the operation of other provisions in the contract to adjust the contract price of the contract - it may turn out to be higher or lower, depending on the nature of the variation. Thus, where a contractor has secured a project on prices and terms which are profitable, he will have a strong interest to argue that any additional work should be construed as a variation and valued according to the prices and rates contained in the contract. There is nothing to prevent the parties from agreeing that varied work should be undertaken under a separate contract.³ Hence, where the contract was awarded on prices and rates which were

² Jeremy Hackett. *Construction Claims: Current Practice And Case Management*, (2000), p.116.

³ See *Stockport Metropolitan Borough Council v O'Reilly* [1978] 1 Lloyd's Rep 595.

subsequently shown to be unprofitable, a contractor may be expected to press the case that the subject work should not be construed as a variation on the terms of the contract and that, instead, it should be the subject of a separate contract or undertaking between the parties, in which case new prices and rates have to be agreed between the parties.⁴

In Malaysia, majority of the local contractors/sub-contractors are usually less 'legal-conscious' or less preferring to legal proceedings. This situation is attributed by firstly, there is always unequal contractual bargaining power which favors the employer instead of the contractor; and secondly, the existing dispute resolution mechanisms are too time consuming and expensive. Therefore, it seems that they do not have much choice of solutions but to uplift the awareness of the common issues of disputes in variations claims.

It is thus essential to foster the understanding of variations claims among all the parties in the construction industry especially the contractors/sub-contractors.

1.2 Problem Statement

Various forms of construction contract defined the variation differently and different standard forms of contract have different wordings for it. The variation clauses are usually drafted in very wide terms and appeared to be all embracing. Although the descriptions are clear but it is difficult to determine the point where it is 'variation' or 'new work', and it is not clear from the ambit of these clauses as to how

⁴ Chow Kok Fong. *Law and Practice of Construction Contracts (3rd Edition)*, Sweet & Maxwell Asia (2004), p175.

extensive a variation may be and still be binding. Thus variation clauses often give rise to argument, debate and litigation.

Uff (2005) pointed out that when there has been a departure from the work specified in the contract, it is necessary to decide whether there is, in law, a variation under the contract; if there is a variation, whether the contractor is entitled to be paid extra; and if so, the amount of the extra payment.⁵

He further noted that contracts do not usually place any limit on the permissible extent of variations. The usual provision that no variation is to vitiate (or invalidate) the contract, makes it difficult to imply any limit. However, there must always be some limit to what may be added to the contract. If work exceeding such limit is ordered, the contractor may be entitled to be paid on a *quantum meruit* basis.⁶

Meanwhile, Vincent Powell Smith (1990) commented that there are more misunderstandings and disputes about variations than any other aspect of construction contracts. The wide definition of the term ‘variation’ or ‘varied work’ in the standard forms of contract also give rise to difficulties. Indeed, it is sometimes suggested that such definition means that the architect can in fact use the variations clause as a means of making fundamental changes in the work.⁷

Therefore the issue here is “what constitute variation” and when variation is considered as new works.

⁵ John Uff. *Construction Law – Law and Practice relating to the Construction Industry* (9th Edition). Sweet & Maxwell (2005), p274.

⁶ Ibid, p277.

⁷ Vincent Powell-Smith. *Problems in Construction Claims*. Oxford BSP Professional Books. Pg42.

1.3 Objective of the Study

The main objective of this study is to determine what constitute a variation in construction from legal perspective.

1.4 Scope of the Study

The study is focused on the following:

1. Contractual provisions in the three major forms of construction contract in Malaysia, namely PAM 98 Form, PWD Form 203A (Rev. 10/83) and CIDB 2000.
2. Legal cases reported in Lexis Nexis in relation to variations in Malaysia and other Commonwealth countries.

1.5 Significance of the Study

Basically, this study is expected to answer some of the uncertain issues that arise in construction contracts such as issues that in relation to variation orders. In accordance to that, issues will be analyzed based on the interpretation and judgment by the courts. It is hoped that this study will be able to help the stakeholders in the

construction to have a more complete understanding of judicial interpretation on what constitute variations in construction projects.

1.6 Research Methodology

The process and method of approach act as guidelines so that the study could be done in a systematic way to achieve the research objective. The study process consists of 4 stages. Stage 1: initial study and finding the research topic, objective, scope and outline; Stage 2: collecting data and research design; Stage 3: analyzing and interpreting data and Stage 4: writing-up. Figure 1.1 shows the research methodology.

1.6.1 Stage 1: Initial Study and Finding the Research Topic, Objective, Scope and Outline

Stage 1 of the research involves initial study which there are two approaches used i.e. discussion with friends and lecturers regarding what research topic can be done. Initial literature review is also done to help get the idea of the research topic. After the initial study, the rough idea of the research topic is formed. The objective and scope of the research are fixed then. After this, a research outline will be prepared in order to identify what kind of data will be needed in this research. Also, data sources will be identified as well.

1.6.2 Stage 2: Collecting Data and Research Design

Collection of all relevant data and information is done during this stage. Data will be collected mainly through documentary analysis. All collected data and information are recorded systematically. Data collected are mainly from the Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis online database. All the cases relating to the research topic will be sorted out from the database. Important cases will be collected and used for the analysis at the later stage.

1.6.3 Stage 3: Analyzing and Interpreting Data

This stage of research involves data analysis, interpretation and data arrangement. This process is to convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process writing of the paper.

1.6.4 Stage 4: Writing-up

This stage is the final stage of the research process. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis.

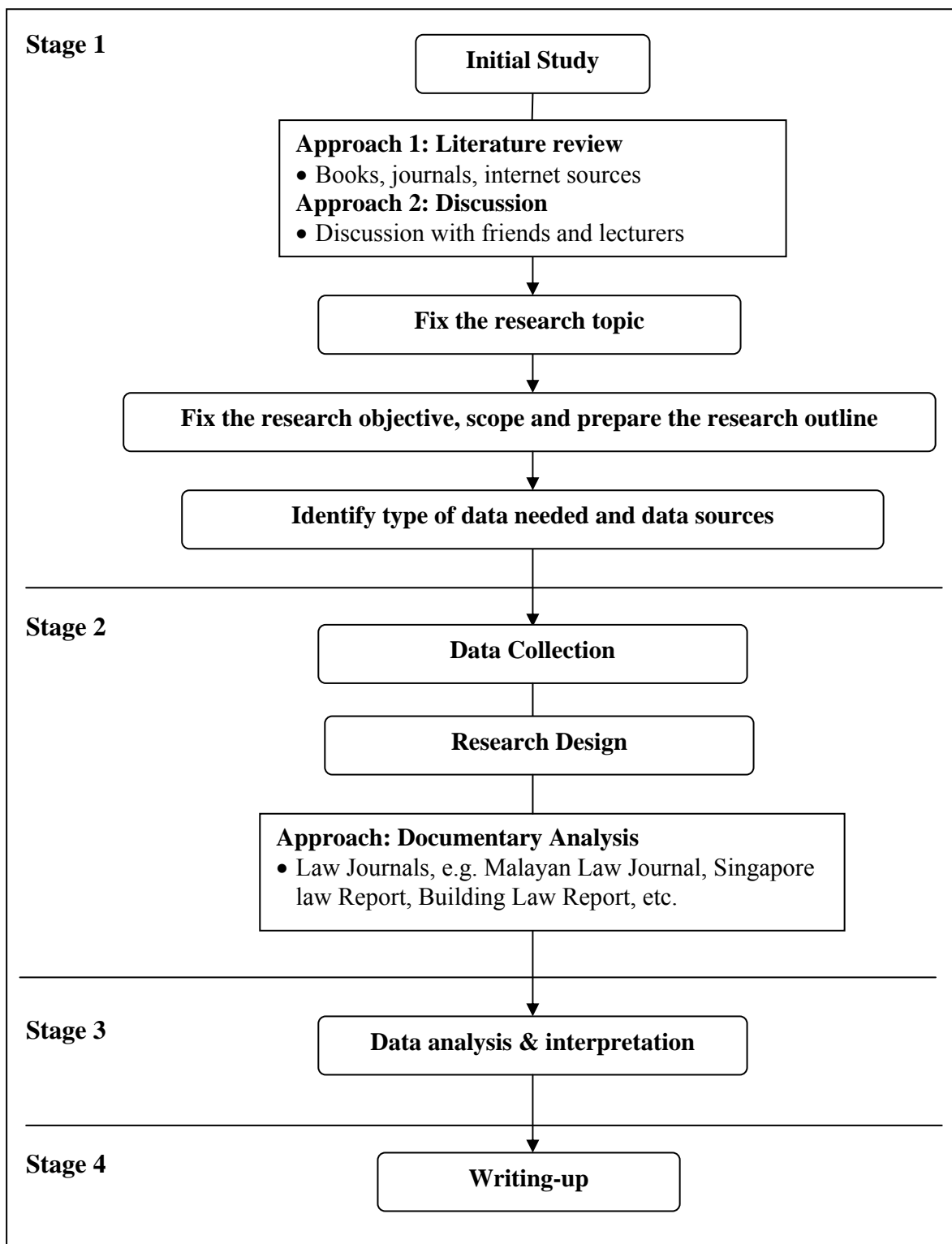


Figure 1.1: Research Methodology

1.7 Organisation of the Report

This report covers five (5) chapters as follows:

Chapter 1: Introduction

This chapter sets the background of the study, problem statement, objective of the study, scope and limitation of the study, significance of the study, research methodology and the organization of the chapters.

Chapter 2: Variation Order in Construction Project

Chapter 2 discusses some basic terminologies and provides a general understanding of variation, contractual terms and contract interpretation on variation, which will be useful to enhance the understanding when reading the subsequent chapters.

Chapter 3: Provision of Definition of Variation and Rules for Valuation of Variation in Local Forms of Construction Contract

This chapter examines the detailed provision of variation clauses in relation to ‘definition of variation’ and ‘valuation of variation’ of the most commonly used local standard forms, i.e. PAM 98 Form, PWD 203A (Rev. 10/83) and CIDB Form 2000 only.

Chapter 4: Variation in Construction from Legal Perspective

This chapter analyses legal perspective of ‘what constitute a variation’ in construction of the various court cases chosen in order to achieve the objective of this project report. It is done mainly through documentary analysis of law journals and law reports, e.g. Malayan Law Journal, Singapore Law Report, All England Report, Canada Law Report, Building Law Report, Construction Law Report, etc.

Chapter 5: Conclusion and Recommendations

This chapter is the final chapter that summarises the findings of the research according to the research objective. It also contains the problems encountered during the research as well as the recommendations for future researches.