

APPLICATION FOR STAY OF PROCEEDINGS AND
UNCONDITIONAL APPEARANCE.

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**APPLICATION FOR STAY OF PROCEEDINGS AND
UNCONDITIONAL APPEARANCE**

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DEDICATION

To my beloved wife and families who have given full support to me.

Thanks for everything.

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ABSTRACT

Dispute in the construction industry is the most common and sometimes cannot be avoided. Arbitration is a popular method in resolving dispute in the construction industry. The law relating to arbitration in Malaysia is governed the Arbitration Act 2005. All standard forms of contract in Malaysia provide arbitration as the major method of dispute resolution. However, sometime a party may bring a dispute direct to litigation. The section 10 of the Act allows the other party to apply to the court for stay of the court proceedings provided that he has not taken any other steps in the proceedings. Entering appearance is one of the steps in any court's proceedings. The entering of appearance may be conditional or unconditional. The courts seemed to have given inconsistent judgments whether or not entering of unconditional appearance as having taken steps in the proceedings. The objective of this research is to determine whether or not the entering of unconditional appearance a step in the proceedings. The methodology for this research is law case study method. The relevant law cases are extracted from the Malayan Law Journal. The examination of the law cases revealed that entering of unconditional appearance is not a step in the proceedings. Therefore, a party that intents to apply for a stay of court proceedings in order to resolve the dispute by arbitration need not be so much concern whether or not the entering of appearance is conditional or unconditional.

ABSTRAK

Pertikaian dalam industri pembinaan adalah suatu perkara yang normal berlaku dan kadangkala tidak dapat dielakkan. Timbang tara adalah suatu kaedah penyelesaian yang mashur dalam pertikaian. Timbang tara ditadbir oleh Akta Timbang Tara 2005. Kebanyakan Borang Kontrak di Malaysia mengesyorkan timbang tara sebagai kaedah alternatif untuk menyelesaikan pertikaian. Walaubagaimanapun, adakalanya pertikaian yang timbul dirujuk terus kepada pihak mahkamah. Seksyen 10 Akta Timbang Tara membenarkan pihak yang menentang proses mahkamah untuk memohon perintah penangguhan dengan syarat, tiada langkah diambil dalam proses mahkamah tersebut. Kemasukan kehadiran merupakan satu langkah dalam proses mahkamah. Kemasukan kehadiran tersebut adalah dalam bentuk bersyarat atau tanpa syarat. Penghakiman dari pihak mahkamah menunjukkan tiada konsistensi samada kemasukan kehadiran tanpa syarat merupakan satu langkah dalam proses mahkamah. Objektif kajian ini adalah untuk menentukan samada kemasukan kehadiran tanpa syarat merupakan langkah dalam proses mahkamah. Kaedah yang digunakan untuk kajian ini adalah kaedah kajian kes. Kes-kes yang berkaitan dikeluarkan untuk mendapatkan data, daripada *Malayan Law Journal*. Daripada pemerhatian, dapat disimpulkan bahawa kemasukan kehadiran tanpa syarat bukanlah suatu langkah dalam proses mahkamah. Oleh yang demikian, pihak yang berniat menyelesaikan pertikaian melalui timbang tara perlu membuat permohonan penginapan dan tidak perlu kuatir samada kemasukan kehadiran yang diperlukan adalah bersyarat atau tanpa syarat.

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LIST OF ABBREVIATION

AC	-	Appeal Cases Law Report
All ER	-	All England Law Report
AMR	-	All Malayan Report
BLR	-	British Law Report
Ch	-	Law Report, Chancery Division
CLJ	-	Current Law Journal
CLJ Supp	-	Current Law Journal Supplement
FSR	-	Fleet Street Report
HKC	-	Hong Kong Cases
KB (or QB)	-	King's (or Queen's) Bench
MLJ	-	Malayan Law Journal
MLJU	-	Malayan Law Journal Unreported
WLR	-	Wales Law Report

CHAPTER 1

INTRODUCTION

1.1 Introduction

Construction activities involve many parties like contractors, employers, architects, engineers, and developers¹. Because of that, problems may occur such as like miscommunication, misunderstanding, etc, which later drag the parties into conflicts or disputes. If the problem goes in uncomfortable zone, it may cause serious problems such as delay in delivering projects, financial losses and endless dispute dilemmas.

Disputes in construction industry may be in the form of financial², legal³ or any other forms. It is an important subject that requires attention of the industry players. Depending on the standard form used, under PWD 203A (Rev. 1/2010), once dispute occurs the first means of resolving it is through Superintending Officer

¹ Nor Azmi Bin Bakhary (2003). *Arbitration in Malaysia Construction Industry*. Universiti Teknologi Malaysia : Master of Construction Management

² Mersing Construction and Engineering Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Ors [2011] 3 MLJ 264; Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd and another appeal [2011] 2 MLJ 606; Liew Yin Yin Construction Sdn Bhd v Tan Teck Seng (sued for and on behalf of *Pertubuhan Penyokong-Penyokong Tokong Ra-Chiar Jelapang*) [2010] 7 MLJ 826

³ Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656

(S.O.)⁴. If the dispute is not resolved at the contract administrator's level, such dispute shall be referred to arbitration⁵. There are many types of disputes resolution method available in construction contract such as arbitration, mediation, adjudication, negotiation and litigation⁶.

Almost all of the contract forms in Malaysia provide arbitration as disputes resolution⁷. These forms are IEM CE 1/89, CIDB (2000), PWD 203 (rev 1/2010) and PAM 2006. From the above only PAM 2006 and CIDB 2000 provide for a mediation as an option. However in the case of CIDB 2000, mediation is compulsory and disputing parties must attempt to resolve any disputes between them first by mediation before arbitration. Whereas in PAM 2006 provide the dispute resolution through mediation only an option⁸. The concept of arbitration is a resolution of conflict by submission of a dispute between two parties for a decision to third party of their own choice⁹. Arbitration is an alternative to litigation and as a method of conflict resolution¹⁰.

This alternative resolution must have an agreement to refer disputes to arbitration¹¹. The agreement must be in writing for it to be a valid arbitration agreement¹². Arbitration proceedings deemed to start on the date of claimant received notice to arbitration¹³. According to Abdul Malik Ishak J in *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor*¹⁴ High Court (Kuala Lumpur), “an agreement to arbitrate is like a contract and it must be clear and certain”. It will be construed to be void for uncertainty if its meaning is so

⁴ Clause 66 PWD 203 (Rev 1/2010)

⁵ Ibid

⁶ Nor Azmi Bin Bakhary (2003). *Arbitration in Malaysia Construction Industry*. Universiti Teknologi Malaysia : Master of Construction Management

⁷ Clause 55 for IEM. CE 1/89, Clause 34.5 for PAM 2006 , Clause 47.3 for CIDB (2000) and Clause 66 for PWD 203 (rev 1/2010)

⁸ Clause 34.5 for PAM 2006 and Clause 47.3 for CIDB (2000)

⁹ Haniz Zuraiha Zaharullil (2009). *Enforcement and Challenging of Arbitration Award*. Master Construction Contract Management

¹⁰ Vincent Powell, John Sims (1989), *Construction Arbitration; A practical guide*, at page 1

¹¹ Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656

¹² Arbitration Act 2005 Section 9(3)

¹³ Article 3 KLRC Arbitration Rules (as revised in 2010)

¹⁴ [2008] 5 MLJ 254; through Tan Kok Cheng & Son Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273

ambiguous that it is incapable of being construed to give the agreement a certain degree of certainty.¹⁵ The insertion of arbitration clause in the standard forms of contract, in a properly executed contract, provides a valid arbitration agreement¹⁶.

In Contracts Act 1950¹⁷; it is stated that *agreement to restrain legal proceedings is void*. Under explanation 1, *referring dispute which may arise to arbitration agreement does not meant restrain legal proceedings*. An arbitration agreement does not restrain or prohibit either one of the contracting parties from referring their disputes to the Court¹⁸. In certain circumstances, a contracting party may take a contra step by not referring the dispute to arbitrator but take it directs to court¹⁹. Pursuant to section 10 of the Arbitration Act 2005 or section 6 of the Arbitration Act 1952, the opposing party may apply for a stay of proceedings to court. The Court is served to set the discretion whether to continue the dispute in court or through arbitration²⁰.

In dealing with a stay application, if the subject matter of the dispute is within the scope of the arbitration agreement, the Court may grant the stay²¹. If parties choose to determine for themselves that they will have domestic forum instead of resorting to court, the Court is to act upon such an agreement²². Court could exercise its discretion to stay and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration²³. Court has discretion to give effect to the agreement for arbitration and need not do so if it thinks is better to do otherwise²⁴. In making

¹⁵ Khutubul Zaman Bin Bukhari. *Arbitration and Mediation in Malaysia*. at page 2

¹⁶ D.A. Stephenson (1993). *Arbitration Practice in Construction contract*. 3rd Ed.

¹⁷ Section 29

¹⁸ Croudace v The London Borough of Lambeth (1986) (33 BLR 20)

¹⁹ Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656

²⁰ Tommy CP Sze & Co v Li & Fung (Trading) Ltd & Ors [2003] 1 HKC 418

²¹ Susu Lembu Asli marketing Sdn Bhd v Dutch Lady Milk Industries Bhd [2004] 2 MLJ 230; Deutz Asia-Pacific (Pte) Ltd Champ parts & Equipment Sdn Bhd [2002] 6 MLJ 29; Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872

²² Lord Selborne in Willesford v Watson (1873) LR 8 Ch 473; Lee Brothers Construction Co v The Teng Seng Realty Sdn bhd [1988] 1 MLJ 459

²³ K.V.Padmanabha Rau (1997). *Law of Arbitration (Cases and Commentaries)*. Kuala Lumpur Malaysia: International Law Book Services at page 60

²⁴ Observation by Gopal Sri Ram JCA in Tan Kok Cheng & Son Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273; K.V.Padmanabha Rau (1997). *Law of Arbitration (Cases and Commentaries)*. Kuala Lumpur Malaysia: International Law Book Services at page 63

decision in this matter, court is bound by the Arbitration Act 1952 and Arbitration Act 2005.

However, the party that applies for a stay must be very careful because, in the Arbitration Act 2005²⁵ it is mentioned that a stay will be granted if the party has not taken any other steps in the proceedings. Taking step in the court proceedings might disentitled parties in contract from stay application. The issue of “*before taking any other steps in the proceedings*” in the stay application for arbitration is not obsolete to be discussed, but giving the applicant-defendant a plenty space to success in the stay application²⁶.

1.2 Problem Statement.

The Court has power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration²⁷. The Arbitration Act 1952 section 6 it provides a discretionary power to grant stay, while the Arbitration Act 2005 section 10 it provides an absolute mandatory power to grant a stay²⁸. Basically, stay will not be granted if the applicant has taken steps in the proceedings. Arbitration Act 1952 section 6 and Arbitration Act 2005 section 10 highlight that a stay of proceedings pending arbitration will be granted if the applicant has not taken any other steps in the proceedings.

Parties entering appearance and files a defense is considered having taken steps in the proceedings within the meaning of Arbitration Act 1952 section 6 and

²⁵ Section 10 and Arbitration Act 1952 Section 6

²⁶ Sundra Rajoo , The Arbitration Act 2005 Perspective

²⁷ Malaysia Government Officers’ Co operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113

²⁸ Sundra Rajoo, The New Malaysia Arbitration Regime 2005

Arbitration Act 2005 section 10. He then is precluded from taking advantage of the remedy of arbitration²⁹. Taking step in the proceedings without in any manner, questioning the jurisdiction of the Court to try the main action, would amount to waiver of the rights of the parties to go to arbitration³⁰.

Arbitration Act 1952 section 6 provides that the applicant-defendant should apply for a stay before taking any step in the proceedings. According to the Peh Swee Chin J (as he then was)³¹ OCJ Ipoh, “*the applicant should apply for a stay before taking any step in the proceedings after appearance*”. The wording in Arbitration Act 1952 of section 6 regards this condition as in *pari material* with the corresponding section 4(1) of the English Act of 1950 except for the words before a party has delivered “*any pleadings*” which appear in the English legislation but not in the Arbitration Act 1952 section 6³² and Arbitration Act 2005 section 10.

Hold with the Act and decided cases, entering appearance in arbitration does not the same as entering appearance in litigation which as per the Rules of High Court 1980, it’s a mandatory procedural step to be taken³³. In the arbitration, entering appearance does not amount to taken ‘step in the proceedings’³⁴. Basically “*taking step*” in the proceedings is serving pleading³⁵.

The expression ‘steps in the proceedings’ being general in terms has given rise to a number of claims and contentions attempting to bring in various aspects of procedure into its fold so as to achieve the rejection of the applications for stay. Stay will not be granted if the applicant has taken steps in the proceedings after entering

²⁹ Mohtar Abdullah FCJ; Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625

³⁰ Thamesia Design Sdn Bhd Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25

³¹ Lee Brothers Construction Co v The Teng Seng Realty Sdb Bhd [1988] 1 MLJ 459

³² Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co [1986] 1 MLJ 347

³³ Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625

³⁴ Ibid

³⁵ Ibid

appearance in the court proceedings. The applicant must unequivocally elect to refer the matter to arbitration³⁶.

1.3 Objectives of the study

The objective of this dissertation is to determine factors that the Court will take into consideration when the parties have entered an unconditional appearance before granting or rejecting application for a stay based on Arbitration Act 1952³⁷ and Arbitration Act 2005³⁸.

1.4 Scope and limitation of study

This dissertation is limited to the scope of:

1. Reported and Unreported Cases in application for a stay of court proceedings specific to conditional and unconditional appearance by Malaysian Law Journal.
2. Arbitration Act 2005 section 10 and Arbitration Act 1952 section 6 regarding conditional and unconditional appearance.

³⁶ Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; Teknik Cepak Sdn Bhd v Nirwana Indah Sdn Bhd [1996] 4 MLJ 154

³⁷ Section 6

³⁸ Section 10

1.5 Significant of study

The subject of entering conditional and unconditional appearance is an important subject that is involved in the application of stay. Thus by taking appropriate steps it gives the applicant space for a prayer for the court proceedings to be stayed pending reference to arbitration. Whether the application is granted or refused is important for the applicant to know which kind of step does not amount to taking step in proceedings as per Arbitration Act 2005 section 10 and Arbitration Act 1952 section 6. At this stage, appearance will subsequently assist the applicant toward more selective space in facing the dispute without taking step in the proceedings thus entitling the stay application granted.

1.6 Research Methodology

The following are the methodologies and schemes approach that have been applied for this studies:-

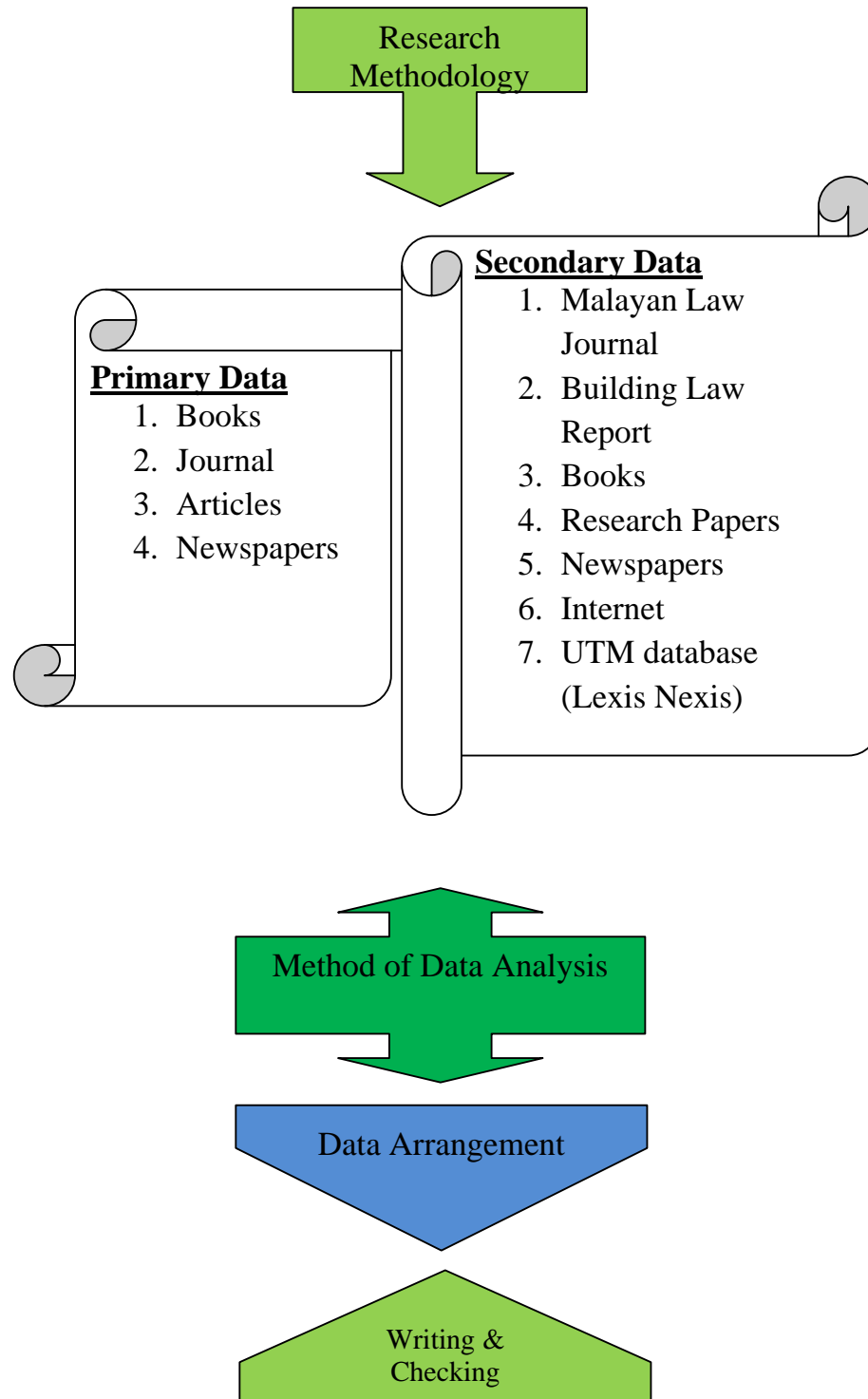
- a) **Primary Data;** this would give an introduction to arbitration in the Malaysia's construction industry, the concepts of taking step, stay be refuse or grant and fundamental solution to it. This is purposely to identify the issue from an intensive reading material such as books, journal, articles and newspapers cut which can be found from the UTM library.
- b) **Secondary Data;** after the issued has been identified, then the secondary data collection can be collected from the latest reading materials in printing form such as Malayan law journal, building law report, books, journal, research

papers, reports, newspaper, internet and etc through UTM database (Lexis Nexis).

- c) **Data Analysis;** data analysis Methodology will be used so that the research will be conducting in the systematic way to achieve the objective. In addition, the data analysis is major part to support the objective. This part will focus to any court cases decided which has been review and analyze in order to discuss the feature of circumstances of appearance.

- d) **Summary formation and report writing;** this part will included the summary of discussion and conclusion has been made from the analysis. Some recommendation will be suggested for the future study and final report will be formatted accordingly.

e) Methodology flow chart



1.7 Dissertation Structure

The followings are the summary of each chapter on this research project paper. This project paper will contains 5 chapters as follows:

a) **Chapter 1: Introduction**

Basically, the first chapter of this research is on the background of the study and it comprises of introduction, issues and problem statements, objectives, scopes and limitations, literature reviews, research significance, methodology and chapter summary to give an overview of the research.

b) **Chapter 2 : Stay of Court Proceedings**

This chapter is based on literature reviews, Arbitration Act 1952 and Arbitration Act 2005. The topics in this chapter include explanation of factors take into consideration by the Court to grant stay, procedure to be fulfilled in granting stay and taking step in the proceedings based on Arbitration Act 1952 and Arbitration Act 2005.

c) **Chapter 3 : Entering Appearance**

The topics in this chapter discuss about entering appearance in general. Type of entering appearance in court cases which will be reviewed and analyzed. Influence of entering appearance in successfulness in the striking out application.

d) **Chapter 4 : Unconditional and Conditional Appearance**

The topics in this chapter discuss about entering appearance in arbitration. Type of entering appearance in court cases which will be reviewed and analyzed. The influence of entering appearance those make successfulness in the stay application. Factor that court take into consideration to refuse or grant the stay when the defendant has entered appearance.

e) **Chapter 5 : Conclusion and Suggestion**

The last chapter wills summaries and discusses the finding on the data collected and made the conclusion and recommendation.

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