

THE PROFILE OF CONSTRUCTION DELAY CASES

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DEDICATION

“To my beloved parents and family”
Thanks for your support, guidance and everything

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ABSTRACT

Construction industry has been increasingly recognizing the need for more efficient and timely projects completion. However, there remain a number of unexpected problems and changes from the original design. This will arise during the construction phase which often leads to many negative effects such as increased costs, lost productivity and revenue, contract termination, arbitration or litigation and even total abandonment of the project. Therefore, this research is set out to develop a profile of the delay in construction projects which lead to disputes. The profiling of the cases has been done based on the year, types of parties involved, time of delay disputes occur, nature of delay disputes and court judgment for the construction delay disputes that have been occurring in Malaysian construction industry. The approach adopted in this research is case law based; only cases in Malaysia between years 1961-2010 reported by Malayan Law Journal specifically centered on issue of delay disputes will be centered in this study. A total number of 18 cases were studied and the results show that the number of construction delay disputes cases is the highest between years 1991-2000. Most of the causes of delay dispute incurred in construction industry being debated in the court suit are mainly committed by the employer which includes late site possession, late payment, late instructions, late drawings and specifications as well as suspensions of work. It also highlighted that most delay disputes cases in construction industry generally occurred when financial conflict such as loss of profit, damages claim, non-payment reimbursement, non-certified work done and so forth between the contractual parties take place as a result of construction delay. In summary, findings of this research will be able to increase the awareness of the construction players of the current scenario in relation to construction delay issues as well as to assist them in addressing and overcoming the problems associated to delay disputes in Malaysian construction industry.

ABSTRAK

Industri pembinaan telah semakin menyedari keperluan supaya projek-projek boleh siap lebih cekap dan tepat pada masanya. Walau bagaimanapun, masih terdapat beberapa masalah yang tidak dijangkakan dan perubahan daripada rekabentuk asal. Ini akan timbul semasa fasa pembinaan yang sering membawa kepada banyak kesan negatif seperti peningkatan kos, kehilangan produktiviti dan hasil, penamatan kontrak, timbang tara atau litigasi dan projek terbengkalai. Oleh itu, kajian ini memaparkan profil kelewatan dalam projek pembinaan yang membawa kepada pertikaian. Profil kes telah dijalankan berdasarkan tahun, jenis pihak yang terlibat, masa pertikaian kelewatan berlaku, jenis pertikaian kelewatan dan penghakiman bagi pertikaian kelewatan pembinaan yang telah berlaku dalam industri pembinaan Malaysia. Pendekatan yang digunakan dalam kajian ini adalah berasaskan kes undang-undang; kes di Malaysia sahaja di antara tahun 1961-2010 yang dilaporkan dalam *Malayan Law Journal* yang berkaitan dengan isu pertikaian kelewatan akan dipaparkan dalam kajian ini. Sebanyak 18 kes telah dikaji dan hasil kajian menunjukkan bahawa bilangan kes-kes pertikaian kelewatan pembinaan adalah yang tertinggi di antara tahun 1991-2000. Kebanyakan punca-punca pertikaian kelewatan yang ditemui dalam industri pembinaan yang dibahaskan dalam saman mahkamah adalah berpunca daripada majikan termasuklah penyerahan tapak lewat, bayaran lewat, arahan dan spesifikasi lewat dan pergantungan kerja. Ia juga menekankan bahawa pertikaian untuk kebanyakan kes kelewatan dalam industri pembinaan secara amnya berlaku apabila konflik kewangan seperti kehilangan keuntungan, tuntutan ganti rugi, kelewatan pembayaran balik, kerja yang dilakukan belum disahkan dan sebagainya di antara pihak-pihak kontrak yang berlaku sebagai hasil daripada pembinaan yang lambat. Secara ringkasnya, penemuan kajian ini akan dapat meningkatkan kesedaran peserta pembinaan senario semasa berhubung dengan isu-isu kelewatan pembinaan serta untuk membantu mereka dalam menangani dan mengatasi masalah yang berkaitan untuk pertikaian kelewatan dalam industri pembinaan di Malaysia.

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LIST OF ABBREVIATION

AC	Appeal Cases, House of Lords
All ER	All England Law Reports
ALJR	Australia Law Journal Reports
AMR	All Malaysia Reports
BCL	Building and Construction Law Cases
BLR	Building Law Report
Con LR	Construction Law Reports
C&P	Carrington & Payne's Nisi Prius Reports
ER	Equity Reports
JP	Justice of the Peace / Justice of the Peace Reports
KB	Law Reports, King's Bench Division
LT	Law Times Reports
MLJ	Malayan Law Journal
QB	Law Reports: Queen's Bench Division
PWD	Public Work Department
PAM	Persatuan Arkitek Malaysia
SO	Superintending Officer

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CHAPTER 1

INTRODUCTION

1.1 Background of the Research

In Malaysia, construction industry is one of major industry which plays a significant role as a major contributor to overall economic growth of the country. Over the last 20 years, the industry has consistently contributed approximately 3% to 5% of the national Gross Domestic Product (GDP)¹. Despite of its great economic importance, the nature of construction industry which is complex, fragmented, schedule and resource driven industry, problems such as low productivity, delay and cost overrun often occur.

Construction projects are very complex with many mutually dependant and interrelated operation which tend to be longer duration than other industry. Every employer usually expects the projects to be built for lowest possible price, within the agreed time frame, technically sound and aesthetically pleasing². A construction project is commonly acknowledged as successful, when it is completed on time,

¹ CIDB. (2009). *Construction Industry Review 1980-2009 (Q1)*. Construction Industry Development Board Malaysia. Kuala Lumpur, Malaysia.

² Cheng, T., Wong, E. and Soo. G. (2004). *Construction Law and Practice in Hong Kong*. Hong Kong: Sweet and Maxwell Asia. p. 346

within budget, in accordance with the specifications and to clients' satisfaction. Hence, any disruptions to the project objectives will certainly contribute to project delays with its specified adverse effects on the project objectives.³

Normally, the building under construction may be contractually required on a particular date. Majority of the construction contract often stipulated a particular date for possession and a date for completion in the contract and the contractor is bound to complete the construction of the works within the prescribed period of time⁴. If the contract is one in which time is of the essence, failure by the contractor to comply with this obligation is a breach of contract that will entitle the other party to terminate the contract and claim for damages. This is clearly stated out in *Percy Bilton Ltd v Greater London Council*⁵:

“the general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer....subject to exception that the employer is not entitle to liquidated damages if by his acts or omissions he prevented the main contractor completing his work by completion date.”

However, with advancement in technology and mammoth requirement of infrastructure, there have been increase in size and complexities in the nature of projects. Many construction projects suffer from delays nowadays where majority of the building projects usually cannot be accomplished within the stipulated contract period⁶. When projects are delayed, they are either accelerated or have their duration extended beyond the scheduled completion date which will incur additional cost.

³ Abdelnaser Omran, Ooi Ai Ling, Abdul Hamid Kadir Pakir and Mahyuddin Ramli . (2010). Delays Factors in Construction Projects Development: The Case of Klang Valley, Malaysia. *Journal of Academic Research in Economics* . Vol 2 (2). p. 135 - 158

⁴ Cheng, T., Wong, E. and Soo. G. (2004). *Construction Law and Practice in Hong Kong*. Hong Kong: Sweet and Maxwell Asia. p. 346

⁵ [1982] 26 BLR 1

⁶ Shen, L. Y., Fisher, N. and Sun, C.S. (2001). An Analysis of the Distribution of Cost Variance for Building Projects. *Journal of Construction Research*. , 2, p. 35-40

1.2 Problem Statement

Construction time is increasingly important nowadays which often serves as a crucial benchmark for assessing the performance of a project⁷. Client or consumers are no longer content merely with minimal cost, adequate functional performance, increasing interest rates, inflation and other commercial pressures but shows concern on the shortest possible time of having building project completed⁸. This is where projects have tended to become more time-constrained and the ability to deliver a project quickly is becoming an increasingly important element in winning a bid.

However, delays remain as a major problem in most of the construction projects in Malaysia and its extent varies considerably from project to project. Some projects are only a few days behind schedule while some are delayed by over a year⁹. In 2009, Works Minister of Public Works Department reported that there were up to 80 percent of government development projects in Malaysia were behind their scheduled completion dates¹⁰. Meanwhile, according to statistics released by Ministry of Housing and Local Government in 2010, there are about 117 housing projects which were considered sick with more than three months delays or abandoned in Malaysia, involving a total of 56,350 housing units and effecting more than 25,000 house buyers¹¹.

⁷ Chan, A. PC and Chan, D, WM. (2002). Benchmarking Project Construction Time Performance: The Case of Hong Kong. *Project Management: Impresario of the Construction Industry*, Hong Kong in 22nd-23rd March 2002.

⁸ Nkado, R.N. (1995). Construction Time Influencing Factors: The Contractor's Perspective. *Construction Management and Economics*, 13, p. 81-89

⁹ Ahmed, S.M., Azhar, S. Kappagtula, P. and Gollapudial, D. (2003). Delays in Construction: A Brief Study of the Florida Construction Industry. *Proceeding of the 39th Annual ASC Conference*, Clemson University, Clemson. p. 257-266

¹⁰ Joshi, M. (2009, June 1). *80 per cent of Malaysian government projects delayed, minister says*. [online] Available at: <http://www.topnews.in/80-cent-malaysiangovernment-projects-delayed-minister-says-2173299> [Assessed on 14 Mar 2012]

¹¹ Ministry of Housing and Local Government (2011). *Statistics Report of Ministry of Housing and Local Government 2010*. Kuala Lumpur

Delays in construction project tend to lead to disruption of work and late completion of project, time and cost overruns, disputes, termination, arbitration and even total abandonment¹². To employers, the later the completion date, the later they will obtain a return from their investment meanwhile to the contractor, a delay means the contractor's manner of performance may be impacted by the attempts to accelerate, lost productivity and efficiency; and changes to the sequencing of the work that resulted in increased costs of overhead because of longer work period, higher material costs through inflation and increase in labour cost¹³.

The most significant unanticipated cost associated with delay and disruption to the works in most construction projects is the financial impact. Assessing the impact of delay and disruption and establishing a direct causal link from a delay event to effect, liability and resulting damages can be difficult and complex. Where these delay issues are not resolved by the contract administrator and contractor in the normal commercial way, then such issues are often left to be decided by third parties in arbitration or adjudication before dispute review boards or ultimately in litigation¹⁴.

Over the years, many construction delay claims have been referred to arbitration or lined up in court. They are either brought up by the employer, contractors, sub-contractors, suppliers and/or consultants. The settlement of delay claims through this method often tends to hampers the project progress if dispute arises during execution stage. The relationship between owner and contractor will also be negatively affected by the disputes, claims, abandonment or termination resulting from delays¹⁵.

¹²Abdul Rahman, H., Berawi, M.A., Mohamed, O., Othman, M. and Yahya, I.A. (2006). Delay Mitigation in the Malaysian Construction Industry. *Journal of Construction Engineering and Management*. Vol. 132 (2). p. 125-133

¹³Bramble, B. B. and Callahan, M.T. (1987). *Construction Delay Claims*. Canada: John Wiley & Sons.

¹⁴Keane, P.J. and Caletka, A.F. (2008). *Delay Analysis in Construction Contracts*. UK: Blackwell Publishing Ltd. p.2

¹⁵Iyer, K.C., Chaphalkar, N.B. and Joshi, G.A. (2008). Understanding Time Delay Disputes in Construction Contracts. *International Journal of Project Management*, 26, p.174-184

Since delay in construction project tend to lead to serious consequences that may retard the development of the construction industry and influence the overall economical condition of a country, therefore it is essential to define the actual causes of delay in order to minimize and avoid delays in any construction project. This is where the construction practitioners can be able to anticipate the problem at the early stage of the project and generate strategies to alleviate the root causes of these problems in order to provide a better time and cost performance on future construction projects.

1.3 Objective of the Study

The objective of this research is to develop a profile of the delay in construction project which leads to disputes.

1.4 Scope of the Study

The scope of this research will be confined to the following areas:

- i) Only construction cases will be discussed in the study.
- ii) Related Malaysian court cases specifically centered on the issue of construction delay disputes reported in Malaysia Law Journal (MLJ) from the year 1961 – 2010.

1.5 Significance of the Study

This research may provide an insight of the current problems in relation to delay issues encountered in the Malaysian construction industry. The findings of the research will assist the construction players such as clients, contractors, consultants and designers to have full understanding of their legal obligations and liability at the early stage of the project development in order to prevent and minimize delays occurrence in construction of building projects.

This research also provides a useful framework for construction players to develop a project management solution and to select appropriate strategies that may be adopted to avoid or mitigate the adverse consequences of delay causes in construction projects so that unnecessary disputes can be avoided and assuring project success.

1.6 Research Methodology

In order to achieve the research objectives, careful thought and planning in the preparation of the research methods, data collection techniques and measurements is very important for conducting research. The detail methodology established for the research is divided into several essential steps as shown in Figure 1.1.

1.6.1 First Stage: Initial Study

Firstly, initial study has been undertaken involving extensive reading to obtain an overview of the concept of this topic. In order to identify the issue, general reading on variety sources of published materials such as seminar papers, journals, articles, previous research report and electronic resources through the World Wide Web and online databases from library of Universiti Teknologi Malaysia, PSZ's website were done. The research issue, objective and scope of the study as well as the research methodology are then being determined. The research topic and outline was then formulated to guide the progress of the whole research.

1.6.2 Second Stage: Data Collection

In this stage, various documentation regarding to the research field were collected to achieve the research objectives after the research issue and objectives have been identified. There were two types of data being collected which includes primary and secondary data.

Generally, primary data was collected mainly from Malayan Law Journals, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. Data was collected by browsing through the Lexis-Nexis Malaysia Legal Database. Meanwhile, secondary data was collected from journals, articles, books, seminar papers, conference articles, internet, and varies Standard Forms of Contract.

This is an important stage towards achieving the objectives where relevant cases were collected based on the secondary data from the published resources and used for the analysis at the later stage.

1.6.3 Third Stage: Data Analysis

In this stage, all the collected cases, information, data, ideas, opinions and comments were arranged, analyzed and also interpreted. This is started with the case studies on the legal court cases. The analysis was conducted by reviewing and clarifying all the facts and issues of the case. This followed by a thorough discussion for each issue to achieve objectives of the study.

1.6.4 Final Stage: Conclusion and Recommendations

The final stage of the research process mainly involved the writing up and presenting the research findings. In this stage, discussions were done based on the findings from previous stage to fulfill the objective of the research and reach a conclusion. Recommendations for further research were made as a suggestion for future researcher.

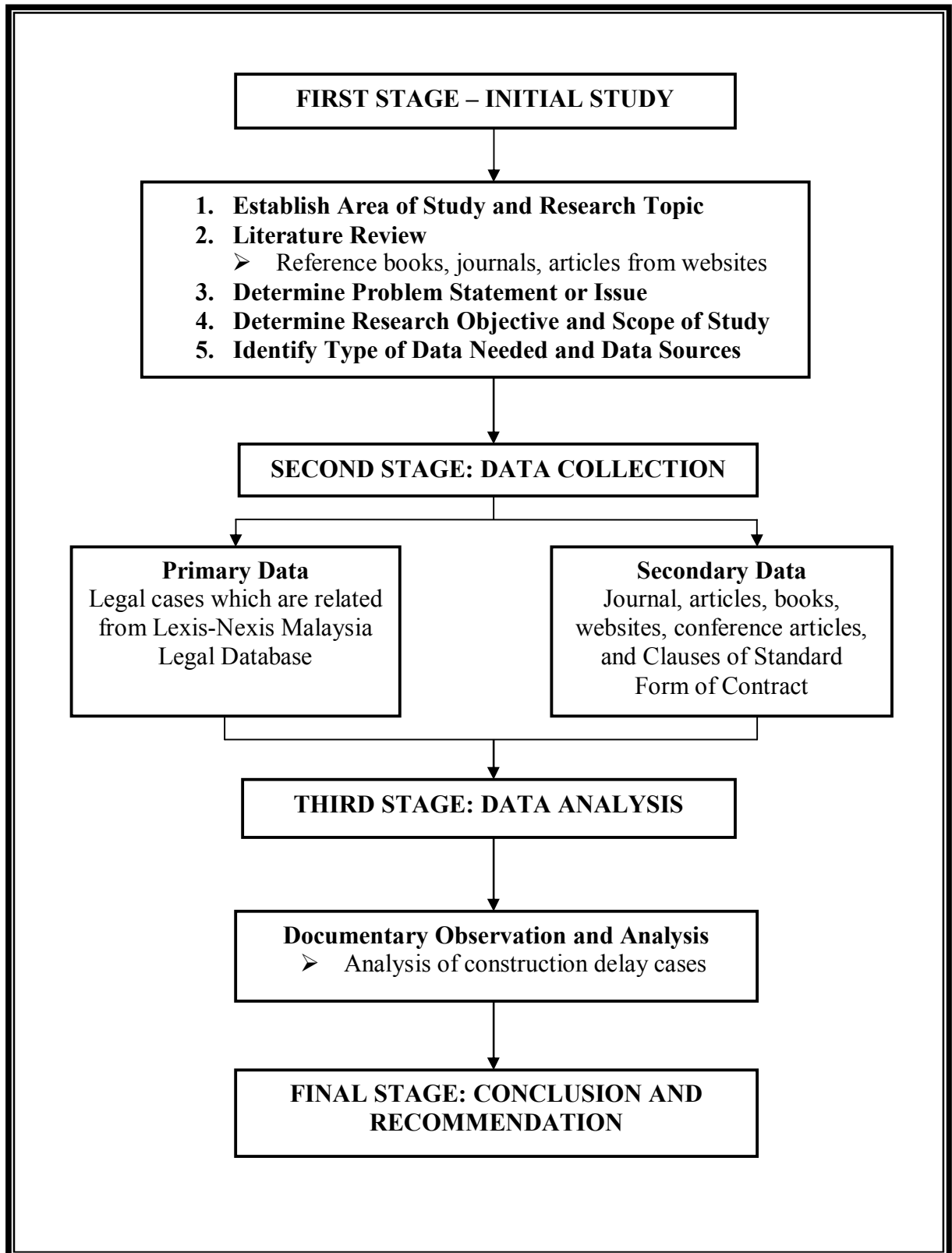


Figure 1.1: Research Methodology

1.7 Organisation of The Research

This research covers five (5) chapters as follows:

a) Chapter 1 – Introduction

This chapter provides the overview of the research. It contains the background of the research, problem statement, objectives of the study, scope of study, significance of the study, research methodology and summary organization of the research.

b) Chapter 2 – Delays in Construction Industry

This chapter discusses the contractor's roles and obligations to complete the work on time as well as provides the overview of definition of delays and the common types of delays as well as the general causes of construction delays. It also explained about condition precedent to extension of time, right and obligation on both parties and also overview on the provisions based on PAM 2006, PWD 203A and under the principle of common law.

c) Chapter 3 – Profile Methodology

This chapter discusses the concept or theoretical background of profiling including the definition and its importance to the construction industry. This chapter also provides the overview on the elements of profiling such as year of cases, types of parties involved, time of occurrence of delay disputes, nature of delay disputes and court judgment.

d) Chapter 4 – Profile of Court Cases in Relation to Delay Disputes in Construction Industry

This chapter presents the data and analyzed the results from the judicial decisions as reported in law reports and further profiling the features or attributes of the construction delay disputes cases to identify the common circumstances that lead to delay in construction industry. The analysis done determines the year of cases, types of parties involved, time of occurrence of delay disputes, nature of delay disputes and the court judgment.

e) Chapter 5 – Conclusion and Recommendation

This chapter consolidating the results and findings of the research related to the research objectives. It also contains the possible measures available to avoid the delay disputes, the problems encountered during the research as well as the recommendations for future researches will also be discussed.

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