

COMPARATIVE STUDY OF DEFECT LIABILITY PERIOD PRACTICES
BETWEEN MALAYSIA AND NIGERIA

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DEDICATION

In blessed memory of my Dad: late Elder Frederick.O. Alejo. May your soul continue to rest in perfect peace of the lord? I miss you...

ACKNOWLEDGEMENT

The ultimate gratitude goes to the Almighty God for his mercy that endureth forever in my life

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Finally, I am too grateful to my entire family members for their unconditional love, unflinching support and encouragement throughout my studies. I shall make it up to you.

Abstract.

Defect liability period is the period contractor is liable to make good of the defects but how reasonable is the defects liability period to allow defects (patent and latent) to manifest? This thesis examines the occurrence of defects during and after the defect liability period and the contractual terms of defects between Malaysia and Nigeria. Federal university of technology, Akure, Nigeria and Universiti Teknologi, Malaysia (Skudai campus) were chosen as case study areas. Findings from the study revealed that 12months defects liability period practice in Malaysia is reasonable enough to allow defects to manifest within the period. whereas in Nigeria most of the defects manifestation often occur after the 6 months defect liability period which really poses a major threat on employers and amount to economic loss. The study suggests extension of defects liability in Nigeria to 12 months as is done in Malaysia so as to allow the employer to have value for money invested.

ABSTRAK

Tempoh liabiliti kecacatan adalah kontraktor tempoh adalah bertanggungjawab untuk membuat baik kecacatan tetapi bagaimana yang munasabah adalah tempoh liabiliti kecacatan untuk membenarkan kecacatan (paten dan pendam) yang nyata? Tesis ini mengkaji berlakunya kecacatan semasa dan selepas tempoh liabiliti kecacatan dan syarat-syarat kontrak kecacatan antara Malaysia dan Nigeria. Persekutuan universiti teknologi, Akure, Nigeria dan Universiti Teknologi Malaysia (Skudai kampus) telah dipilih sebagai kawasan kajian kes. Hasil kajian menunjukkan bahawa 12months kecacatan liabiliti tempoh latihan di Malaysia adalah cukup munasabah untuk membolehkan kecacatan pada yang nyata dalam tempoh. manakala di Nigeria kebanyakan manifestasi kecacatan sering berlaku selepas 6 bulan tempoh liabiliti kecacatan yang benar-benar menimbulkan ancaman utama terhadap majikan dan jumlah kerugian ekonomi. Dapatan kajian ini mencadangkan lanjutan liabiliti kecacatan di Nigeria hingga 12 bulan seperti yang dilakukan di Malaysia untuk membolehkan majikan mempunyai nilai untuk wang yang dilaburkan.

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LIST OF ABBREVIATIONS

ABBREVIATION	TITLE
AC	Appeal Cases, House of Lords
All ER	All England Law Reports
ALJR	Australia Law Journal Reports
AMR	All Malaysia Reports
OAD	Office of Asset and Development
BCL	Building and Construction Law Cases
BLR	Building Law Reports, UK
Con LR	Construction Law Reports
ER	Equity Reports
FUTA	Federal University of Technology, Akure.
ICR	Industrial Cases Reports
ILR	International Law Reports
IR	Irish Reports
JCT	Joint Contract Tribunal
JP	Justice of the Peace / Justice of the Peace Reports
LIL Rep	Lloyd's List Reports
MLJ	Malayan Law Journal
NSWLR	New South Wales Law Reports

PWD	Public Works Department
QB	Law Reports: Queen's Bench Division
QSR	Queensland State Reports
SC	Session Cases
SCR	Supreme Court Reporter
SLR	Singapore Law Reports
UTM	Universiti Teknologi Malaysia
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Background of Study:

The causes of building collapse in Nigeria can be traced to abnormal factors not obtainable in many other developing nations like Malaysia. All over the world structural defects occur, but rate of occurrence in Nigeria is beyond bound. Aside from the generally known causes of collapse such as ageing, material fatigue, design flaws, extreme operational, environmental conditions, natural hazards, accidents and terrorist attacks, the Nigeria factor becomes a prominent issue to contend with¹. The defect liability period practice in Nigeria compare to other developing countries is the major issue to contend with. This study is aimed to conduct a comparative study of defects liability period of building construction practices between Malaysia and Nigeria in accordance with the standard form of contract. Research has proved that significant proportion of fund are for the rectification work to correct defects at the point when the

¹Ede, A. N. (2010). "Structural Stability in Nigeria and Worsening Environmental Disorder: the Way Forward". The West Africa Built Environment Research Conference Accra Ghana, July 26-28, 2010, pp 489-498.'

building is completed, while some fund are spent to rectify defects that appear during the building life.²

Cama³ defines defect in the context of a building contract as ‘a failure of the completed project to fulfill the quantity obligation or implied quality or express quality of the construction contract. Defect is defined by law as failure of any building component or failure of the building to be erected in a reasonably workmanlike manner. Sweet⁴ and Marianne⁵, define construction defects as a failure of a building component to be erected in the appropriate manner.

In construction projects delivery, construction defects are inevitable and are usually contentious between the contractor or sub-contractors and employer. The unacceptable qualities of a project which can be identified and remedied are the construction defects.

² Hassan. F; Ismail. Z; Isa. H.M and Takim.R (2011). Tracking Architectural Defects in the Malaysian Hospital Projects. 2011 IEEE Symposium on Business, Engineering and Industrial Applications (ISBEIA), Langkawi, Malaysia. Pp229.

³ Cama, J. (2004). Who Pays to Fix Building Defects? American Systems USA inc. Berrymans Legal Consultants. Chan (2002),

⁴ Sweet, J. J. (1993). Avoiding or Minimizing Construction Litigation. San Jose California: Wiley Law Publication.

⁵ Marianne, J. (2005). Building defects spoil homeowners’ dreams. Portland: The Oregonian News. The Aldrich Law Office, P.C. 522 SW 5th Avenue.

Patent and latent defects are two main categories defects can be classified. Patent defects can be detected by normal testing or examination but latent defects take time to manifest after a period of time. It cannot be discovered by normal examinations.⁶

Contractor(s) obligation comes to an end after the issuance of certificate of practical completion and defects due to materials and poor workmanship not in accordance with the contract terms or clauses are required to be remedied at the contractor cost.

In construction contracts it is common to require the contractor to warrant that the works upon completion are free from defects and to make good defects which occur during the defects liability period. Practical mechanism provision to the employer for the repair or making good of defects which may not be obvious before completion, without restoring to resolution is the defects liability period⁷. After the expiration of defects liability period and defects appeared, employer's remedy in most cases is limited to pursuing a legal claim in damages. Defect liability clause of JCT Standard Form of Contract stated that:

"... After receipt of such schedule the defects, shrinkages and other fault therein Specified shall be made good by the Contractor at no cost to the Employer ..."

⁶ Anon, 2007: *"What Are The Obligations Of The Contractor During Defect Liability Period?"*
The Entrusty Group, Master Builders, 1st quarter 2007

⁷ Malleasons Stephen Jaques, 2003. "Defects Liability Period - an introduction. Asian Projects and Construction Update."

1.2 Problem statement

The case in the building cannot be different, as disobedience to civil laws is common in Nigeria. On this note, lawlessness finds a fertile ground in non-adherence to the building codes and hasty construction.⁸. Defects in building occur during construction, during defects liability period and post defects liability period. Most of the defects verified in the in the recent years occurred during construction stage⁹. In 2006, the council for the Regulation of Engineering in Nigeria (COREN) recommended the persecution of pharmacist who supervised a collapsed building in Port Harcourt in 2005¹⁰.

The high- lightened facts above can be buttressed by one of the recent collapse verified in Abuja (figure 1) at Ikole street. On the 11th of August 2010, thirteen people died in the collapse building; 35 persons were trapped in the debris while 10 persons were rescued¹¹.

⁸ Ede, A. N. (2010). "Structural Stability in Nigeria and Worsening Environmental Disorder: the Way Forward". The West Africa Built Environment Research Conference Accra Ghana, July 26-28, 2010, pp 489-498.

⁹ Ede, A. N. (2010). "Structural Stability in Nigeria and Worsening Environmental Disorder: the Way Forward". The West Africa Built Environment Research Conference Accra Ghana, July 26-28, 2010, pp 489-498.

¹⁰ Olajumoke, A. M., Oke, L. A., Fajobi, A. B. and Ogedengbe, M. O. (2009). "Engineering Failure Analysis of a Failed Building in Osun State, Nigeria" Journal of failed analysis and Prevention, Vol. 9, pages 8-15.

¹¹ Bukola Amusan (2010). Nine feared dead in Abuja building collapse
<http://thenationonlineng.net/web3/news/9389.html>



Fig.1.1 Catastrophic collapse at Ikole Street, Abuja of 11th August 2010 (courtesy The Nation on line)

After the issuance of final certificate the onus of the building is passed onto the employer and defects in building components may occur shortly after the defects liability period. Most of the defects are due to shoddy jobs and sub-standards materials the contractor used during the construction activities. This often poses unnecessary liability on the employer and often led to dispute.

Common types of construction defects include: faulty electrical wiring or defective and /or lighting; structural defects resulting in cracks or collapse; inadequate or faulty ventilation; heating; suppression systems/ inadequate fire protection and

inadequate heating or cooling systems; inadequate or faulty drainage systems; defective or faulty plumbing and inadequate sound proofing or insulation.¹².

According to Marianne¹³ these common types of constructions defects can be classified into the following four major categories: material deficiencies, design deficiencies, subsurface/geotechnical problems and construction deficiencies. The failure of the contractor to perform or negligently perform these responsibilities or duties constitute a breach, hence the contractor will be accountable or liable to employer who may have suffered as a result of contractor wrongful act. In *Greaves & co. v Bayham Meikle*¹⁴, Lord Denning M.R stated: ‘Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired results, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient nor does the solicitor warrant that he will win case’. Furthermore, in respect to defect liability, the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*¹⁵, the court held that the recovery of damages for breach of contract was not dependent or conditional on the plaintiff having a proprietary interest in the subject matter of the contract at the date of the breach. It was stated that the present owner could recover damages for defective work even though the owner suffered no actual damage as the building had been sold for full value before the damage was discovered.

¹² Kenneth. S. Grossbart. (2002). Construction Defects, An analysis of SB 800. Reeves Journal.ABI/INFORM Trade & Industry, pg.8 London: Spon Press.

¹³ Marianne, J. (2005). Building defects spoil homeowners’ dreams. Portland: The Oregonian News. The Aldrich Law Office, P.C. 522 SW 5th Avenue.

¹⁴ (1975) 1 WLR 1095

¹⁵ (1993) 3. AllE.R. 417

A similar case related to liability for defect, in the Supreme Court of Queensland, Sir Harry Gibbs in the case of *Director of War Service Home v Harris*¹⁶ said: “If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder of damages.” In this case the defective works carried out by the defendant for the plaintiff were not discovered until after the houses were sold. By the verdict of learned judge and agreed with by Stable and Hart JJ, that the employer is entitled to recover damages for the cost of rectification of the defective works.

A defects liability clause may also address the procedures for notifying the contractor of the defects which require remedy, the circumstances under which the defects liability period may be extended, as well as any limits on such extensions to the defects liability period¹⁷

‘Like the strings of a marionette puppet, after the completion of a New York construction project there are various legal theories that serve as ties between the builder and the owner’.¹⁸

‘For the builder, the sooner these lingering ties can be removed the less exposure they face for claims of defects. For the owners, the longer they are able to establish

¹⁶ (1968) Qd R 275

¹⁷ Monica Neo (2005), “*Construction defects: your rights and remedies*” Sweet & Maxwell Asia, Singapore, pp.24.

¹⁸ John Caravella, Esq.(2012). Construction warranty vs. statute of limitations between Builder and Owner, Construction law blog. Posted on Tue, April 17, 2012. Via: www.liconstructionlaw.com/construction-la (visited 18th April 2012).

these connections the longer they may have legal recourse against the builder for defects, should that be necessary? ¹⁹

In Malaysia, after the completion of the building project the defects liability period is 12 months whereas in Nigeria after the completion of the building project the defects liability period is 6months. This study is aim to investigate the effects of defect liability period in respect to the study area by conducting critical assessment of their existing defect liability policies and provide a recommendation policy on the appropriate defect period for building construction work. The flowcharts below are the contractor(s) liability to defects during defects liability period.

¹⁹ John Caravella, Esq.(2012). Construction warranty vs. statute of limitations between Builder and Owner, Construction law blog. Posted on Tue, April 17, 2012. Via: www.liconstructionlaw.com/construction-la (visited 18th April 2012).

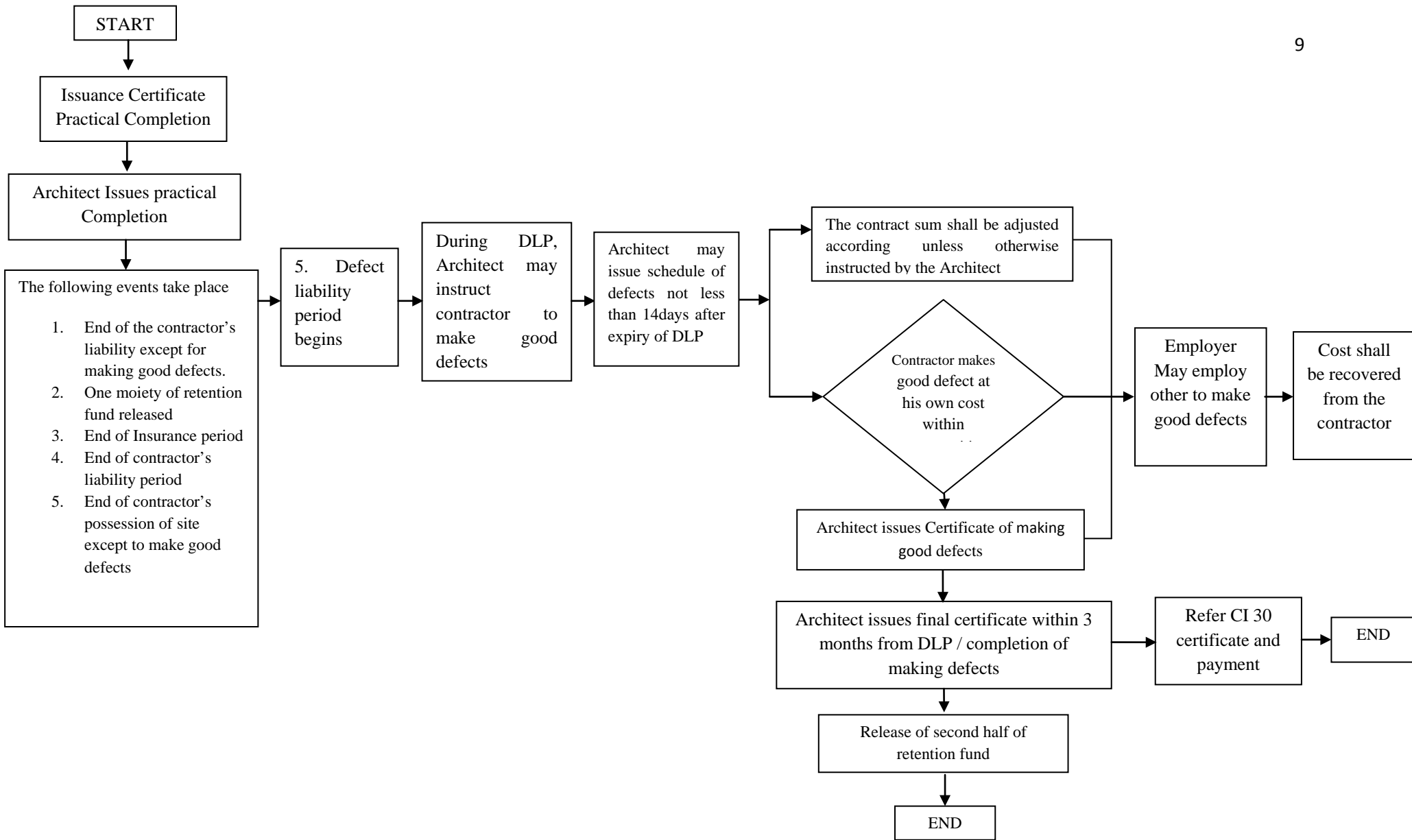


Figure 1.2. Flowchart – PAM 2006 Standard form of contract clause 15 – Practical Completion & Defects Liability. (Source: Anon (2007). "What are the Obliaation of the Contractor durina Defect Liability Period?" The Entrustv Groun. Master Builders. 1st auater 2007

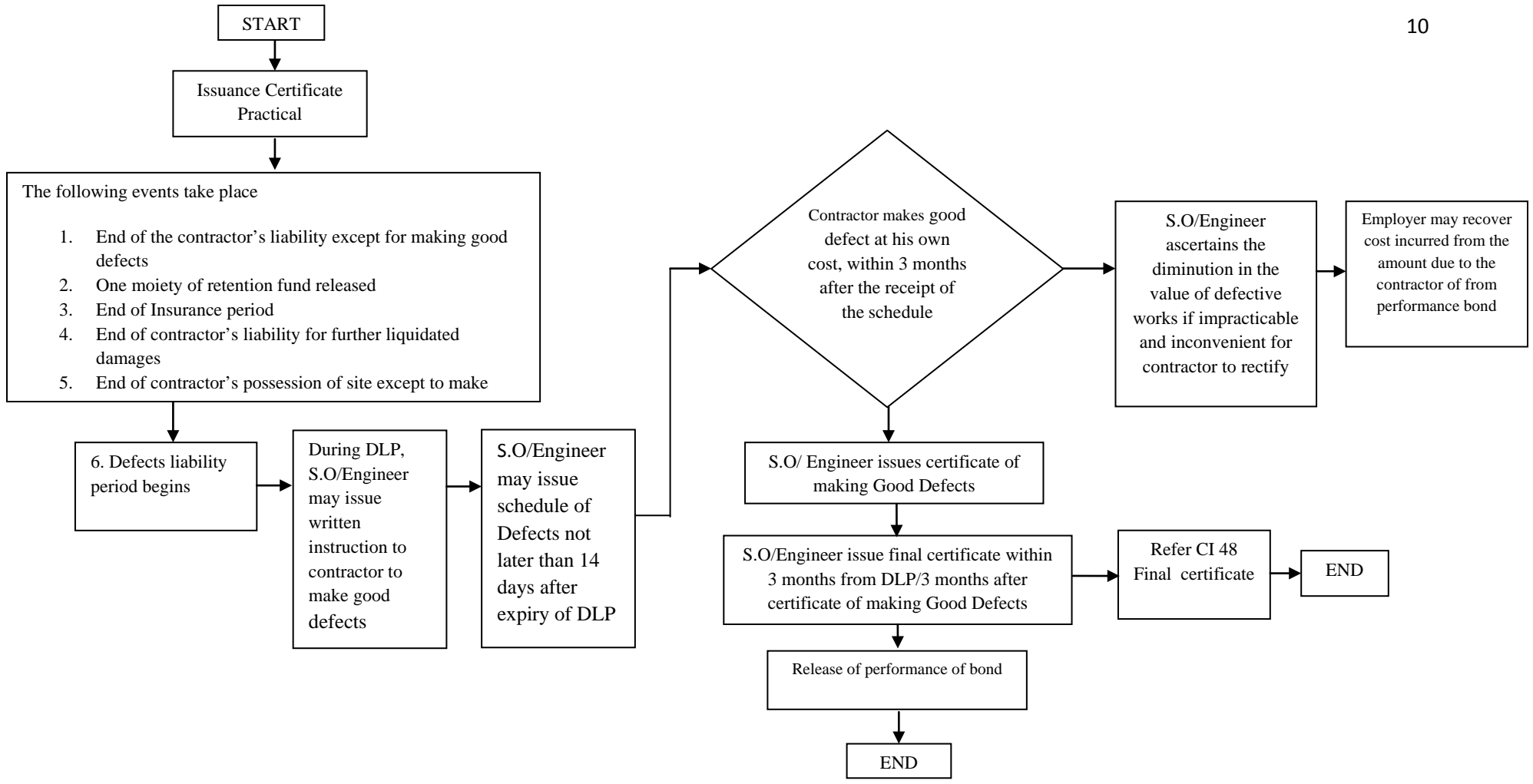


Figure 1.3. Flowchart – IEM/JKR Clause 45 – Defects liability and Making Good. (Source: Anon (2007), "What are the Obligation of the Contractor during Defect Liability Period?" The Entrusty Group, Master Builders, 1st quater 2007

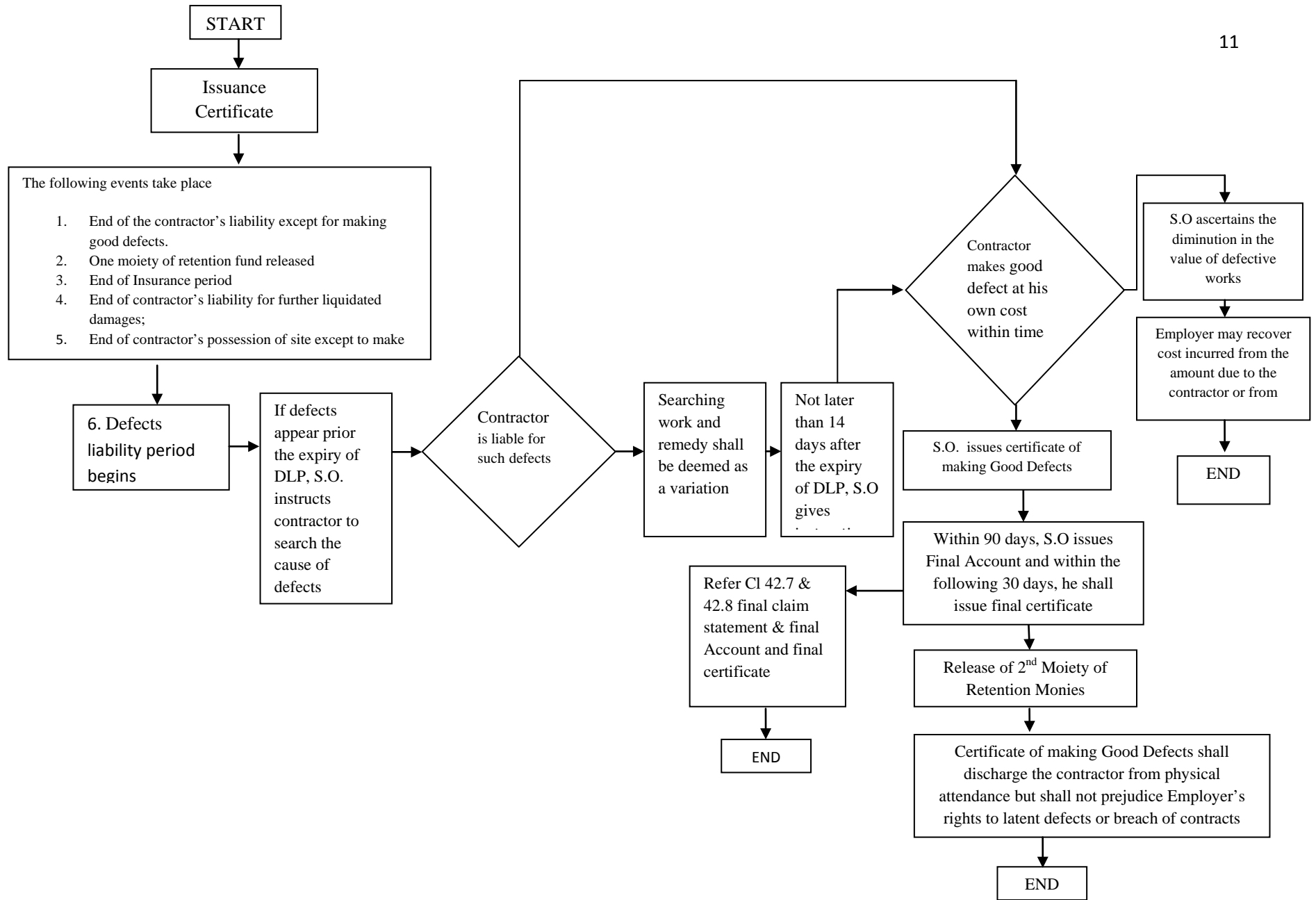


Figure 1.4. Flowchart – CIDB Clause 27 – Defects liability after completion. (Source: Anon (2007), "What are the Obligation of the Contractor during Defect Liability Period?" The Entrusty Group, Master Builders, 1st quarter 2007)

1.3 Aim and Objectives:

The aim of this study is to compare the defects liability period practice between Malaysia and Nigeria and the objectives:

- a) To study the contractual terms of defects liability period and occurrence of defects during and after the defects liability period in the study area.
- b) To compare the occurrence of defects during the defect liability period and after the defect liability period of the study area respectively.

1.4 Research Questions

- a) Does the defect liability period practice in Nigeria reasonable enough to allow defects (latent and patent) to manifest?
- b) Does the defect liability period practice in Malaysia reasonable enough to allow defects (latent and patent) to manifest?
- c) Which of the two countries is having the preferred practice of defect liability period?

1.5 Scope of study and limitation

The scope of this research shall be:

- a) In-depth understanding of the construction defect liability policy obtainable in the study area with legal issues.

The limitation of the research:

- b) The research shall be limited to defect liability period on building components.

1.6 Significance of study

The defect liability period in the study area varies despite that the two countries are having similar climatic weather condition. Thus, the defects liability period in Malaysia is 12 months while in Nigeria is 6 months. Therefore, there is a need for an in-depth study to determine the occurrence of building defects in the study area by way of comparative study of the defect liability periods in the two countries.

On the completion of the study, it will help to determine the specific time lag in which the building defects will manifest. This study will use the user feedback to determine the reasonable period for a building defect in the study area. However, the study will engender further research in the subject matter.

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