

THE EXCLUSION CLAUSE IN GOVERNMENT STANDARD FORM OF
CONSTRUCTION CONTRACTS

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*To my beloved parents, wife, daughters, and friends
for their endless love, care and support.....*

Thank you so much. I love you.

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ABSTRACT

One of the functions of contract is to set out the rights, duties and liabilities of the parties to the contract. When a party fails to perform his duty, he is liable to pay damages to the innocent party. However, it is quite a normal practice for a party to expressly exclude liability in such eventuality. Such a term is generally known as exclusion clause. It essentially means that if he fails to perform the duty that he is expressly or impliedly bound to carry out under the contract, he is not liable to the other party. Exclusion in performing obligations in the event of breach of contract is an issue that often creates a dispute between the contracting parties. It is even more crucial when the contract is wholly drafted only by one party. Exclusion clauses are also found in standard forms of construction contracts. But they are worded in such a way that it is very difficult to determine with certainty that they are in fact exclusion clauses. They normally exclude the liability of the employers and thus create inequality and unfairness between the contracting parties. Therefore, the objective of this study is to identify the exclusion clauses and their effectiveness in excluding the employers' liabilities. The scope of this study is limited to the Public Works Department standard forms of contracts. The study was carried out by analyzing the standard contract forms. The effectiveness was evaluated by examining the relevant court cases and opinions of experts. The analysis of the standard forms revealed sixteen exclusion clauses. In term of their effectiveness, by and large, the research found that, not all the exclusion clauses were effective to exclude the government's liability to the contractor in the event of such failure of performance.

ABSTRAK

Salah satu fungsi didalam kontrak adalah untuk menentukan hak dan tanggungjawab pihak yang terlibat didalam kontrak. Apabila satu pihak gagal melaksanakan kewajipannya, dia bertanggungjawab untuk membayar ganti rugi kepada pihak yang menanggung kerugian. Walau bagaimanapun, adalah satu amalan yang biasa apabila satu pihak bertegas untuk menafikan tanggungjawabnya apabila berlaku sesuatu perkara. Terma ini dikenali sebagai klausa penafian. Ia bermaksud apabila satu pihak gagal melaksanakan kewajipannya di dalam kontrak, secara langsung atau tersirat ia tidak akan bertanggungjawab terhadap kerugian pihak yang satu lagi. Pengecualian didalam melaksanakan kewajipan apabila berlaku satu kemungkiran kontrak, biasanya akan mengakibatkan berlaku pertelingkahan diantara pihak-pihak yang berkontrak. Ia akan menjadi lebih kritikal apabila kontrak tersebut didaftarkan oleh satu pihak sahaja. Klausa penafian ini juga boleh di dapati didalam borang piawai kontrak pembinaan. Walau bagaimanapun, ia ditulis melalui satu kaedah yang amat sukar untuk dikenalpasti yang mana ia adalah merupakan satu klausa penafian. Biasanya ia mengecualikan tanggungjawab majikan dan secara tidak langsung ia menimbulkan satu keadaan yang tidak samarata dan tidak adil diantara pihak-pihak yang berkontrak. Oleh yang demikian, objektif kajian ini adalah untuk mengenalpasti klausa-klausa penafian dan keberkesanan penggunaannya untuk pengecualian tanggungjawab majikan. Skop kajian hanya terhad kepada borang kontrak piawai yang dikeluarkan oleh Jabatan Kerja Raya Malaysia. Kajian dilaksanakan dengan menganalisa borang kontrak piawai tersebut bagi mengkaji keberkesanannya melalui kes-kes mahkamah yang berkaitan dan pandangan dari pakar-pakar didalam bidang ini. Sebanyak enam belas klausa penafian telah dikenalpasti daripada borang kontrak piawai ini. Dari segi keberkesanannya, secara keseluruhannya, didapati tidak semua klausa penafian ini berkesan untuk mengecualikan tanggungjawab kerajaan terhadap kontraktor apabila berlaku kegagalan didalam pelaksanaan kontrak.

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LIST OF ABBREVIATIONS

| | |
|----------|--|
| AC | Law Reports: Appeal Cases |
| All ER | All England Law Reports |
| App Cas | Appeal Cases |
| ASBCA | Armed Services Board Of Contract Appeals |
| BCA | Board Of Contract Appeals |
| Beav | Beavan's Reports |
| BLR | Building Law Reports (UK) |
| BLSS | Braddel's Law of the Straits Settlements |
| Build LR | Building Law Reports |
| B & S | Best & Smith's Reports |
| CA | Court of Appeal |
| CB | Common Bench Reports |
| CBNS | Common Bench Reports (New Series) |
| Ch | Cases in Chancery |
| Cl. Ct | Claim Court |
| CLJ | Current Law Journal (Malaysia) |
| CLR | Commonwealth Law Reports |
| Con LR | Construction Law Reports (UK) |
| Const LR | Construction Law Reports |
| CP | Law Reports, Common Pleas |
| CPD | Law Reports, Common Pleas Division |

| | |
|-----------|--|
| DCA | District Court Appeal |
| DLR | Dominion Law Reports (Canada) |
| EG | Estates Gazette (UK) |
| EWCA | Court of Appeal of England and Wales |
| EWCA Civ. | Court of Appeal Civil Division |
| EWHC(TCC) | High Court of England and Wales Decisions (Technology & Construction Court) [Media Neutral Citation] |
| Ex | Exchequer |
| Ex D | Exchequer Division |
| F 2d | Federal Reporter (2nd Series) (USA) |
| FC | Federal Court |
| Fed. Cir | Federal Circuit |
| HL | House of Lords |
| HL Cas | Clarke's House of Lords Cases [ER 9-11] |
| IR | Industrial Reports |
| IRLR | Industrial Relation Law Reports |
| IPR | Intellectual Property Report |
| JCT | Joint Contract Tribunal (UK) |
| KB | King Bench |
| LGR | Local Government Reports, (UK) |
| Lloyd's | Rep Lloyd's List Reports |
| LR | Law Reports |
| LT | Law Times Reports (New Series) |
| M & W | Meeson & Welsby's Exchequer Reports [ER 150-153] |
| NILR | Netherlands International Law Review |
| NSWCA | New South Wales Court of Appeal [Media Neutral Citation] |

| | |
|-------|--|
| NSWLR | New South Wales Law Reports |
| MLJ | Malayan Law Journal |
| P | Pacific Reporter (USA) |
| PAM | Pertubuhan Arkitek Malaysia |
| PWD | Public Work Department (Malaysia) |
| PC | Privi Council |
| PD | Probate, Divorce and Admiralty Division of High Court (UK) |
| QB | Queen Bench |
| QBD | Queen Bench Division |
| QS | Quantity Surveyor |
| RIBA | Royal Institute of British Architect (UK) |
| SCLR | Scottish Civil Law Reports |
| SIA | Singapore Institute of Architect |
| SLR | Singapore Law Report |
| SMM | Standard Method of Measurement |
| S.O | Superintanding Officer |
| STARK | Starkie's Nisi Prius Reports |
| TLR | Times Law Reports |
| TCC | Technology and Construction Court (England and Wales) |
| WLR | Weekly Law Report |
| WWR | Western Weekly Reports (Canada) |

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CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Contracts are made every day. Usually a contract takes place from as simple as trading activity through to an agreement that involves complex activities. A contract may be defined as an agreement, enforceable by law¹, between two or more person to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises, both having given something, or having promise to give something of value as consideration for any benefit derived from the agreement.²In Malaysia, an agreement and a contract are interpreted under section 2 subsection (e) and subsection (h) in the Contract Act 1950 (Act 136)

“(e) every promise and every set of promises, forming the consideration for each other, is an agreement

(f)

(g)

(h) an agreement enforceable by law is a contract”³

¹ Legal Research Board, “Contracts Act 1950(Act 136), Contracts (Amendment)Act 1976(A329) & Government Contracts Act 1949 (Act 120) (Internasional Law Book Services,2010)p2

² Denis Keenan,“Smith & Keenan’s English Law” Fourteenth Edition (Pearson Longman,2004)p253

³ *ibid*, no 1

Contract may be made orally or in writing. If the contract is in writing, then usually there will be written terms that are binding on the contracting parties that explain the responsibilities of each party. The terms that the parties specifically use in formulating their agreement are the express terms of the contract. However the express terms do not always constitute the whole contract. In certain circumstances, there may be other terms which fall to be implied into it. The basic principle of implied term is a term will be implied where, and only where, such a term is necessary in order to bring the contract into line with the intention of the parties⁴.

Not all the terms in the contract are of equal importance. The terms in the contract are divided into conditions and warranties. This distinction between each other is significant in terms of their remedies. The breach of a term that has serious result on the contract, the court interprets it as a condition; the injured party may elect either to repudiate the contract and claim damages, or go on with the contract and claim damages. Furthermore, when the term in breach has not seriously effected the purpose of the contract, where the court is interpreted it as a warranty, the injured party cannot repudiate the contract but can sue for damages.

There are also a term which takes place between a condition and a warranty. It calls intermediate term or innominate term. The effect on this term is depending upon how serious the breach has turned out to be in fact. If the breach has turned out to be serious the court will then treat the term as a condition, so that the contract can be repudiated. If in fact the breach has not had a serious effect on the contract, the court will treat it as a breach of warranty, so that the parties must proceed with the contract, though the injured party will have an action for damages.⁵

Exclusion clause or exemption clause is one of the types of terms that may be included in a contract. The clauses are a common feature drafted by a professional such as lawyer in the contract for example in the sale and purchase contract, insurance contract, construction contract and others. An exclusion clause is a term in a contract that seeks to restrict the rights or liability of the parties to the contract

⁴ F.R Davies, "Contract". Fifth Edition. (London Sweet & Maxwell, 1986) p69

⁵ Denis Keenan, "Smith & Keenan's English Law" Fourteenth Edition (Pearson Longman, 2004) p319

An exemption clause is a term in a contract which seeks to exempt one of the parties from liability in certain events.⁶ An exclusion may be total, or may limit the party's liability to a specified sum of money⁷. In other words it seeks to exclude liability or remedies for breach of contract or negligence or which to limit that liability to a specified amount of money.

The party may only rely on such a clause if it has been incorporated as a term in contract, and if, as a matter of interpretation, it extends to the loss in question. Such clauses partially seek to exclude or limit their liability under the contract by expressly stating that liability will not arise in a party or will be limited for a number or all defaults under the agreement on their part.⁸ Rules of interpretation of contracts state that exclusion clauses must be clearly expressed and unambiguous, or they will be ineffective; they are also construed against the party seeking to rely on them.⁹

Generally, to ensure that the exclusion clauses can be used effectively in the contract, it must have been brought to the attention of the other party prior to entering the contract. The party accepting the exclusion clause must be aware of its existence through a notice in two ways:

- a) **Actual notice** - occurs when the party relying on the clause actually brings the clause to the other party's attention or the other party simply reads the contract;
- b) **Constructive notice**- occurs when the party is not actually aware of the existence of the clause but the party relying on the clause has done all that is reasonably necessary to bring it to the other party's attention.¹⁰

⁶ F.R Davies,"Contract". Fifth Edition. (London Sweet & Maxwell,1986) p73

⁷ Ritchard Stone. "The Modern Law Of Contract." Seventh Edition. (Routledge-Cavendish,2008)p 288

⁸ Gillhams Solicitors And Lawyers Exclusion Clauses And Limitations Of Liability

⁹ ibid,

¹⁰ Arts Law Centre of Australia, "Exclusion Clauses, Disclaimers and Risk Warnings"

The Malaysian courts have had few occasions to consider the validity of such limitation or exemption clause in consumer transactions.¹¹In a few report cases dealing with exemption cases it appears that the Malaysian court have applied some of common law principles. ¹² Vissu Sinnadurai (2003) has mention that the general principles of law relating to exemption clause under the common law are:

1. Notice.

Notice of the exemption clause must be contemporaneous with the contract: see *Olley v Marlborough Court Ltd*¹³, *Thornton v Shoe Lane Parking Ltd*,¹⁴and *Levison v Patent Steam Carpet Cleaning Co Ltd*¹⁵. It is generally said that the exemption clause must be incorporate into the contract as to sufficiency of notice, see *Parker v South Eastern Railway Co*¹⁶and *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*¹⁷. The notice must also be in a contractual document, see *Chapleton V Barry UDC*.¹⁸

2. Interpretation.

A strict interpretation is given to exemption clause. see case of *Walis, Son & Wells v Pratt & Hynes*.¹⁹The “*contra proferentem*” rule is generally applied against the party relying on the exemption clause. *Lee (John) & Son (Grantham) Ltd v Railways Executive*²⁰

3. Negligence

Clear words are needed to exclude negligence.²¹See Privy Council decision in *Canada Steamship Lines v The King*.²²

¹¹ Visu Sinnadurai, “Law of Contract”, Third Edition, volume 1 (Lexis Nexis, Butterworths, 2003) p198

¹² *ibid*,

¹³ [1949] 1 KB, 532 CA

¹⁴ [1971] 2 QB, 163 CA

¹⁵ [1978] 2 QB, 69

¹⁶ [1930] 1 KB, 41

¹⁷ [1989] QB 433, CA

¹⁸ [1940] 1 KB, 532

¹⁹ [1911] AC 394, HL

²⁰ [1949] 2 All ER 581, CA

²¹ *ibid* no 11,

²² [1952] AC 292

However in common law, the courts were very concerned to protect a party against an exemption clause imposed without negotiation by a party who had superior bargaining power.²³ The court achieves this by finding that the clause had not been incorporated as a term in the contract.²⁴

1.2 Problem Statement

Standard form of contracts has become a common feature in many consumer and commercial transaction. In many transactions, contracts are no longer negotiated between the parties as more and more contracts entered into the standard form contract where the term of the contract are already printed in these documents.²⁵ The general principle of contract, once a party enters into a contract, he must perform his obligations strictly according to the terms of the contract as stated in section 38 Contract Act 1950. Construction contract is a unique contract because it involves many parties and regulations where usually it takes a long time to be completed. Therefore many of the issues or disputes that arise during construction need a solution that can deliver justice to the contracting parties.

Presently most of the construction contract in Malaysia is made based on the existing standard form of contract. For the government job they usually used the Public Work Department Form of Contract (PWD). Beside that the private sectors usually used the conditions of contract issued by the construction bodies recognized by the government such as Pertubuhan Arkitek Malaysia (PAM), Construction Industry Development Board (CIDB) and Institut Engineer Malaysia (IEM). Apart from that, there are condition of the contract issued by corporate bodies such as the Perbadanan Putrajaya, KLCC, IRDA, PETRONAS and others. For international construction projects normally Federation Intenationale des Ingenieurs Conseils (FIDIC) condition of contract is widely used in Malaysia. However, there are certain

²³ Jill Poole. "Case Book On Contract Law". Tenth Edition (Oxford University Press,2010)p268

²⁴ *ibid*,

²⁵ Visu Sinnadurai, "Law of Contract", Third Edition, volume 1 (Lexis Nexis, Butterworths, 2003) p198

construction contracts which were made only by conduct without any specific conditions such as small construction contracts or contracts between the contractors and the subcontractors.

With these standard forms, the contracts between parties are no longer negotiated where the term of contract are already printed in these document. As a result, the contracting parties usually either the contractor or even the employer does not know or read the terms in the contract that will bind them when signing the contract. The exemption clause or exclusion clause are one of the type of clauses contain in these standard form of contract. An exclusion clause is a term in a contract that seeks to restrict the rights of the parties to the contract. It seeks to exclude liability or remedies for breach of contract and/or negligence or which to limit that liability to a specified sum. In construction contract it use to exclude or limit the liability by transfer the risk of breach to the other party. For example, the information that gives to the contractor to perform his duty without any guarantee for the sufficiency or accuracy of the information as illustrated in the case of *Bacal Construction (Midland) Ltd v Northampton Development Corporation*. At this point, contractors have to bear the risk or reduce the risk by putting a higher price on the work.

Therefore a dispute arises in a contract during the construction; one of the parties will suffer losses due to misunderstanding to the terms in the contract. This will cause the contract unable to perform with impartiality and indirectly may affect the project. This situation will become worse when the court intervention is required to resolve this dispute. So it would be a bad phenomenon in the construction industry in Malaysia and could jeopardize the national economy.

Nigel M. Robinson *et al.* (1996) had referred the exemption or exclusion clauses on such terms as the show characteristic of exclusion, limitation, restriction and indemnity in the written contract. Therefore, this study will determine the terms contained in the standard form of construction contract. However, this study will only focus on the standard contract construction forms used in the Public Work Department in order to identify each party's liability that is set in the contract.

1.3 Objective of the Study

The main objective of this study is to identify the effectiveness of the exclusion clause or exemption clause in government standard form of construction contracts.

1.4 Scope of the Study

The scope of this study is limited to the standard form of contract which being used in the government projects issued by the Public Works Department Malaysia. Contract forms used are PWD Form 203A(Rev.1/2010), PWD Form 203 (Rev.1/2010), PWD Form DB (Rev.1/2010) and PWD Form 203 N (Rev.1/2010). In this study the cases related to construction contract will be discussed. The analysis will focus on the dispute arising from the contract regarding the exclusion/exemption clause that occurred in the construction project. The cases were chosen from the online law journals, such as *Malayan Law Journal*, *Singapore Law Report*, *Building Law Report* and etc which published on the Lexis Nexis online database.

1.5 Significance of the Study

By identifying the terms of exclusion/exemption clause, this study will provide a basic guide to the contracting parties to consider the potential risks in the event of a dispute during project implementation. Indirectly the parties would be able to take appropriate steps to evaluate the risk to reduce the losses when there are any disputes in the contract.

1.6 Research Methodology

Research methodology proposes an arrangement of research procedures .The processes and methods of approach act as a guideline so that the research can be done in a systematic way to achieve the objectives of the study. This research is

divided into five main stages: *Identify Research Issue, Literature Review, Data Collection, Data Analysis and Preparation of Full Research Report.*

1.6.1 Identify Research Issue

The initial stage of the whole research is to identify the main objective of the research. The research issue will be discussing with the supervisor appointed to get idea and guidance in order to identify the objectives and type of data that needed with regard to the topic. It also involves reading on variety sources of published materials such as journals, seminar papers, articles, previous research report, newspapers, magazines and electronic resources as well through the internet.

1.6.2 Literature Review

The research title was further explained and discussed in these stages. Basically literature review is the stage where published resources such as books, journals, articles will be read. These resources are important to complete the literature review chapter. This phase is vital to support and strengthen the research before proceed to other stages.

1.6.3 Data and Information Collection

The next stage in this research is data and information collection. This is an important stage where it will lead towards achieving the main objectives. The data were collected from the reported cases mainly from *Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report* and other law journals. It is collected mainly through the LexisNexis online database. All the cases found from this online database are related to the exclusion/exemption clause

in the construction contracts. Other than that, the data also obtained from research done by third parties such as from books, articles, seminar paper and the act.

1.6.4 Research Analysis

After the data and information collection stage, all the collected cases, information, data, ideas, opinions and comments were analysed. This was started with the case studies on the related legal court cases. The analyses were conducted by reviewing and clarifying all the facts and issues of the case.

1.6.5 Conclusion

The final stage of the research is the conclusion and recommendations. It is basically involves the conclusion for the findings. After the objectives has been successfully achieved, a conclusion need to be made and also at the same time, some appropriate recommendations related to the problems shall be made for a better solution in relation to the arising issues or else for further research purposes.

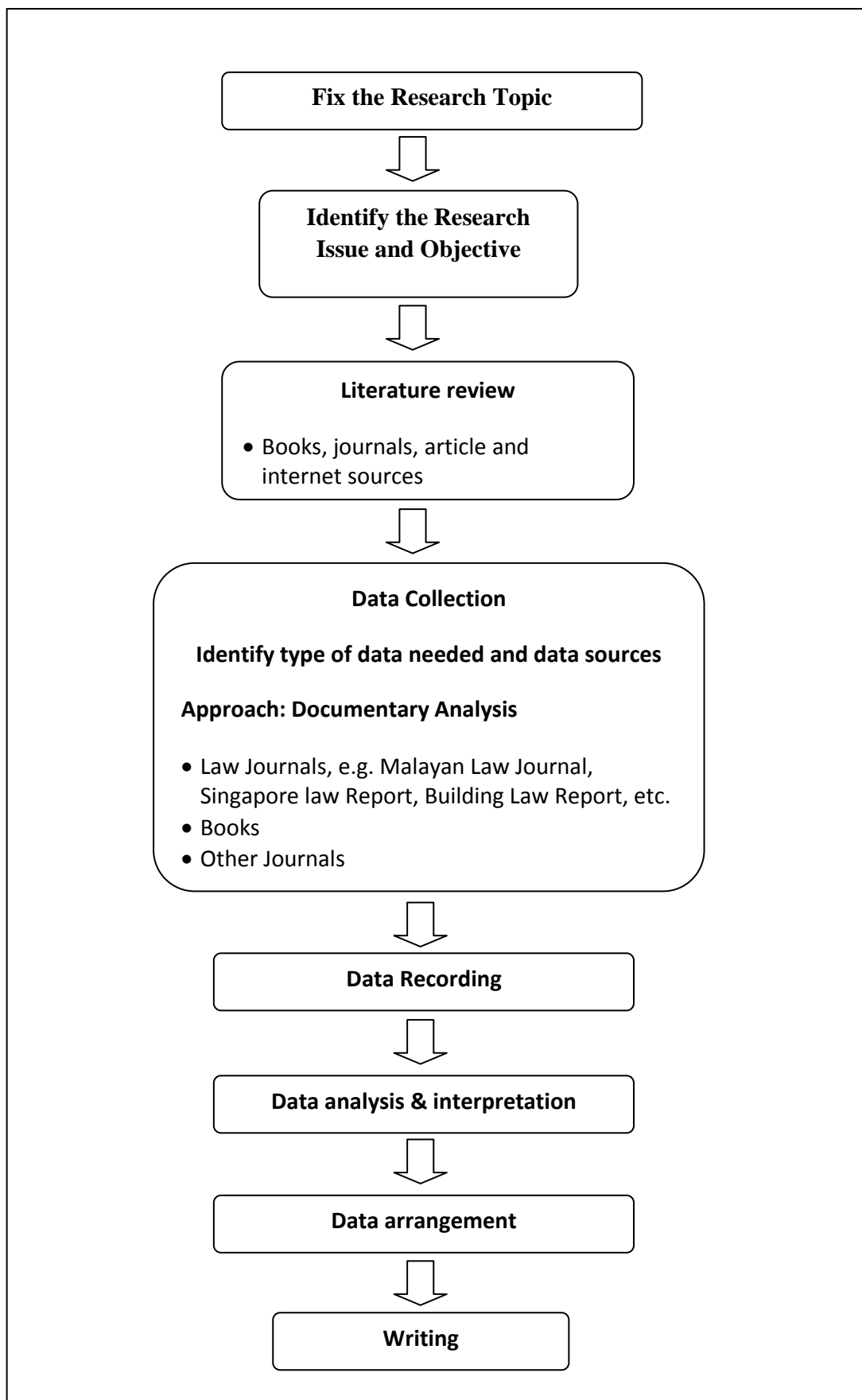


Figure 1.1: Research Process and Methods of Approach

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