

**CONTRACTING OUT OF STATUTORY PROVISION  
IN MALAYSIAN CONSTRUCTION CONTRACT**

**LEE SZE YIN**

**UNIVERSITI TEKNOLOGI MALAYSIA**

**CONTRACTING OUT OF STATUTORY PROVISION  
IN MALAYSIAN CONSTRUCTION CONTRACT**

LEE SZE YIN

A project report submitted in partial fulfillment of the  
Requirement for the award of the degree of  
Master of Science (Construction Contract Management)

Faculty of Built Environment  
Universiti Teknologi Malaysia

APRIL 2010

## DEDICATION

To my beloved Family

Thank you for your support and confidence in me.

## **ACKNOWLEDGEMENT**

A debt of gratitude is owed to many individuals who have given me the benefit of their unconditional help, tolerance and knowledge in writing and completing this master project. First, I would like to express my highest gratitude to my supervisor, En. Jamaludin Yaakob for his guidance, advice and support in completing this master project.

Next, I am also indebted to all the lecturers of this course (Master of Science in Construction Contract Management) for their patient and kind advice during the process of completing the master project.

Not forgetting my family members, particularly my mother, uncle and aunty, a token of appreciation goes to them for their patience and full support. Lastly, I would like to express my special thanks to my fellow course mates, who have helped me a great deal throughout the preparation and production stages of this master project.

## ABSTRACT

Contracts are legally binding agreement enforces by the law of contract. In general, CA 1950 governs the contractual transactions in Malaysia as it also provides general guidelines to formation of contracts. There are also specific statutes, for example Employment Act 1955, Sales of Goods Act 1957, Insurance Act 1963, Companies Act 1965 etc provided in order to cater specific transactions. Despite the statutory provision, there are party who intended to contract out of the legal effect of these provisions. These parties tend to determine the terms and conditions that are to be incorporated into their agreement and the practice to introduce such terms and conditions in the agreement that tend to avoid the application of the statutory provision is known, by the law experts, as an act of **contracting out**. The freedom for parties to do so is supported by the idea commonly known as Freedom of Contract. It is however, doubtful that whether the contracting out clauses are valid and applicable in the eye of law. The issue of whether the freedom of contract is so untrammelled to the extent that application of a codified statute provision can be evaded arose. In standard form of building contract, it can be said that there are clauses which the similar contracting method has been applied. In other words, it is noticed that some of the clauses tend to contract out of the statutory provision. Out of the many clauses, the liquidated damages clause and automatic determination clause will be discussed in details as regards to the issue of contracting out. According to section 75 of the CA 1950, the injured party shall be able to prove his actual loss in order to claim for the damages. Notwithstanding the provision, the LAD clause in standard forms of building contract was drafted in order to avoid the need to prove. On the other hand, section 236 of the Company Act give the right to the liquidator to carry on with the contract while the clause in the standard form of contract prohibited them to do so by determining the contract automatically. From the analysis of case law, although there are some cases where contracting out is permissible under certain circumstances, it can be said that the validity of both of these clause might be challenged as it was held, in general that contracting out clauses are invalid.

## ABSTRAK

Kontrak merupakan satu perjanjian di bawah pengurusan undang-undang kontrak. Secara umumnya, Akta Kontrak 1950 menguasai transaksi kontrak di Malaysia. Di samping Akta Kontrak, beberapa undang-undang yang spesifik seperti Akta Kerja 1955, Akta Jualan Barang 1957, Akta Syarikat 1965 adalah diperlukan untuk mengawal pelbagai kontrak ataupun perjanjian. Di Malaysia, kebebasan diberikan kepada pihak-pihak kontrak untuk menentukan klausa-klausa yang sesuai dengan transaksi mereka. Kebebasan ini merujuk kepada kebebasan untuk membuat perjanjian. Dengan kebebasan ini, mereka didapati mengecualikan Akta-akta yang telah pun ditetapkan. Tindakan mereka mengecualikan akta-akta tersebut dikenali sebagai “Contracting Out”. Walaupun mereka diberikan kebebasan untuk menentukan klausa yang diinginkan dalam perjanjian mereka, kesahihan klausa tersebut adalah diragui. Persoalan yang wujud adalah sama ada kebebasan diberikan sehingga akta-akta yang ditetapkan oleh parlimen boleh dikecualikan dengan begitu sahaja. Dalam syarat-syarat kontrak yang biasanya digunakan dalam industri pembinaan di Malaysia, terdapat beberapa klausa yang cenderung mengecualikan Akta-akta. Dua klausa dari syarat-syarat tersebut iaitu klausa yang berkaitan dengan bayaran ganti rugi dan klausa yang berkaitan dengan penamatan kontrak secara automatik akan dibincang secara terperinci. Merujuk kepada S75 Akta Kontrak 1950, pihak yang ingin menuntut ganti rugi dikehendaki membuktikan kerugian sebenarnya secara tepat. Kalau dia gagal membuat demikian, dia tidak dapat menuntut ganti rugi tersebut. Walau bagaimanapun, klausa dalam syarat-syarat kontrak pembinaan menentukan bahawa pihak yang ingin menuntut ganti rugi mempunyai hak untuk mendapatkan ganti rugi seperti yang dicatatkan dalam kontrak tanpa bukti diperlukan. Ini telah pun mengecualikan peruntukkan Akta Kontrak 1950. Selain itu, terdapat satu peruntukkan di bawah Akta Syarikat 1965 telah memberi hak kepada liquidator untuk meneruskan kontrak. Akan tetapi, klausa yang ditetapkan dalam syarat kontrak pembinaan menunjukkan bahawa kontrak tersebut adalah ditamatkan secara automatik apabila kontraktor mengalami muflis. Merujuk kepada kes-kes yang didapati, tindakan untuk mengecualikan akta-akta tersebut adalah tidak sah dari segi undang-undang. Dengan itu, kedua-dua klausa tersebut boleh dikatakan tidak sah dan mungkin boleh dicabar di mahkamah mengenai kesahihannya.

## TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	Title	i
	Declaration	ii
	Dedication	iii
	Acknowledgement	iv
	Abstract	v
	Abstrak	vi
	Table of Contents	vii
	List of Cases	x
	List of Abbreviations	xiii
<b>1</b>	<b>INTRODUCTION</b>	
1.1	Background Study	1
1.2	Problem Statement	5
1.3	Research Objectives	7
1.4	Scope of the Study	8
1.5	Importance of the Study	8
1.6	Research Methodology	9

<b>CHAPTER</b>	<b>TITLE</b>	<b>PAGE</b>
<b>2</b>	<b>FREEDOM OF CONTRACT</b>	
2.1	Introduction	10
2.2	Freedom of Contract as the Starting Point	12
2.2.1	Party Freedom to Contract	15
2.2.2	Term freedom	15
2.2.3	Sanctity of contract	16
2.3	Limitation of Freedom of Contract	20
2.4	Decline of Freedom of Contract	31
2.5	Conclusion	32
<b>3</b>	<b>CONTRACTING OUT OF THE STATUTE OR COURT JURISDICTIONS</b>	
3.1	Introduction	34
3.2	Using Exclusion Clause to Contract Out	36
3.3	Contracting Out of Statutory Provision	40
3.3.1	Contracting out of Contract Act 1950	40
3.3.2	Contracting out of Section 29 of the CA 1950 and Limitation Act	52
3.3.3	Contract out of National Land Code 1965	60
3.3.4	Contract out of by-law of Private body	62
3.3.5	Contracting out of Sales and Goods Act 1957 (SOGA 1957)	64
3.4	Validity of Contracting Out of Statutory Protection	71
3.5	Conclusion	72
<b>4</b>	<b>CONTRACTING OUT IN CONSTRUCTION INDUSTRY – LIQUIDATED DAMAGES</b>	
4.1	Construction Contracts	75
4.2	Provision for Damages as Remedy to Breach of Contract	76



<b>CHAPTER</b>	<b>TITLE</b>	<b>PAGE</b>
	4.3 Statutory Provision of Liquidated Damages	77
	4.4 Contractual Provision of Liquidated Damages	84
	4.5 Analysis	87
	4.6 Conclusion	97
<b>5</b>	<b>AUTOMATIC DETERMINATION IN STANDARD FORM OF BUILDING CONTRACT</b>	
	5.1 Introduction	99
	5.2 Statutory Provision that are relevant to determination of contract upon insolvency	101
	5.3 Contractual Provision in Standard Form of Building Contract	103
	5.4 Does the Automatic Determination Clause Contract Out of the Statutory Provision?	108
	5.4.1 Right to Terminate A Contract In The Event of Party's Insolvency	108
	5.4.2 Determination of Contract or Contractor's Employment	113
	5.4.3 Right of Liquidator to adopt the contract	115
	5.5 Validity of Contracting Out of Statutory	118
	5.6 Conclusion	122
<b>6</b>	<b>CONCLUSION AND RECOMMENDATIONS</b>	
	6.1 Introduction	125
	6.2 Summary of Research Findings	125
	6.3 Problems Encountered During Research	127
	6.4 Further Research	127
	6.5 Conclusion	128
	<b>REFERENCES</b>	130

## LIST OF CASES

### CASES

Amarjit Singh a/l Kartar v. Kung Boon Chin & Ors. Unreported, <a href="http://202.75.7.131/kl/attachments/131_D6-22-1285-2006.pdf">http://202.75.7.131/kl/attachments/131_D6-22-1285-2006.pdf</a>	51
Aroomogum Chitty v. Lim Ah Hang [1894] 2 SSLR 80	39
Asa'ari bin Muda and ors v. Kerajaan Malaysia and ors [2006] 5 MLJ 322	71
BFI Group of Companies Ltd v. DCB Integration Systems Ltd(1987) CILL 348	91
British Eagle International Airlines Ltd v Compagnie Nationale Air France. [1975] 2 All ER 390.	120-121
British Movietonews Ltd. V. London District Cinemas, Ltd. [1952] AC 166	22
Chanter v. Hopkins,[1838] 4 M & W 339 at p.404; 8 LJ Ex 14	68
Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor [1995] 1 BLJ 25.	38
Clydeback Engineering and Shipbuilding Co Ltd v Don Jose Yzquierdo Y Custaneda[1905] AC 6	84
Dancom Telecommunication (M) Sdn Bhd v Uniasia General Insurance Berhad [2008] 6 MLJ 52	56
F.G. Cullis Construction Limited v. HMF Fields (Properties) Limited and Another	114
Godcharles v. Wigeman [1886] 113 Pa. St. 431	14
Hadley v Baxendale [1854] 9 Exch 341	83, 96
Isito Electronic Sdn Bhd v. Teh Ah Kiam & Anor [2004] 3 CLJ 272	51
J & Wong Logging Contractor v Arab Malaysian Eagle Assurance Bhd [1993] 1 MLJ 240	56
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445	44-45, 51,82, 92-98, 126

**CASES**

Joo Yee construction Pte Ltd v Diethelm Industries Pte Ltd[1990] 2 MLJ 66	121
Karsales (Harrow) Ltd. V. Wallis [1956] 1 WLR 936 CA.	69
Keen Builders Sdn Bhd v Utara Dua (M) Sdn Bhd (Samudra (Malaysia) Sdn Bhd, Garnishee)[1998] 2 CLJ Supp 256.	91
Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors[1997] 2 MLJ 805	60
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89	79, 90-91
Lionel v Government of Malaysia[1971] 2 MLJ 172	71
Malayan Banking Bhd v. Yap Seng Kee & Ors. [1988] 1 MLJ 313	50
Maxisegar v Silver Concept [2005] 5 MLJ 1	17
Murugesan v. Khrisnasamy & Anor [1958] MLJ 92.	26
National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] AC 785	119
New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading )[1992] 1 MLJ 185	54, 56-59
Oil & Natural Gas [2003] SC 2629	90
Olga Tellis v Bombay Municipal Corp AIR 1986 SC 180	71
Olley v. Marlborough Court Limited, [1949] 1 KB 532.	37
Ooi Boon Leong & Ors v Citibank N.A. , [1984] 1 MLJ 222	16, 40, 46, 50-51, 72, 127, 129
Parker v. South Eastern Railway Co [1877] 2 CPD 416 at p. 428.	29
Perar BV v General Surety & Guarantee [1994] 66 BLR 72.	110
Pinnocks Bros v. Lewis & Peats Ltd. [1923] 1 KB 690	69
Printing and Numerical Registering co v Sampson (1875) LR 19 Eq 462.	2, 12, 17

**CASES**

Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513	42, 44
Re Tru-Grain Co Ltd [1921] VLR 653 [27 ALR 390]	109
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461	88
Ritchie v. People[1895] 155 Ill. 98.	13
Sakinas Sdn Bhd v Siew Yik Hau & Anor	81
Schuler v Wickman [1974] AC. 235, [1973] 2 All ER 39	29
Sekawan Guards Sdn Bhd v Thong Guan Sdn Bhd [1995] 2 CLJ 304.	38
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817	6, 42-45, 80-82, 88-90, 92, 95-97, 126
SS Maniam v The State of Perak [1957] MLJ 75	78
Suisse Atlantique Societe D' Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale [1967] AC 361.	2
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (FC)	62
Union Fédérale des Consommateurs v AOL France	4, 26-27, 44, 53
Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd.[2005] 1 MLJ 162	66
Westminster City Council v. Reema Construction Ltd. and Others (No.2) [1990] 24 ConLR 26.	113, 119
Willment Bros Ltd v North West Thames Regional Health Authority (1986) 26 BLR 51 (CA).	119

## LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases, House of Lords
All ER	All England Law Reports
App. Cas.	Appeal Cases
B & C	Court of King's Bench
BLR	Building Law Reports
CA 1950	Contract Act 1950
CIDB 2000	CIDB Standard Form of Contract for Building Works (2000 Edition)
Con LR	Construction Law Reports
ER	English Report
Eq.	Law Reports: Equity
Exch	Law Reports: Court of Exchequer
HL	House of Lords
IEM 1989	IEM Standard Conditions of Contract, 1989
JCT	Joint Contracts Tribunal
JCT 63	JCT Standard Form of Building Contract, 1963
KB	Law Reports: King's Bench Division
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PAM 98	PAM Standard Conditions of Contract, 1998
PAM 2006	PAM Standard Conditions of Contract, 2006
PAM/ISM 69	PAM/ISM Standard Conditions of Contract, 1969
PWD	Public Work Department
PWD 203A (Rev.10/83)	PWD Standard Form of Contract (With Quantities)
PWD 203A (Rev.2007)	PWD Standard Form of Contract (With Quantities), [Revised 2007]
QB	Law Reports: Queen's Bench Division
SOGA 1957	Sale of Goods Act 1957
WLR	Weekly Law Report

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background Studies**

Contracts are legally binding agreement enforces by the law of contract. The word 'contract' in a legal sense refers to an agreement between two or more parties that is legally binding between them: in the words of section 2(h) of the Contracts Act 1950 (Act 136) (CA 1950), it is an agreement enforceable by law'. In general, CA 1950 governs the contractual transactions in Malaysia as it also provides general guidelines to formation of contracts. However, the general provisions of contract act do not satisfactorily account for every contractual transaction. Hence, there is the necessity to have a specific and comprehensive statute to regulate contractual relationship between parties in specific commercial transactions. These specific statutes, for example Employment Act 1955, Sales of Goods Act 1957, Insurance Act 1963, Companies Act 1965, Hire-Purchase Act 1967, and Housing Developers (Control & Licensing) Act 1966, has been enacted along side with the governing act on contracts, provide for specific rules and regulations in which the specific contract may or can be entered.

In theory, it is generally agreed that there is no standard contract for every contractual transaction as the intentions and requirements of parties may vary among each contract. For instance, the content of a hire purchase contract will definitely defer from the construction contracts, as the nature of business and background of parties are different. Hence, the parties, relying to these specific legislations, tend to determine the terms and conditions that are to be incorporated into their agreement. The freedom for parties to do so is supported by the idea commonly known as Freedom of Contract.

The idea of freedom of contract is one of the principles of the classical contract law. It is closely related to the philosophy of *laissez-faire*, which was established during the eighteenth and nineteenth centuries. During the heyday of the natural law and *laissez-faire*, many educated people took *laissez-faire* to mean that the law should interfere with people as little as possible. According to Lord Devlin, it is axiomatic within the classical view that **free dealing is fair dealing**<sup>1</sup>. Thus, in *Printing and Numerical Registering co v Sampson*<sup>2</sup>, Sir George Jessel MR famously said:

*“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Court of justice. Therefore, you have thus paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.”*<sup>3</sup>

” Also, in *Suisse Atlantique Societe D' Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale*<sup>4</sup>, the Judge stated: "... the general principle of English law that parties are free to contract as they may see fit."

It seems that the idea of freedom of contract insisted that it would only be fair, if the people, having the capacity to enter into a contract, were given the right and freedom

---

<sup>1</sup> Devlin, *The Enforcement of Morals* (1965) p 47.

<sup>2</sup> (1875) LR 19 Eq 462.

<sup>3</sup> *Ibid.* at 465.

<sup>4</sup> [1967] AC 361.

to enter into a contract freely and enjoy the freedom to choose the terms of their agreements. As the idea of freedom of contract was increasingly gaining recognition by the Court, parties to contract, who normally attempt to evade the application of express provisions of certain specific statute, include clauses that are contradict to the statutory provision. The practice to introduce terms and conditions in the agreement that tend to avoid the application of the statutory provision is known, by the law experts, as an act of **contracting out**.<sup>5</sup>

In general, there are different means that are adopted by the contracting parties that attempt to contract out of statutes. In the United States of America<sup>6</sup>, the parties may contract out of statutory provision with the freedom of choice of law given to the party. This can take place as each of the states has different governing regulations. In the US, individuals can physically exit the jurisdiction by locating or conducting their business elsewhere. For instance, one is free to gamble in Nevada, pay less to workers in Mexico<sup>7</sup>, charge unlimited interest in South Dakota<sup>8</sup>, and so on. This particular method is seldom used in Malaysia because, unlike United State of America, the statutes in Malaysia are unified throughout the whole country. In addition to the above method, methods that are normally adopted by contracting parties in Malaysia are such as modification of the statutory provision by express terms and conditions in the contract; and by inserting an exemption clause in the contract (the most commonly adopted method).

---

<sup>5</sup> Yusfarizal Yussoff , Contracting out of Contracts Act 1950 – General Concept of Contract Act 1950("CA 1950") [2009] 7 CLJ xxxvii

<sup>6</sup> The Malaysian Court usually does not refer to American Court's jurisdiction. However, it is worthwhile to discuss the circumstances in USA as an illustration only.

<sup>7</sup> Erin Ann O'Hara, Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law(2000):See Benjamin Rozwood & Andrew R. Walker, *Symposium on the North American Free Trade Agreement. Side Agreements, Sidesteps and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARV. INTL L.J. 333, 335 (1993).

<sup>8</sup> *Ibid.* See *Greenwood Trust Co. v. Commonwealth*, 776 F. Supp. 21, 26 (D. Mass. 1991) (noting that both Delaware and South Dakota have eliminated their usury laws after federal laws were interpreted to enable banks to charge any interest rate permissible in their home state).



As regards to the reason of inserting the contracting out clause in a contract, it is perceived that the clause that contracted out may be able to exclude implied terms by showing a contrary intention. Where terms are implied in a contract by statute, the effect of a clause purporting to exclude them depends on the provisions of the statute, which may permit exclusion or may not. In addition, where an obligation is imposed by the common law, such as liability in negligence in the law of tort, a contract may attempt to exempt a party from such liability. Below are examples of agreement drafting that shows contracting out of the statutory provision:

*“Except where there is no express terms herein, the provision of CA 1950 shall not in any manner whatsoever, be applicable to the construction, interpretation, enforcement etc. of this Agreement.”<sup>9</sup>*

*“The provision of CA 1950 shall not in any manner whatsoever, be applicable to this Agreement, and the Islamic principles of contract shall be applicable.”<sup>10</sup>*

*“The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained.”<sup>11</sup>*

In a French Case of *Union Fédérale des Consommateurs v AOL France*<sup>12</sup>, the situation of contracting out of statutory provision is clearly illustrated, despite the fact that the French Court Jurisdiction have not much influence in the Malaysian court. In June 2004, 31 clauses in the standard contractual terms used by AOL’s French subsidiary in its online subscriber contract were held to be illegal by a French court. Most of the clauses that the French court held to be illegal breached mandatory rules of local contract law and/or consumer and data protection laws that are harmonized across the European Union (EU). Further, most of the illegal clauses were in a form typically used by many companies – particularly US-based companies – in their

---

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> [1949] 1 KB 532, at p. 546.

<sup>12</sup> French Case, Unreported, <http://www.droit-technologie.org/actuality-805/b2c-in-europe-and-avoiding-contractual-liability-why-businesses-with.html>

standard consumer contracts. As a result of the French court's decision, the illegal clauses (including crucial disclaimers and limitations of liability, as well as clauses relating to payment and termination) are unenforceable by AOL France (AOL).

By way of example, the Court deemed that the following clauses are illegal clauses: *“if you are not satisfied with AOL or with the service provided by AOL, your only remedy is to terminate your subscription”* and *“AOL is entitled to terminate the contract at any time and without providing any reasons for termination.”* The reason given by the court was that the clauses are unfair and therefore illegal. The Court held that, as for the first example, the subscribers shall not be limited to terminate their own subscription only. Other rights i.e. to take legal action against the company shall not be evaded. As for the second example, the court held that in France, termination clauses must be favourable to consumers. The consumers should be entitled to terminate the contract at any time, without reason, and subject to a reasonable notice period/minimum contract duration, but the service provider should not have symmetrical rights. The Court held that AOL should only be entitled to terminate the contract for a serious breach by the customer. The Court's conclusion on this point is consistent with the indicative list of unfair terms that is attached to the Directive.

## **1.2 Problem Statement**

Having discussed that there are indeed, parties that tend to contract out of statutory by express terms in their agreement, such agreement may subsequently give rise to confusion. On one hand, one need to consider its validity and applicability *vis-a-vis* statutory provision such as CA 1950 as a guideline. On the other hand, it is trite law that parties are free to contract, as long as the contract entered into does not fall under the category of void or voidable contracts under CA 1950. Consequently, the issue that arise is whether the freedom of contract is so untrammelled to the extent that application of a codified statute provision can be evaded?

In standard form of building contract, it can be said that there are clauses which the similar contracting method has been applied. In other words, it is noticed that some of the clauses tend to contract out of the statutory. By way of example, the provision for liquidated damages (LAD), that has become a regular feature in construction contracts. With such a clause, according to the literal reading of the said section, there can be no inquiry into actual loss suffered, subject only to damages payable up to the sum named in the contract. In PAM standard form of contract 1998, the clause for LAD is drafted as following:

***“Clause 22.2 LAD amount Deemed as agreed***

*The Liquidated and Ascertained Damages stated in the Appendix is to be deemed to be as the actual loss which the Employer will suffer in the event that the Contractor is in breach of the Clause hereof. The contractor by entering into this Contract agrees to pay to the Employer the said amount(s) if the same become due without the need of the Employer to prove his actual damage or loss.” (emphasis added)*

Despite the fact that according to PAM 1998, the amount stated in the contract is deemed as agreed by both of the parties, and there is no need for the injured party to prove the actual loss, the CA 1950 stipulated in another way. The CA 1950 stated that there is no difference between penalty and LAD and that the injured party who intent to claim for damages shall be able to prove his actual loss. This is strictly followed by the famous case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*<sup>13</sup>. The judgement of this case is also followed by a few local cases. Hence, the issue that arises as regards to LAD is, with the provision of clause 22 in the standard form of contract; can the injured party excuse themselves from proving the actual loss?

In addition, PAM standard form of contract enables the client to terminate the service of the contractor automatically upon insolvency of the latter as shown below:

---

<sup>13</sup> [1995] 1 MLJ 817

***“Clause 25.3 Contractor’s Insolvency***

*In the event of the Contractor becoming insolvent or making a composition or arrangement with his creditors, or have a winding up order made, or (except for purposes of reconstruction or amalgamation) a resolution for voluntary winding up, or having a liquidator or receiver ..... the employment of the contractor shall be forthwith automatically determined.”*

However, this seems to be prohibited as well by the Companies Act 1965 in Malaysia as the statute provides for power and right of the liquidator. The automatic determination of employment of contractor evaded the right of the liquidator who is given by section 236 of the Companies Act i.e. to carry on with the business or contract of the company. If the clause in standard form of building contract express that the employment is to be terminated automatically, then how could the liquidator execute the power to continue with the contract?

In short, referring to the above circumstances, does these clauses in standard form of building contract amount to contracting out of statutory provision? If yes, the most important question remains that in an event of contracting out of the statutory provision, are those clauses valid and enforceable or otherwise may be challenged as illegal?

### **1.3 Research Objectives**

The objective of this study is-

- To determine the validity of clauses in standard forms of building contract that contract out of statutory provisions.

The finding will hence determine whether the freedom of contract is so untrammelled to the extent that application of statute provisions can be evaded. The LAD and automatic determination clause are studied because it is perceived that these provisions tend to be unfair to the contractors that usually have weaker bargaining power in construction contracts.

## **1.4 Scope of Research**

Given the legalistic nature of this research, the approach adopted in this research is based on case-law. The scope of this research will cover the following areas:

- a) Cases in any field will be discussed in the research due to lack of related issues in the industry
- b) Court cases referred in this research include Malaysian, Australian, New Zealand, and English cases
- c) American cases and French cases are used in order to give illustration only because the court's Jurisdiction are not binding in Malaysia
- d) The study is limited to LAD clauses and automatic determination clauses in standard forms of building contract, specifically with reference to section 75 of the CA 1950 and section 236 of the Companies Act 1965

## **1.5 Importance of Research**

As the relevant clauses in the standard form of building contract as mentioned above have never been challenged in court, there is no judicial decision on its validity. Thus, the importance of this research is to anticipate its validity of these clauses by studying the relevant cases. Through this study, the parties to the contracts in construction industry may able to have prepared themselves shall the clauses are challenged in court in the future.

## **1.6 Research Methodology**

A proper research methodology will be required to provide a framework of an organized approach and steps so that the desired aims and objectives can be achieved. Initially, the concept is studied widely in general. Clauses and cases that are not specifically on construction cases are studied in order to comprehend the practice of contracting out in other legal cases, subsequently the validity of contracting out clauses are determined according to judgement held by the court. For example, clauses that contracted out of Limitation Act, Sales of Goods Act are referred. After studying relevant clauses and cases of “Contracting Out” in general, further study will be carried out, focusing especially on clauses in PAM Standard form of Contract and PWD Conditions of Contract.

The relevant cases will be highlighted from books, journals, dissertations, online reference publications or professional organization’s publications. It involves reading and critically appraising what other people have written about the area of investigation/ study to obtain full understanding for the research. The final stage of the research process is the writing up and presenting the research findings. Having analysed the research topic based upon the objective set earlier, it is important to determine whether the research objectives have been achieved. Conclusion and recommendations will be made based on the findings during the stage of analysis.

## REFERENCE

1. Anonymous, "Chapter 15- Contract Law and Performance, Legality of object", <http://www.mbsre.com/mbsreforum/>
2. A. S. Burrows, "*Remedies For Torts and Breach of Contract.*" (London: Butterworths, 1987)
3. Abdul Mohaimin Bin Noordin Ayus, Building Contract Claims: Comparative study (Scotland, England, Malaysia), Thesis resented for Doctorate of Philosophy (Law), University of Aberdeen, 1992
4. Abdullah, S.S., Lim, T.H., Chew, E, Corporate Receivership, the Law and Practice in Malaysia and Singapore, Butterworth Asia, 1997
5. Andrew Phang Boon Leong, Cheshire, Fifoot and Furmston's Law of Contract, Second Singapore and Malaysian Edition, Butterworths Asia, 1998.
6. Artin Vaqari, Contracting out and Public Policy under S24(E) of the CA1950, [1998] 2 MLJ ix; [1998] 2 MLJA 9, International Islamic University, Malaysia
7. Atiyah, P.S., An Introduction to the Law of Contract (5<sup>th</sup> Ed.), 1995, Oxford University Press, New York
8. Avtar Singh, Law of Sale of Goods and Hire Purchase, 4<sup>th</sup> ed., Eastern Book Company (1993)
9. Barker, D. & Padfield, C., "Law Made Simple." 11th Edition. (Amsterdam: Made Simple Books,(2003)
10. Brownsword "Remedy Stipulation" in the English Law of Contract – Freedom or Paternalism?" (1977) 9 Ottawa LR
11. Catherine Tay and K. L. Ter, 'The Photo Production Case: The Rule of Law Burnt Out?' [1981] 2 MLJ cliii-clix.
12. Chitty law of contract, vol 1, Page 1464
13. Choong Yeow Chong, Law of Limitation, Butterworth Asia, Malaysia, Singapore, Hong Kong (1995)
14. Chow Kok Fong, "An Outline of the Law and Practice of Construction Contract Claims." (Singapore: Longman Singapore Publishers Pte. Ltd., 1988)

15. Cyril Ritter n & David Naylor, B2C in Europe and Avoiding Contractual Liability : Why Businesses with European Operations Should Review their Customer Contracts Now (2004)
16. D. Milman and C. Durrant, Corporate Insolvency, Law and Practice, 3rd ed., Sweet & Maxwell, 1999, London
17. Dato' Visu Sinnadurai, The Law of Contract in Malaysia and Singapore: Cases and Commentary, 2nd edn, Butterworths (Singapore), 1987.
18. David G. Pierce, 'Exemption Clauses in Contracts Since Photo Production' [1984] 1 MLJ xxvii-xxxvi
19. Erin Ann O'Hara, **Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law**(2000)
20. Granham Lim and Lamilah Kasim, "*Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 498: *One Step Forward, Two Steps Back?*" ( The Malayan Law Journal Articles: Lexis Nexis Business Solution, 2002)
21. Grubb, A. , Furmston, M., The Law of Contract, Butterworth Common Law Series (1995)
22. Harban Singh, Enginerring and Construction Contracts Management: Law and Principles, Lexis Nexis, Malaysia, 2002
23. <http://duhaime.org/LegalDictionary/F/FreedomofContract.aspx>
24. I.N. Duuncan Wallace Q.C., Hudson Bulding And Engineering Contracts, vol. 2, London Sweet and Maxwell, 1995
25. John Murdoch and Will Hughes, "*Contract Law.*" Sixth Edition. (Great Britain: The Cornwell Press, (2008)
26. Jonathan Riley, India: Contracting Under Indian Or English Law: Part 2 – Key Contract Differences, (2008), <http://www.mondaq.com/article.asp?articleid=65440>
27. Lim Chong Fong, "*Enforcement of Liquidated Damages- To Prove Actual Loss?*" (The Malayan Law Journal Articles: Lexis Nexis Business Solution, 2002)
28. Lim Chong Fong, The Malaysian PWD Form of Construction Contract, Sweet and Maxwell, Malaysia (2004)
29. Mahmood, R., Case Law Development Relating to Sale by Description – A Malaysian Perspective, [1993] 3 MLJA 54 1993
30. McPherson, The Law of Company Liquidation, student edition, James O' Donovan, the Law book company limited, 1994, Australia, p 96



31. Nigel M Robinson, Anthony P Lavers, George KH Tan, Raymond Chan, Construction Law in Singapore and Malaysia (2nd Edition) (1996)
32. Norila Abu Hassan, "The Relevance of Liquidated Damages Clause in Construction Contracts" (Paper presented in International Conference in The Built Environment in The 21<sup>st</sup> Century, 2006)
33. Parry, The Sanctity of Contract (1959) , Stevens and Sons Limited, London
34. Powell- Smith, V. and Sims, J., Determination and Suspension of Construction Contracts, London: Collins, (1985)
35. Robert Upex, "Davies on Contract", (London: Sweet & Maxwell, 1991)
36. Sakshi Srivastava, Liquidated damages (2008), <http://www.legalserviceindia.com/article/I269-Liquidated-Damages.html>
37. Sundra Rajoo, The Malaysian Standard Form of Building Contract (PAM 1998), (1999) Malayan Lay Journal
38. <http://www.droit-technologie.org/actuality-805/b2c-in-europe-and-avoiding-contractual-liability-why-businesses-with.html>(Union Fédérale des Consommateurs v AOL France)
39. Unknown author, Chapter 9: the doctrine of freedom of contract, [http://epress.anu.edu.au/cotm/mobile\\_devices/index.html](http://epress.anu.edu.au/cotm/mobile_devices/index.html)
40. Vohrah, B. & Wu, Min Aun, "The Commercial Law of Malaysia." (Malaysia: Longman, 2004),
41. Yusfarizal Yussoff , Contracting out of Contracts Act 1950 – General Concept of Contract Act 1950("CA 1950") [2009] 7 CLJ xxxvii