

TERMINATION OF CONTRACTOR DUE TO THE CORRUPTION, UNLAWFUL OR  
ILLEGAL ACTIVITIES

HASNITA HANA BINTI HASSAN

UNIVERSITI TEKNOLOGI MALAYSIA

TERMINATION OF CONTRACTOR DUE TO THE CORRUPTION, UNLAWFUL OR  
ILLEGAL ACTIVITIES

HASNITA HANA BINTI HASSAN

A master's project report submitted in partial fulfillment of the  
requirements for the award of the degree of  
Master of Science (Construction Contract Management)

Faculty of Built Environment  
Universiti Teknologi Malaysia

JULY 2011

*Special dedicated to my beloved family for your love and support*

*'With Love and Appreciation'*

## ACKNOWLEDGEMENT

In the name of Allah, the Most Gracious, the Most Merciful. My praises goes to Allah, who gave me chance and ability to finish this masters. Alhamdulillah.

In preparing this master project, I was in contact with many people. They have contributed towards my understanding and thoughts. First and foremost, I wish to express my sincere appreciation to my kind supervisor, Assoc. Prof. Dr Rosli Abdul Rashid for the encouragement, guidance and critics to supervise me in completing this master project.

My sincere appreciation also extends to all my friends who helped me to get lots of books and materials for this master project. Besides, I am grateful to all my Construction Contract Management, Session 10/11 classmates and lecturers who helped me and always been supportive throughout the process of preparation and production of this master project.

Last but not least, I am deeply grateful to my lovely parents and sisters, who always support, motivate and help me trough out this masters courses. I will always remember and appreciate their kindness and may Allah bless them.

## ABSTRACT

A construction contract can be brought to an end in a various ways either by performance, agreement, frustration or by breach. Normally, termination of contract is a remedy for discharged of contract or put the contract to an end by breach. A contract for government project normally use PWD Form 203A (Rev. 2007). In its effort to eradicate corruption in the construction industry, the government has incorporated an anti-corruption clause in the PWD standard form of contract that is Clause 53.0. However, it is silent on the true meaning of the words corruption, unlawful or illegal activities. It can be anything to the ordinary person since there is no clear meaning. It also raise a question whether the clause (without clear definition) is adequate enough for the employer to terminate the contract. The objectives of this research is to determine the meaning of corruption and unlawful or illegal activities and their differences. It is also to determine whether the employer, is entitled to terminate the contract based on Clause 53.0 of PWD Form 203A (Rev. 2007). This research is confined to the Clause 53.0 of PWD Form 203A (Rev. 2007) and the reported English court cases on corruption, unlawful or illegal activities. This research is carried out by analyzing selected court cases. It is found in this research that the meaning of corruption is offences relating to the improper influencing of people in certain position of trust and willing to act dishonestly in return for money or personal gain. Meanwhile an unlawful or illegal activity is means by activities commit by a person or a group of person that is forbidden by law. It also pointed out that it is wrong for the employer to terminate the contract under Clause 53.0 of PWD Form 203A (Rev. 2007).

## ABSTRAK

Di dalam standard kontrak pembinaan bangunan, terdapat peruntukan untuk membenarkan pihak untuk menamatkan kontrak itu mengikut pelbagai keadaan yang telah dinyatakan di dalam standard kontrak bangunan. Kontrak boleh ditamatkan dalam pelbagai cara sama ada oleh prestasi, perjanjian, kekecewaan, atau oleh perlanggaran. Biasanya, penamatan kontrak adalah remedi yang berpunca dari kontrak yang berakhir dengan perlanggaran. Kontrak bagi projek kerajaan biasanya akan menggunakan Borang JKR 203A (Pind. 2007). Dalam usaha untuk memansuhkan rasuah dalam industri pembinaan, kerajaan telah memasukkan fasal anti rasuah iaitu Fasal 53.0 di dalam Borang Kontak JKR 203A (Pind. 2007). Fasal ini tidak memberikan pengertian yang sebenar kerana tidak mempunyai maksud yang jelas. Selain itu, ia juga memberikan persoalan sama ada kerajaan boleh menamatkan kontrak di bawah fasal tersebut atau tidak. Objektif kajian ini adalah untuk menentukan makna dan perbezaan di antara rasuah dan aktiviti atau perbuatan yang menyalahi undang-undang. Selain itu, ia juga untuk menentukan sama ada kerajaan adalah berhak atau tidak untuk menamatkan kontrak di bawah Fasal 53.0. Kajian ini akan memberi tumpuan kepada Fasal 53.0 di dalam Borang JKR 203A (Pind. 2007) dan kes-kes mahkamah yang berkaitan dengan rasuah, aktiviti atau perbuatan yang menyalahi undang-undang. Kajian ini dilakukan dengan menganalisis kes-kes mahkamah sebelum ini. Oleh itu, pada akhir kajian ini, boleh disimpulkan bahawa rasuah adalah kesalahan yang berhubung dengan pengaruh tidak wajar dalam kedudukan tertentu dan bersedia untuk bertindak tidak jujur sebagai balasan wang atau untuk keuntungan peribadi. Sementara itu, aktiviti atau perbuatan yang menyalahi undang-undang aktiviti yang dilakukan oleh seseorang atau kumpulan orang yang dilarang oleh undang-undang. Selain itu, kajian ini menunjukkan bahawa ia adalah salah bagi kerajaan untuk menamatkan kontrak itu di bawah Fasal 53.0 Borang JKR 203A (Pind. 2007).

## TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF FIGURES	xi
	LIST OF TABLES	xii
	LIST OF ABBREVIATIONS	xiii
	LIST OF CASES	xiv
1	INTRODUCTION	
	1.1 Background of research	1
	1.2 Statement of Issues	3
	1.3 Objective of Research	5
	1.4 Scope and Limitation of Research	5
	1.5 Significance of research	6
	1.6 Research methodology	6
	1.6.1 Identifying the Research Issue	6
	1.6.2 Literature Review	7
	1.6.3 Data and Information Collection	7
	1.6.4 Data Analysis and Interpretation	7

1.6.5	Conclusion and Recommendations	7
1.7	Organisation of Research	9

## **2                   TERMINATION OF CONSTRUCTION CONTRACT**

2.1	Introduction	11
2.2	Standard Form of Contract used In Malaysia	12
2.3	Termination and Determination	14
2.4	Determination of Contract	17
2.4.1	Common Law Determination of Contract	17
	2.4.1.1 Employer's Breach	19
	2.4.1.2 Contractor's Breach	21
2.4.2	Contractual Determination of Contract	23
	2.4.2.1 Determination by Employer	24
	2.4.2.2 Determination by Contractor	31

## **3                   CORRUPTION, UNLAWFUL AND ILLEGAL ACTIVITIES IN CONSTRUCTION CONTRACT**

3.1	Introduction	34
3.2	Corruption	35
3.2.1	Definition of Corruption	36
3.2.2	Classification and Types of Corruption	37
	3.2.2.1 Administrative Corruption	38
	3.2.2.2 Political Corruption	39
3.2.3	Level of Corruption	39
	3.2.3.1 Grand Corruption	40
	3.2.3.2 Petty Corruption	40
3.3	Unlawful or Illegal Activities	41
3.3.1	Definition of Unlawful or Illegal Activities	41



3.3.2	Classification and Types of Unlawful Or Illegal Activities	42
3.3.2.1	Crimes against People	42
3.3.2.2	Crimes against Property	42
3.3.2.3	Crimes against Society	43
3.3.2.4	Crimes of Non-compliance	43
3.4	Procedure to Terminate the Contract due to Corruption, Unlawful or Illegal Activities	44
3.4.1	Law of Natural Justice	46
3.4.2	Rule against Bias	46
3.4.3	Rule to ‘Hear the Other Side’	47
3.4.4	Breaches of the Principles of Natural Justice	48

#### **4 CASE ANALYSIS: CORRUPTION, UNLAWFUL OR ILLEGAL ACTIVITIES**

4.1	Introduction	49
4.2	Case Studies	49
4.2.1	<i>City of Phoenix v Bellamy</i>	50
4.2.2	<i>Taylor v Bhail</i>	51
4.2.3	<i>Parkinson v College of Ambulance</i>	53
4.2.4	<i>Pearce v Brooks</i>	55
4.2.5	<i>Upfill v Wright</i>	56
4.2.6	<i>Alexander v Rayson</i>	57
4.3	Analysis of Case Studies	59
4.3.1	Review of the Case Studies	59
4.5	Conclusion	65

**5****CONCLUSION AND RECOMMENDATIONS**

5.1	Introduction	68
5.2	Research findings	68
5.2.1	Objective 1: To Determine the Definition and Differences of Corruption, Unlawful or Illegal Activities	69
5.2.2	Objective 2: To Determine Whether the Employer is Entitled to Terminate the Contract under Clause 53.0 of PWD Form 203A (Rev. 2007)	70
5.3	Research constraints	71
5.4	Recommendations	71
5.5	Area of future research	71
5.6	Conclusion	72
	<b>REFERENCES</b>	74

**LIST OF FIGURES**

<b>FIGURE NO.</b>	<b>TITLE</b>	<b>PAGE</b>
1.1	Outlines of Research Stages	8

**LIST OF TABLES**

<b>TABLE NO.</b>	<b>TITLE</b>	<b>PAGE</b>
4.1	Summarize of Analysis on the Selected Cases	64

**LIST OF ABBREVIATIONS**

AI	Architect's Instruction
Ariz.	Arizona Supreme Court
BLR	Building Law Report
CIDB	Construction Industry Development Board
CILL	Construction Industry Law Letter 1983
Con LR	Construction Law Report
Exch	Exchequer
IEM	Institute of Engineering Malaysia
IIM	Integrity Institution of Malaysia
JKR	Jabatan Kerja Raya
KB	King's Bench
LJ	Law Journal
LR	Law Report
MATRADE	Malaysian External Trade Development Corporation
MLJ	Malayan Law Journal
NIP	National Integrity Plan
NSWSC	New South Wales Supreme Court
PAM	Pertubuhan Arkitek Malaysia
PKFZ	Port Klang Free Zone
PMC	Project Management Consultant
PWD	Public Work Department
QB	Queen's Bench
S.O	Superintending Officer
UTM	Universiti Teknologi Malaysia

## LIST OF CASES

CASE	PAGE
<i>Alexander v Rayson</i> [1936] 1 KB 169.....	51, 58, 63, 66
<i>Attorney General of Singapore v Wong Wai Cheng Trading and Union Contractor</i> [1980].....	19
<i>Cheok Hock Beng v Lim Thiam Siong</i> [1992].....	22
<i>City of Phoenix v Bellamy</i> [1987] 153 Ariz. 363.....	51, 61, 64, 67, 71
<i>Disdain Project Services Ltd. v Opecprime Development Ltd.</i> [2001] CILL 1698.....	47
<i>Earth &amp; General Contracts Ltd. v Manchester Corporation</i> [1958] 108 LJ 665.....	19
<i>F.G Cullis Construction Ltd. v HVM Fields (Properties) Ltd. &amp; Anor</i> [1990].....	16
<i>Feather &amp; Co. (Bradford) Ltd. v Keighley Corporation</i> [1953] 53 Local Government Reports.....	17
<i>Government of Ceylon v Chandris</i> [1963] 2 QB 327.....	48
<i>Haji Kassim v Tegap Construction Sdn Bhd</i> [1981].....	20
<i>Musico &amp; Ors v Davenport &amp; Ors</i> [2003] NSWSC 977.....	48
<i>Parkinson v College of Ambulance</i> [1925] 2 KB 1.....	51, 54, 62, 64
<i>Pearce v Brooks</i> [1866] LR 1 Exch 213.....	51, 56, 58, 63, 65
<i>Pebinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd</i> [2007] 4 MLJ 113.....	21
<i>Perini Corporation v Commonwealth of Australia</i> [1969] 12 BLR 82.....	20
<i>Photo Production Ltd. V Securicor Transport Ltd (supra)</i> .....	15
<i>Sutcliffe v Chippendale &amp; Edmondson</i> [1971] 18 BLR 149.....	22
<i>Taylor v Bhail</i> [1995] 50 Con LR 70.....	51, 52, 62, 65
<i>Upfill v Wright</i> [1911] 1 KB 506.....	51, 57, 63, 65

## **CHAPTER ONE**

### **INTRODUCTION**

#### **1.1 Background of Research**

Contractors are builders who entered into a contract to build things or who contracts for and supervises construction, as of a building. As a contractor, he owes an obligation to carry out and completed the works accordingly to the contract and provides the workmanship and materials as required by the specifications given by the architects and engineers. In a construction industry, corruption might be happen. It can be involved in pre-contract or post-contract stages. Corruption is the abuse of entrusted power for private gain and it is damaging to a country because decisions are taken not for the public benefit but to serve private interests. The best example for corruption is bribery.

Construction industry cannot be escape from corruption and bribery. We can see that in Malaysia there is some of the construction project that involved in corruption. And due to this, many problems can occur such as delay in completing the project and the project cost will balloons into a higher amounts. Corruption is generally understood to be the giving or offering of any reward to any person in power to influence his conduct so that he can abuse his power and act in favouring

the giver. In Malaysian Anti-Corruption Commission Act 2009, Section 17 (b) stated:

*Corruptly gives or agrees to give or offers any gratification to any agent as an inducement or a reward for doing or bearing to do or for having done or forborne to do any act in relation to his principal's affair.*

Clause 53.0 of PWD Form 203A (Rev. 2007) deals with the termination on corruption, unlawful or illegal activities commit by the contractor and in year 2009, Jabatan Kerja Raya Malaysia had issue an instruction to make an amendment to all tender documents for procurement of employment and include additional provision relating to corruption. Clause 53.0 stated:

“Termination on Corruption, Unlawful or Illegal Activities”

- a) Without prejudice to any other rights of the Government, if the Government is satisfied that the Contractor, its personnel, servants, agents or employees is or are involved in corruption or unlawful or illegal activities in relation to this Contract or any other agreement that the Contractor may have with the Government, the Government shall be entitled to terminate at any time, by giving immediate written notice to that effect to the Contractor.
- b) Upon such termination, the Government shall be entitled to all losses, costs, damages and expenses (including any incidental costs and expenses) incurred by the Government arising from such termination and clauses 51.1 (c) (i) and (ii) shall apply.
- c) Nothing in Clause 53 or anything else contained in this Contract shall render the Government in any way liable for payments upon termination.



To stop and to be a corruption free in the construction industry, all of the parties should be responsible and play their roles properly. Previous prime minister of Malaysia, Dato' Seri Abdullah Ahmad Badawi had launched the National Integrity Plan (NIP) and the Integrity Institute of Malaysia (IIM) as a new measures to combat corruption according to the following quotation:

*“Integrity is one of the several paths; it distinguishes itself from the others because it is the right paths and the only one upon which you will never get lost” M.H McKee*

Forms of corruption exist in the construction industry can be summarized in two groups which are contractor related and professional consultant clients of government officers related. The forms of corruptions related to contractors include, the construction company offer bribes to client or the tender evaluation committee members in order to win the project. Bribery, normally for the tender evaluation committee to lower the tendering price for the tenderer to win the project.

In November 2004, a local newspaper, The New Straits Times carried a front-page story on seriously defective buildings and road. The immediate response of the Minister of Works was that the 2 billion ringgit fiasco was not the fault of the Public Works Department (PWD) but of a group of contractor known as Project Management Consultant (PMC). The PMC practice allowed government agencies to carry out their own projects through limited tender or direct negotiations. With the introduction of the PMC, PWD was by-passed and the justification of this new procedure was the speedy completion of projects but the cost for some projects almost doubled.

For examples are a work on the RM167 million MATRADE (Malaysian External Trade Development Corporation) building began in 1994 and was scheduled to be completed in 1997 but till 2004 the building could not be occupied. It was reported that repairs to the defects in the building would cost RM28.4 million.

Meanwhile, in The Star newspaper dated September 4, 2009 reported on the Port Klang Free Zone (PKFZ) scandal that shows a shocking trail of how businessmen, top civil servants and professionals have colluded to cause multi-billion ringgit losses to taxpayers.

Thus, the government of Malaysia had introduced Malaysian Anti-Corruption Commission which is to incessantly eradicate all forms of corruption, abuse of power and malpractices. A quote from Karl Kraus (1874-1936) said that:

*“Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.”*

## **1.2 Statement of Issues**

The foregoing discussion lead us to several important issues which are the clause is silent on the true meaning of the corruption, unlawful or illegal activities. Since it is a new clause, it has not been tested yet and really defined. It can be anything to the ordinary person since there is no clear meaning and what exactly does it mean by corruption, unlawful or illegal activities. Normally, people are confusing in understanding or interpreting it. According to Begovic (2005), bribery is most probably comes first to mind when people talking about corruption. Besides that, it also raises a question of whether the clause (without clear definition) is adequate and can be use by the employer to terminate the contract.

### **1.3 Objective of Research**

The objectives of this research are:

1. To determine the definition and differences of corruption, unlawful or illegal activities.
2. To determine whether the employer is entitled to terminate the contract under Clause 53.0 of PWD Form 203A (Rev. 2007).

### **1.4 Scope and Limitation of Research**

The scope of research will be focused on the following matters:

1. Clause 53.0 of PWD Form 203A (Rev. 2007) regarding on termination due to the corruption, unlawful or illegal activities.
2. Reported English court cases related to the corruption, unlawful and illegal activities based on Lexis Nexis Legal Database via UTM Library website.

### **1.5 Significant of Study**

There are many provisions relating to the termination of contract in the standard form of contract. Termination of contract is one of the remedies that can be

aggrieved party take because of the one party fails to perform their obligation or breach of the contract. However, termination of contract only can be done if one of the party in the contract breach the contract and it is fundamental breach.

In PWD Form 203A (Rev. 2007), there is a provision to terminate the contractor's employment because of the corruption, unlawful or illegal activities involved by the contractor, its personnel, servants, agents or employees. Therefore, this research is done to determine whether illegal contract can be terminated or it was wrong to terminate.

## **1.6 Research Methodology**

In order to achieve the research objectives, a systematic process of conducting this research had been organized. Briefly, the research process will be divided into five (5) stages as shown in the Figure 1.1.

### **1.6.1 Identifying the Research Issue**

The initial study will be carried out to identifying the research issue by extensive reading on variety sources of published materials. From the issue, the objectives of this research have been identified.

### **1.6.2 Literature Review**

This is the second stage of the research where it involved in collection of data and information from the books, internet, paper and previous thesis. Other than that, reports court cases found through the access of Lexis Nexis Legal Database which is available in the UTM Library website.

### **1.6.3 Data and Information Collection**

After finishing the literature review stage by extensive readings on the related issue, all the relevant information based on the secondary data will be collected and carry out the case studies. Legal cases based on previous court cases which are related to this research will be collected from Lexis Nexis Legal Database via UTM library website.

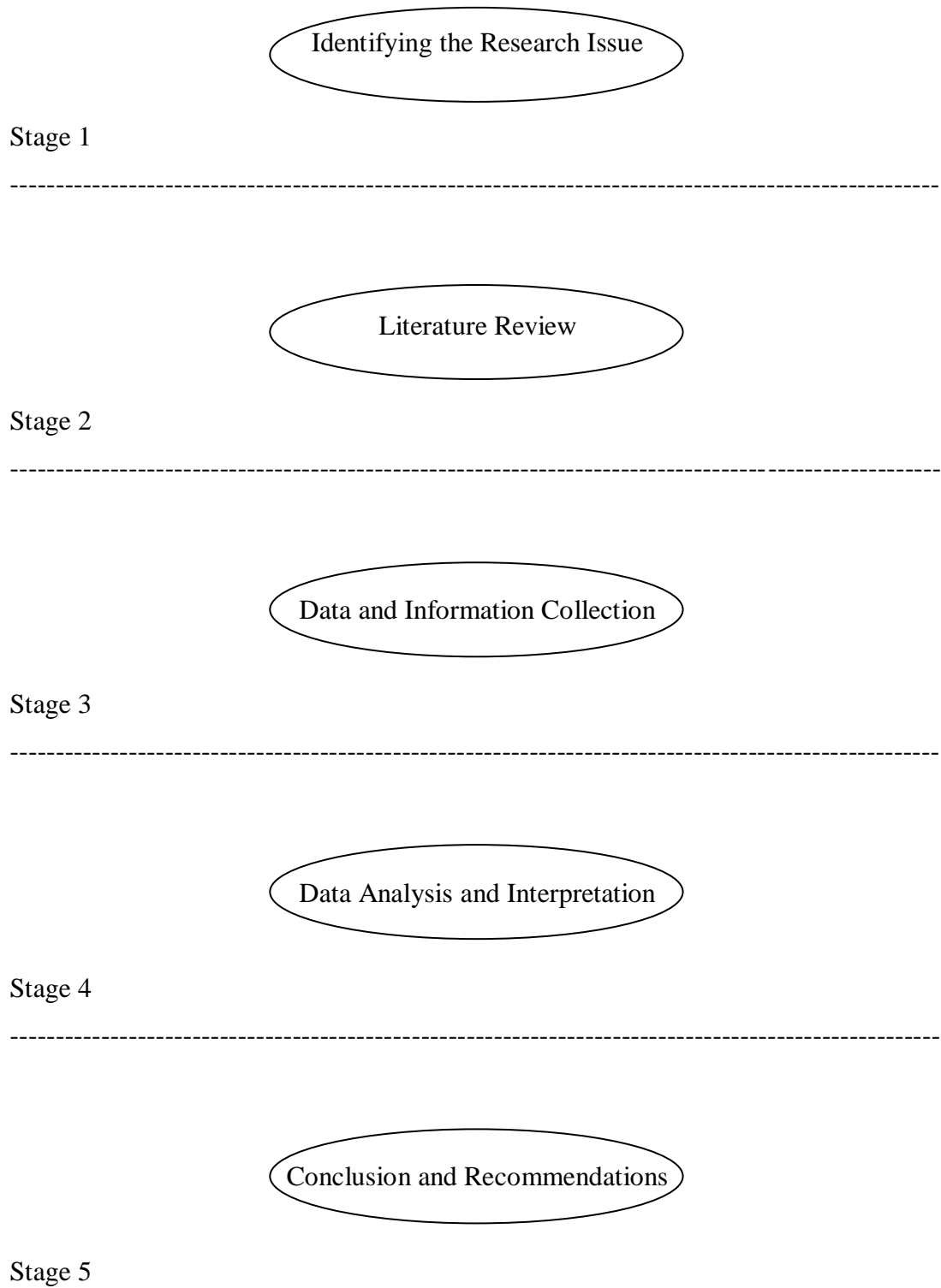
### **1.6.4 Data Analysis and Interpretation**

Data analysis will be done on collected information and those legal court cases. In this stage, the objectives of this research will be determined whether it is achieved or vice versa.

### **1.6.5 Conclusion and Recommendations**

Conclusion and recommendations is the final stage of this research. Finally, the author will make the conclusion from the analysis and able to show the result of the research. Other than that, some recommendations related to the problem will be made and further research will be suggested.

**Figure 1.1:** Outlines of Research Stages



## **1.7 Organisation of the Research**

This research is structured into 5 chapters and briefly described as follows:

### Chapter 1: Introduction

This chapter presents an introduction to the subject, background and the specific problem associated with it. This chapter also specifies the aim and objectives, the methodology of conducting this study to achieve the objectives and a brief summary on the structure of the research.

### Chapter 2: Termination of Construction Contract

This chapter generally discussed about standard form of contract used in Malaysian construction industry. Other than that, the definition of termination and determination are determined in this chapter and the termination of contract by common law or contractual provision.

### Chapter 3: Corruption, Unlawful or Illegal Activities

This chapter discussed about the definition and differences between corruption and unlawful or illegal activities. The classification and types of those default also been discussed in this chapter.

### Chapter 4: Analysis of Case Laws

This chapter analysed about the result from the judicial decisions based on the court cases which are related to the research objectives.

## Chapter 5: Conclusion and Recommendations

Conclusion on the research based on all the discussion in the previous chapter will be presented in this chapter. Furthermore, recommendations and further research will be suggested.



## REFERENCES

- Allan Ashworth. (2001). *Contractual Procedures in the Construction Industry*. 4<sup>th</sup> Edition. Pearson Education Limited. England
- Beatrix Vohrah and Wu Min Aun. (2009). *The Commercial Law of Malaysia*. Longman. Kuala Lumpur
- Boris Begovic. (2005). *Corruption: Concepts, types, causes and consequences*
- Contracts Act 1950 (Act 136). (2010).
- Criminal Procedural Code. (2006). Act 593
- Damien J Cremean. (1995). *Brooking On Building Contracts*. 3<sup>rd</sup> Edition. Reeds International Books Australis Pty Limited
- Don McLagan. (1991). *An Introduction to Building Contracts*. The Law Book Company Limited
- Duncan Wallace. (1995). *Hudson's Building and Engineering Contracts*. 11<sup>th</sup> Edition. Sweet & Maxwell. London
- Elizabeth A. Martin. (2001). *A Dictionary of Law*. 5<sup>th</sup> Edition. Oxford University Press
- Guest, A G. (1975). *Anson's Law of Contract*. Clarendon Press. Oxford
- Heffey, P, Paterson, J and PJ Hocker. (1998). *Contract, Commentary and Materials* 8<sup>th</sup> edition. LB Information Services.

Law of Malaysia. (2006). Penal Code, Act 574

Lim Chong Fong. (2004). *The Malaysian PWD Form of Construction Contract*. Thomson Asia Pte Ltd

Ling Tek Lee. (2006). *Natural Justice in Adjudication*. Universiti Teknologi Malaysia

Maslie Ikran Ismail. (2008). *The Validity of Determination by Insolvency Clause in Malaysia Standard Form of Contract*. Universiti Teknologi Malaysia

Michael Furmston. (2000). *Building Contract Casebook*. 3<sup>rd</sup> edition. Blackwell Science

PAM Contract 2006 (With Quantities)

Paterson, J, Robertson, A and Heffey, P. (2005). *Contract Cases and Materials*. 10<sup>th</sup> Edition. Lawbook Co.

Powell-Smith, V and Sims, J. (1985), *Determination and Suspension of Construction Contracts*. William Collins Sons & Co. Ltd. London

Powell-Smith, V, Sims, J and Dancaster, C. (2000). *Contract Documentation for Contractors*. 3<sup>rd</sup> Edition. Blackwell Science

PWD Form 203A (Rev. 2007)

Roslinda binti Rosly. (2009). *The Profile of Construction Contract Termination Cases*. Universiti Teknologi Malaysia

Stephen Graw. (1998). *An Introduction to the Law of Contract*. 3<sup>rd</sup> Edition. LBC Information Services

Sundra Rajoo. (1999). *The Malaysian Standard Form of Building Contract (the PAM 1998 Form)*. 2<sup>nd</sup> Edition. Malayan Law Journal Sdn Bhd

Tay Lee Yong. (2006). *Determination of Contract by Employer in Construction Industry*. Universiti Teknologi Malaysia

Wan Nordiana Wan Ali. (2006). *Determination of contract by contractor*. Universiti Teknologi Malaysia

<http://www.politicalcorruption.net/2009/01/30/types-of-corruption-found-in-local-government/>

[http://www.cadal.org/documents/documento\\_26\\_english.pdf](http://www.cadal.org/documents/documento_26_english.pdf)

<http://info.worldbank.org/etools/docs/library/35970/mod03.pdf>