

**VALID AND ACCEPTABLE FORM AND FORMAT OF
ARCHITECT'S INSTRUCTIONS**

NOOR AZLIFAH AMIR SUTAN

UNIVERSITI TEKNOLOGI MALAYSIA

VALID AND ACCEPTABLE FORM AND FORMAT OF
ARCHITECT'S INSTRUCTIONS

NOOR AZLIFAH AMIR SUTAN

A project report submitted in partial fulfilment of the
requirements for the award of the degree of
Master of Science in Construction Contract Management

Faculty of Built Environment
Universiti Teknologi Malaysia

MAY 2011

Specially dedicated to my lovely family:

Tuan Muhammad Azhan, husband

Tuan Amir Az-Zikri, son

Tuan Ameer Az-Zafran, son

Amir Sutan Habib Mohamad, father

Arpah Rahim, mother

All siblings and in laws

Thank you for all the infinite prays, supports, encouragement and assistance...

May Al-Mighty Allah SWT reward all of you.

ACKNOWLEDGEMENT

Not to discouraging anybody, but it was not an easy task to complete this research. However, I managed to complete it due the coolness and encouragement from my dedicated supervisor, En. Norazam Othman. I wish to thank him for the support and trust he has in me. His ways of seeing thing differently make me ‘opens up’ my eyes to understand and explore more on this topic. His suggestion for me to read the book *Legal Research and Writing* by Anwarul Yaqin has helped me a lot in developing my research.

Not to forget, my sincere thanks to En Jamaludin Yaakob for teaching and guiding me to understand what law and contract are. I’m proud enough to say that I’m a better person now in administering and managing my contractual work as an architect. Thank you also to Dr. Nur Emma Mustafa for suggesting me to research on Architect’s Instructions. My heartfelt thanks shall also be awarded to the other lecturers of Master of Science (Construction Contract Management), Assoc. Prof. Dr. Maizon Hashim, Assoc. Prof. Dr. Rosli Abdul Rashid, Assoc. Prof. Dr. Fadhlin Abdullah, Assoc. Prof. Dr. Roslan Amiruddin, Assoc. Prof. Dr. Razali Adul Hamid, Dr. Kherun Nita Ali and Dr. Ismail Mohamad. Thank you all for the commitment and guidance throughout the course.

Last but not least, thank you to my family for the infinite prays, supports, encouragement and assistance. Completion of this research and course is the success for all of us.

ABSTRACT

It is excellent if projects can be implemented purely as per the issued construction drawings. Yet, this scenario is too good to be true, especially when involving people with millions of feelings and desires. There are many external factors that lead to changes in each project. Thus, valid instructions are required to formalize and bind these changes into the construction contracts. Hence, the state of practice method in issuing Architect's Instructions in construction industry is very important for effectively communicating directions and orders of changes, further information, method of working and others, to the contractors, especially when some information is illegible due to poor quality, inadequacy and unclear construction drawings. The effectiveness of instructing during regular meetings is also questionable. This is because the verbal and written communication skills are inadequate among the constructional people, thus may lead to mistakes, inefficiencies, and even conflicts. These problems become more critical if they escalate into disputes. The most popular disputes in relations to Architect's Instructions are on the entitlement of claiming additional payments by the contractors on variation works. These disputes occur because there are also disputes in recognizing the Architect's Instructions among the construction people including the employers, consultants and contractors. In some cases law, some forms and formats are judged as the valid instructions, and some are not. Therefore, this research will find out what are the valid and acceptable form and format of Architect's Instructions.

ABSTRAK

Adalah sesuatu keadaan yang sangat baik sekiranya sesuatu projek dapat dilaksanakan secara tepat seperti yang terlakar di dalam lukisan-lukisan pembinaan yang diterbitkan. Namun, senario ini terlalu bagus untuk menjadi kenyataan, terutama ketika melibatkan manusia yang mempunyai berjuta-juta perasaan dan keinginan. Terdapat banyak faktor luaran yang menyebabkan perubahan dalam setiap projek. Oleh itu, arahan yang sah diperlukan untuk merumuskan dan mengikat perubahan ini ke dalam kontrak pembinaan. Justeru itu, kaedah amalan pengeluaran Arahan Arkitek (Architect's Instructions) dalam industri pembinaan amat penting untuk menyampaikan arahan dan perintah ke atas perubahan, maklumat lebih lanjut, kaedah kerja dan lain-lain, secara efektif kepada kontraktor, terutama ketika beberapa maklumat yang terdapat dalam lukisan-lukisan pembinaan tidak dapat difahami disebabkan kualiti yang buruk, ketidakcukupan dan ketidakjelasan maklumat. Keberkesanan arahan-arahan yang diberilan semasa mesyuarat tapak sering dipersoalkan. Ini adalah kerana kemampuan komunikasi lisan dan bertulis dikalangan mereka yang terlibat dengan pembinaan adalah tidak mencukupi dan mungkin mengakibatkan kesalahan, inefisiensi bahkan konflik. Masalah-masalah ini menjadi lebih kritikal jika mereka meningkat menjadi pertikaian. Pertikaian yang paling popular yang ada hubungkaitnya dengan Arahan Arkitek ialah pada hak kontraktor untuk menuntut bayaran tambahan disebabkan kerja-kerja variasi. Pertikaian ini berlaku kerana terdapat juga pertikaian di antara ahli pembinaan seperti klien, perunding dan kontraktor dalam mengenalpasti Arahan Arkitek. Dalam beberapa kes undang-undang, sebahagian bentuk dan format Arahan Kerja adalah sah dan sebahagian yang lain tidak. Oleh yang demikian, kajian ini akan merungkai bentuk dan format yang sah dan diterima sebagai Arahan Arkitek.

TABLES OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	V
	ABSTRAK	vi
	TABLES OF CONTENT	vii
	LIST OF TABLES	xii
	LIST OF FIGURES	xiii
	LIST OF ABBREVIATIONS	xiv
	LIST OF CASES	xv
	LIST OF APPENDICES	xx
1	INTRODUCTION	
	1.1 Background of Research	1
	1.2 Problem Statement/ Research Issue	7
	1.3 Previous Research	17
	1.4 Objective of Research	18
	1.5 Scope of Research	18
	1.6 Significance of Research	19
	1.7 Research Process and Method of Approach	20
	1.8 Tentative Chapter Headings	23
	1.8.1 Chapter 1: Introduction	23

CHAPTER	TITLE	PAGE
	1.8.2 Chapter 2: Architect's Instructions In Construction Industry	23
	1.8.3 Chapter 3: Analysis Of Cases Law	24
	1.8.4 Chapter 4: Conclusion And Recommendation	24
 2	 ARCHITECT'S INSTRUCTIONS IN CONSTRUCTION INDUSTRY	
	2.1 Introduction	25
	2.2 Who is the Architect?	27
	2.3 Duties of the Architect	28
	2.3.1 Design	30
	2.3.2 Contract Administration	33
	2.3.3 Supervision	34
	2.3.4 Certification	35
	2.3.5 Instruction	37
	2.4 What is an Architect's Instruction?	39
	2.4.1 Definition	39
	2.4.2 Instruction = Direction	42
	2.4.3 Valid Architect's Instruction	42
	2.5 Provisions Empowering Architect's Instrution	44
	2.5.1 PAM 2006	44
	2.5.2 Other Malaysian Forms	48
	2.5.3 International Forms	40
	2.5.4 Compliance with Architect's Instruction	52
	2.6 Disputes of Architect's Instruction	52
	2.7 Summary	49

CHAPTER	TITLE	PAGE
3	ANALYSIS OF CASES LAW: IDENTIFYING VALID AND ACCEPTABLE FORM AND FORMAT OF ARCHITECT'S INSTRUCTIONS	
3.1	Introduction	57
3.2	Case 1: <i>Myers v. Sarl.</i>	58
3.2.1	Fact of case	58
3.2.2	Issue (relating to instruction)	58
3.2.3	Finding	58
3.2.4	The Principle	59
3.2.5	Valid and Acceptable Form and Format of Instruction	60
3.3	Case 2: <i>Tharsis Sulphur and Copper Co. v. Melroy & Sons & Ors.</i>	60
3.3.1	Fact of case	60
3.3.2	Issue (relating to instruction)	61
3.3.3	Finding	61
3.3.4	The Principle	64
3.3.5	Invalid and Unacceptable Form and Format of Instruction	64
3.4	Case 3: <i>Molloy v. Liebe.</i>	65
3.4.1	Fact of case	65
3.4.2	Issue (relating to instruction)	65
3.4.3	Finding	66
3.4.4	The Principle	67
3.4.5	Valid and Acceptable Form and Format of Instruction	67
3.5	Case 4: <i>Brodie v. Cardiff Corporation.</i>	68
3.5.1	Fact of case	68
3.5.2	Issue (relating to instruction)	69
3.5.3	Finding	69
3.5.4	The Principle	70

CHAPTER	TITLE	PAGE
	3.5.5 Valid and Acceptable Form and Format of Instruction	70
3.6	Case 5: <i>Simplex Concrete Piles Ltd v. St Pancras Borough Council.</i>	71
	3.6.1 Fact of case	71
	3.6.2 Issue (relating to instruction)	72
	3.6.3 Finding	72
	3.6.4 The Principle	73
	3.6.5 Valid and Acceptable Form and Format of Instruction	73
3.7	Case 6: <i>Holland Hanned & Cubbits (N) Ltd v. Welsh Health Technical Services and Others.</i>	74
	3.7.1 Fact of case	74
	3.7.2 Issue (relating to instruction)	75
	3.7.3 Finding	75
	3.7.4 The Principle	76
	3.7.5 Valid and Acceptable Form and Format of Instruction	76
	3.7.6 Invalid and Unacceptable Form and Format of Instruction	76
3.8	Case 7: <i>The Missouri Department of transportation, ex rel. PR Developers, Inc. v. Safeco Insurance Co. of America and Robertson Contractors, Inc.</i>	77
	3.8.1 Fact of case	77
	3.8.2 Issue (relating to instruction)	77
	3.8.3 Finding	78
	3.8.4 The Principle	78
	3.8.5 Valid and Acceptable Form and Format of Instruction	79

CHAPTER	TITLE	PAGE
3.9	Case 8: <i>Flooring System Inc. v. Staat Construction Co. DLJ</i>	79
3.9.1	Fact of case	79
3.9.2	Issue (relating to instruction)	80
3.9.3	Finding	80
3.9.4	The Principle	81
3.9.5	Valid and Acceptable Form and Format of Instruction	82
3.10	Analysis of Cases Law	82
3.10.1	Group 1: <i>Bona Fide</i> Written Architect's Instruction	82
3.10.2	Group 2: Written Architect's Instruction with Additional Term	84
3.10.3	Group 3: Other Forms of Written Architect's Instruction	85
3.10.4	Group 4: Arbitration Award	87
3.10.5	Group 1: Oral Instruction	88
3.11	Summary	88
5	CONCLUSION AND RECOMMENDATION	
5.1	Introduction	91
5.2	Summary of Research Findings	92
5.3	Problem Encountered during Research	97
5.4	Limitation of Research	98
5.5	Suggestion for Future Research	98
5.6	Conclusion	99
	REFERENCES	100
	BIBLIOGRAPHY	103
	APPENDIX A~B	105-106

LIST OF TABLES

TABLE NO.	TITLE	PAGE
3.1	Summary of Findings (Cases 1 ~ 3)	89
3.2	Summary of Findings (Cases 4 ~ 8)	90

LIST OF FIGURES

FIGURE NO.	TITLE	PAGE
1.1	Letter 01	12
1.2	Email 01	13
1.3	Drawing 01	14
1.4	Formal AI 01	16
1.4	Research Process	22

LIST OF ABBREVIATIONS

AC	Law Report: Appeal Case
AI	Architect's Instruction
BLR	Building Law Reports, UK
CIDB	Construction Industry Development Board, Malaysia
CIDB year	CIDB Standards Form of Contract for Building Works.
CNC	Certificate of Non Completion
EI	Engineer's Instructions
EOT	Extension of Time
ICE	Institution of Civil Engineers
JCT	Joint Contracts Tribunal, UK
PAM	Pertubuhan Akitek Malaysia
PAM year	PAM's Agreement and Schedule of Conditions of Building Contract
PSSCOC	Public Sector Standard Conditions of Contract for Construction Works
PWD	Public Work Department (Jabatan Kerja Raya), Malaysia
PWDyear	PWD Form 203A – Standard Form of Contract of Building Contract
RIBA	The British Royal Institute of Architect
REDAS D&B	Real Estate Developers' Association of Singapore Design and Build Conditions
SIA	Singapore Institute of Architects
S.O.	Superintending Officer

LIST OF CASES

CASES	PAGE
<i>Alexander Corfield v. David Grant</i> (1992) 59 BLR 102.	35
<i>Balfour Beatty Building Ltd. v. Chestermount Properties Ltd.</i> (1993) 62 BLR 1.	3
<i>Bolam v. Friern Hospital Management Committee</i> 1957 [1957] 1 WLR 582; 2 All ER 118.	30
<i>Brockman v. Soltysiak</i> 49 S.W.3d 740, 745 (Mo.App. E.D.2001).	80
<i>Brodie v. Cardiff Corporation</i> [1919] AC 337 (HL).	53, 68, 87, 90, 95
<i>Cardy v. Taylor</i> (1994) 38 CLR 79.	31
<i>CJ Peace Ltd. v. Hereford Corporation</i> (1968) 66 LGR 647.	54
<i>Consarc Design v. Hutch Investments</i> (2002) 84 Con LR 36.	35
<i>Cooper v. Langdon</i> (1841) 9 M&W 60.	43, 46

CASES	PAGE
<i>Craig Johnson Construction v. Floyd Town Architects</i> (2006 Opinion No. 43, Docket No. 31448).	32
<i>Crosby (J) & Sons Ltd v. Portland Urban District Council</i> (1967) 5 BLR 121, QBD	54
<i>English Industrial Estate Corporation v. George Wimpey Co. Ltd.</i> [1973] 7 BLR 122.	4
<i>Faulkner Associates v. Newham LBC</i> [1994] 71 BLR 1.	28
<i>Flooring System Inc. v. Staat Construction Co.</i> DLJ ED 80814 and ED 80867, filed 11 February 2003.	79, 87, 90, 96
<i>Gallagher v. Hirsch</i> (1899) NY 45 App Div 467.	26
<i>Glenlion Construction v. The Guinness Trust</i> (1988) 39 BLR 89.	39
<i>Greaves & Co. (Contractors) Ltd v. Bayham Meikle and Partners</i> [1975] 3 All ER 99.	31
<i>Hickman & Co. v. Roberts</i> (1913) AC 229.	36
<i>Holland Hanned & Cubbits (N) Ltd v. Welsh Health Technical Services and Others</i> (1981) 18 BLR 89.	17, 74, 82, 90, 93
<i>J & J Fee Ltd. v. The Express Lift Co.</i> (1993) 34 Con LR 147.	39
<i>Jardine Engineering v. Shimizu Corporation</i> (1992) 63 BLR 96.	39

CASES	PAGE
<i>John Holland Construction v. Majorca Projects</i> [2000] 16 Const. LJ 114.	37
<i>Leicester Guardians v. Trollope</i> [1911] 75 JP 197.	34
<i>London Borough of Hounslow v. Twickenham Garden Developments Ltd</i> [1971] 1 Ch 233.	29, 30, 34
<i>London Borough of Hillingdon v. Cutler</i> [1967] 2 All ER 361.	52
<i>London Borough of Merton v. Stanley Hughes Leach</i> (1985) 32 BLR 51.	39
<i>Mitsui Construction Co. Ltd v. Attorney-General of Hong Kong</i> (1986) 33 BLR, 1 (PC).	38, 44
<i>Modern Engineering (Bristol) Ltd. v. Gilbert-Ash Northern</i> [1974] AC 689 717.	2
<i>Molloy v. Liebe</i> [1910] 102 LT 611.	65, 83, 87, 88, 89, 94
<i>Myers v. Sarl</i> (1860) 3 E & E 306.	26, 58, 85, 88, 89, 95
<i>Neodox v. Swinton and Pendlebury Borough Council</i> (1958) 5 BLR 34.	39, 54
<i>Pacific Associates v. Baxter</i> [1990] 1 QB 993.	36, 37

CASES	PAGE
<i>Page v. Llandaff and Dinas Powis Rural District Council</i> (1901) Hudson's BC 4th ed. Vol.2 316.	36
<i>Pepper v. Bourland</i> (1792)	36
<i>Robinson v. Powers</i> 777 S.W.2d 675 (Mo.App. S.D.1989).	80
<i>Rusell v. Viscont Sa da Bandeira</i> [1862] 13 CB (NS) 149.	26
<i>Sharpe v. San Paulo Railway</i> (1872-1873) LR 8 Ch App 665.	43, 46, 53
<i>Simplex Concrete Piles Ltd v. St Pancras Borough Council</i> (1958) 14 BLR 80.	54, 71, 83, 85, 90, 94, 97
<i>Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors.</i> [2000] 4 MLJ 200.	31
<i>Stockport Metropolitan Borough Council v. O'Reilly</i> [1978] 1 Lloyd's Rep 595.	38, 44
<i>Sutcliffe v Thackrah</i> [1974] AC 727.	29
<i>Tharsis Sulphur and Copper Co. v. Melroy & Sons & Ors</i> (1878) 3 App Cas 1040.	17, 43, 60, 85, 89, 95
<i>The Missouri Department of transportation, ex rel. PR Developers, Inc. v. Safeco Insurance Co. of America and Robertson Contractors, Inc</i> ED 79860, filed 5 November 2002.	77, 87, 90, 96
<i>Voli v. Inglewood Shire Council</i> (1963) ALR 657.	32

CASES**PAGE**

*Yorkshire Water Authority v. Sir Alfred McAlpine & Son
(Northern) Ltd.* (1985) 32 BLR 114.

55

LIST OF APPENDICES

APPENDIX	TITLE	PAGE
A	Suggested format for Architect's Instruction.	105
B	Suggested format for Confirmation of Architect's Instruction.	106

CHAPTER 1

INTRODUCTION

1.1 Background of Research

Whenever a change is required in a constructional work, no matter by whom, the contractors always ask the architects to issue Architect's Instruction (AI), even though for purely engineering matters. In practical, the engineers will issue instructions for changes that purely concern engineering matters; but if these changes amounting to additional payments to the contractors, and if the architects are named as the contract administrator of the construction contract, then the AIs are always required to formalize the Engineer's Instructions (EI). Hence, it shows that AIs are important construction contracts.

'Contract' can be defined as a legal terminology of an agreement that legally binding two or more parties¹ into doing or not to do certain tasks which are mentioned in the contract. It is an agreement enforceable by law.² Whereas

¹ Vohrah, B. & Wu, M. A. (2005), *The Commercial Law of Malaysia*, 2nd ed., Malaysia: Longman, p. 6.

² Section 2(h) of Contract Act 1950.

‘construction’ includes all immovable structures³ like buildings, dam, airports, bridges, tunnels and others. Construction projects “*are relatively complex and generally are completed through the combined efforts of different crafts.*”⁴ They also involve engagements “*over different points in time of several organisations such as consultants, contractors, subcontractors and suppliers, with a client system that is organisationally complex.*”⁵ In other words, construction works are complex in terms of their processes and manpower organizations that require high degree of expert skills and professionals.

Hence, the construction contract can be defined as “*an agreement entered into between the employer or building owner, and the contractor employed to execute specified construction works in consideration of payments to be made at various stages in the works; yet it is different from other types of contract. Its implementation requires the services and skills of a wide range of professional advisers, contractors, specialist contractors, suppliers and others.*”⁶ Not only the construction works are complex, the construction contracts are also complicated and tedious. The nature of construction contract was described by Lord Diplock in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash Northern*⁷ as:

“an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract.”

³ Hinze J. (2001), *Construction Contract*, 2nd ed., New York: McGraw-Hill Higher Education, p. 1.

⁴ *ibid.*, p. 3.

⁵ McInnis, A. (2001), *The New Engineering Contract: A Legal Commentary*. London: Thomas Telford Publishing, p. 51.

⁶ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T. (2010), *Handbook For PAM 2006 Contract*, Malaysia: Pertubuhan Akitek Malaysia, p. xxi.

⁷ [1974] AC 689, 717.

Even though they are complex, once they are entered into, the contracting parties “are bound to each other for a certain period of time by unique and exclusive relationship which they have created for their mutual benefit. The unique relationship, called ‘privity of contract,’ gives them both obligations which they agree to accept so that they both may benefit. This contractual relationship persists until the contract is discharged or terminated; that is, until it is performed, or terminated because of impossibility, agreement (by the parties), by bankruptcy (in some cases), or breach of contract.”⁸

As it is highlighted earlier that the construction works are complex in terms of their processes and manpower organizations, which require high degree of expert skills and professionals; so do the construction contracts.⁹ Therefore the Malaysian standard form of contract, that was the PAM/ISM 1969, was enacted. It based on RIBA 1969¹⁰ and the judgements of cases law in United Kingdom, Singapore and Hong Kong that using RIBA 1963. At that time, these cases were relevant being applied to Malaysian cases. By 1980, the applicability of some cases law from United Kingdom and Singapore had ceased their effectiveness in guiding the Malaysian cases. Thus their judgements could not be blindly applied onto Malaysian cases “without knowing the primary circumstances that gave rise to their decisions.”¹¹

For example of the irrelevant case, was in the judgements of extension of time (EOT) in *Balfour Beatty Building Ltd. v. Chestermount Properties Ltd.*¹² The case was judged based on JCT 80 and was unrelated to PAM/ISM 1969 or PAM 1998.¹³ Consequently, clause 23.9 is added into PAM 2006, providing a clearer provision that architects are expressly allowed to issue extension of time (EOT) after

⁸ Collier, K. (1987), *Construction Contract*, 2nd ed., United States of America: Prentice Hall, Inc., p.1.

⁹ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T., *op.cit.*, p.xxi.

¹⁰ *ibid.*

¹¹ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T., *op.cit.*, p.xxiii.

¹² (1993) 62 BLR 1.

¹³ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T., *op.cit.*, p.xxiii.

the issuance of Certificate of Non Completion (CNC) for the delay caused by the employers only. Clause 23.9 will then be a clearer and precise guidance to judge further ‘*Malaysian Balfour Beatty*’ situations.¹⁴

Providing clearer express provisions are not the only aim of the new PAM 2006, instead, it also omits some controversial clauses of PAM 1998.¹⁵ For example was the omission of clause 12.2 in PAM 1998 that states:

“Nothing contained in the Contract Bills shall override, modify or affect in any way the application or interpretation of that which is contained in these Conditions.”

This clause was similar to clause 12(1) of RIBA and clause 2.2.1 of JCT 1963¹⁶, which were considered as too offensive by Lord Denning in the case of *English Industrial Estate Corporation v. George Wimpey Co. Ltd.*,¹⁷ in which he held that:

“[The special insertions] were carefully drafted and inserted in type in the bills of quantities. They were put in specially to enable the contractor to make their tender and the employer accepted it. They were incorporated in the formal contract just as much as the [contract conditions]. In contrast, the [contract conditions] were not specially inserted at all. They were ... in quite general terms. On settled principles they should have taken second place to the special insertions ... If and in so far as [the contract conditions] contain anything inconsistent with [the special insertions] ... they should be rejected, just as the printed form was in Love and Steward Ltd v Rowtor Steamship Co Ltd (1916) ...”

¹⁴ *ibid.*, p.185.

¹⁵ *ibid.*, p.xxiii.

¹⁶ *ibid.*, pp.83-85.

¹⁷ [1973] 7 BLR 122.

By providing precise and practical express provisions and omitting controversial clauses, PAM 2006 is seen as a step towards “a positive provision that helps put in as express form a long informal practice or another welcome change that puts in an express form a common implied practice thus far.”¹⁸

Another clause that is significantly affected by the revision and emergence of PAM 2006 which is chosen as the topic of this research is clause 2 on AI. It brings major changes to clause 2 of PAM 1998, especially in clause 2.5 that states:

“All instructions issued by the Architect shall be in writing. If the Architect issues an instruction otherwise than in writing, it shall have no immediate effect, but shall be confirmed in writing by the Contractor to the Architect within seven (7) days. If within seven (7) days upon receipt of the Contractor’s confirmation, the Architect does not dissent to it in writing, then the Contractor’s confirmation shall be deemed to be an Architect’s Instruction. The said instruction shall have taken effect on the date when the Contractor’s confirmation was issued.

2.5(i) Provided always that if the Architect If within seven (7) days of giving instruction otherwise than in writing himself confirm the same in writing, then the Contractor shall not obliged to confirm in writing and the instruction shall take effect as from the date of the Architect’s confirmation; or

2.5(ii) If neither the Architect nor the Contractor confirm such instruction in the manner and at the time aforesaid but the Contractor nevertheless does comply with the same, then the Architect may confirm the same in writing at any time prior to the issue of the Final Certificate, and the said

¹⁸ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T., *op.cit.*, p.xxiii.

instruction shall be deemed to have taken effect on the date when it was issued otherwise than in writing by the Architect.”

This clause 2.5 was daringly reworded by clause 2.2 of PAM 2006 that states:

“All instructions issued by the Architect shall be in writing expressly entitled “Architect’s Instruction” (‘AI’). All other forms of written instruction including drawings issued by the Architect shall be an AI:

2.2(a) upon written confirmation from the Contractor entitled “Confirmation of Architect’s Instruction” (‘CAI’); or

2.2(b) upon subsequent confirmation of written instruction by the Architect with an AI.”

Therefore, under the provision of clause 2.2 of PAM 2006, the AIs have now to be in specific format. Whereas previously, there was no requirement for them to be in any specific format under PAM 98 and PAM/IEM 1969, except that they have to be in writing. This sudden change brings in hick up among construction industry people. But why this change was made mandatory in PAM 2006?

According to the drafters of PAM 2006, the change was due to the difficulty faced by construction industry people, including the employers, consultants and contractors to precisely know and recognise what AIs are,¹⁹ especially when the instructions are transpired via oral instructions, site memos, minute of meetings, emails, letters, sketches and revised drawings. In such difficulty and in the event the contractors failed to comply with these AIs, they are in breach of the contract. Hence, the employers have right to determine the contractors’ employment.²⁰ In

¹⁹ *ibid.*, p. 35.

²⁰ Clause 25.1(d) of PAM 2006.

short, the change in clause 2.2 is beneficial in reducing doubts of AIs among the construction people.

1.2 Problem Statement/ Research Issue

Under the provision of clause 2.2 of PAM 2006, each AI must now be in a specific format, which is to be expressly entitled with “Architect’s Instruction.” All other written formats of instructions such as drawings shall only be considered as instructions if they comply with this new format of AI or via the contractor’s written confirmation, headed with “Confirmation of Architect’s Instruction.” This is an excessive change because previously there was no requirement for AIs to be in any specific format under PAM 98 and PAM/IEM 1969, except that they have to be in writing. Examples of written instructions by the Architects “*will, therefore, inter alia, include emails, letters, issue of drawings transmittal forms, instructions written in site record books and site meetings recorded by the Architects.*”²¹ In fact, these formats are still valid as written instructions in PWD 2007 via its clause 5.1 that states:

“The S.O. may from time to time issue further drawings, details and/or written instructions (all of which are hereafter collectively referred to as “S.O’s instructions”) ...”

Moreover, this new express titled format of instruction is not a requirement in other Malaysian standard forms of contract. They only required the instructions to be in writing. For example are clause 2.5 of PAM 1998, clause 5(a)(i) of IEM 1989; clause 5.2 of PWD 2007 and clause 3 in CIDB 2000. Internationally also, no

²¹ Tan, P.L., Low, K. S., Sum, P. M. J., and Chee. S. T., *op.cit.*, p.35.

requirement for instruction to be headed with specific words is made mandatory.²² Most of them require the instruction to only be in written format. For example are in JCT Minor Works Building Contract 2005,²³ ICE condition of contract,²⁴ FIDIC forms of contract,²⁵ SIA Forms and PSSCOC.²⁶ However, Singaporean REDAS D&B form is silent for issuing instruction in writing. It is only advisable for evidential purpose.²⁷

It is earlier brought to light that formatting AI as per the clause 2.2 of PAM 2006 is beneficial in reducing doubts of AIs among the construction people; what will happen if there are still instructions issued via the previously acknowledged formats of AIs such letters, drawings and emails? Will they be automatically invalid for not headed with the words “Architect’s Instruction.”? Sundra Rajoo, WSW Davidson and Harban Singh are in the opinion that clause 2.2 has imposed that written AIs are now “*mandatorily restricted to only two types of formal instructions namely “Architect’s Instruction” (‘AI’) and “Confirmation of Architect’s Instruction” (‘CAI’)*” and subjected to be signed by the architects and contractors respectively.²⁸ Therefore, the status of written instructions without such expression is a crucial issue to be looked for, especially when approximately 90 per cent of private sector works are using the PAM Form.²⁹

²² Chappell, D. (2006), *The JCT Minor Works Building Contracts 2005*, 4th ed., Great Britain: Blackwell Publishing, p. 58.

²³ *ibid.*

²⁴ Eggleston, B. (2001), *The ICE Conditions of Contract*, 7th ed., Great Britain: Blackwell Science Ltd, p. 38.

²⁵ Bunni, N. G. (2005), *The FIDIC Forms of Contract: The Fourth Edition of the Red Book, 1992, The 1996 Supplement, The 1999 Red Book, The 1999 Yellow Book, The 1999 Silver Book*, 3rd ed., Great Britain: Blackwell Publishing, p. 136.

²⁶ Lip, E. (2009), *It’s All About Instruction!*, Retrieved on February 9, 2011, from <http://www.kpkqs.com/download/KPK%20Research%20Digest%20-%20About%20Instructions%20-%20Aug%202009.pdf>, p. 1.

²⁷ *ibid.*

²⁸ Rajoo, S., Davidson, W. S. W., & Harban Singh, K. S. (2010), *The PAM 2006 Standard Form of Building Contract*, Malaysia: Lexis Nexis, p.106.

²⁹ Rajoo, S. (2010), *The PAM 2006 Standard Form of Building Contract - A Change in Risk Allocation*, Retrieved on February 25, 2011, from <http://www.sundrarajoo.com/wp-content/uploads/2010/08/mlj-article-on-PAM-2006-Form-July-2010.pdf>, p.cxlviii.

Another issue is on the status of oral instructions. Clause 2.5 of PAM 1998 allows them to happen but needed to be confirmed in writing:

“... If the Architect issues an instruction otherwise than writing, it shall have no immediate effect, but shall be confirmed in writing ...”

In fact, most standard forms required them to be confirmed in writing. For example is in clause 5.2 of PWD 2007 that states:

“If such instruction is given orally, the S.O. shall then issue a written instruction within seven (7) days from the date of such oral instruction is given.”

Clause 1.1 of SIA 6th Edition also has the same approach, which states:

“... Any direction or instruction given verbally shall be deemed to have been given in writing, retrospectively effect from the date of the verbal direction or instruction, provided that the Contractor confirms the direction or instruction in writing within 14 days of its being given, ...”

But, the provision for verbal instruction is omitted in PAM 2006 throughout its clauses 2.1 until 2.4. Does this omission mean oral instructions are totally not allowed in PAM 2006? This omission protrudes another practical issue because in the norms of the practice, the architects and other consultants give verbal instructions when site visits.³⁰ They also verbally instruct the contractors on very urgent matters via telephone. Since confirming the oral instruction is not enacted at all in PAM 2006, then it is fair to say that the contractors are therefore “*entitled to validly ignore*”³¹ the given verbal instructions. What will happen if the contractors proceed with the verbally instructed works? Let’s say the instructions are on additional

³⁰ Rajoo, S., Davidson, W. S. W., & Harban Singh, K. S., *op.cit.*, p. 106.

³¹ *ibid.*

works. Will they be entitled to claim for the additional payments on the additional works?

The rigid restriction of clause 2.2 of PAM 2006 projects further difficulties to the architects, consultants, contractors and employers especially on very urgent matters that require the contractor to immediately act upon the verbal instruction, and “*cannot wait the processes of the Clause 2.2.*”³² Without confirming such instructions, the contractors can just disregard them, hence detriming the employers. Yet, if the contractors proceed with such instructions, they may face claiming additional compensations. To avoid such difficulties, the contractors will pester the architects to issue the formal AIs for such verbal instruction, because there is no provision in PAM 2006 that allows them to confirm the verbal instructions in writing. On contrary, clause 2.5 of PAM 1998 allows the contractors to do so:

“... an instruction otherwise than writing, it shall have no immediate effect, but shall be confirmed in writing by the Contractor to the Architect ...”

In comparison, it is fair to justify that PAM 1998 is more practical and friendlier in embarking upon this difficulty via its clause 2.5(ii), by recognising the additional verbal instructed works done by the contractors, provided that they are later formalized by written instruction from the architects before the issuance of Final Certificate. PAM 1998 also upholds the architects’ discretionary powers to formalize the verbal instructions retrospectively.³³ But, it is impossible for the architects to do so with the inflexible restraint of clause 2.2 of PAM 2006.

In short, clause 2.2 of PAM 2006 may become considerable distraction among the architects, consultants and employers because the contractors will keep

³² *ibid.*

³³ *ibid.*, p. 107.

demanding for AIs before carrying out the instructed works. In addition, it sets mandatory requirement for all AIs to be issued in writing format and labelled with “Architect’s Instruction.” *Per se*, what will happen to the following examples, if they are still transpired to the contractors? Will they be considered as valid and acceptable instructions from the architects?

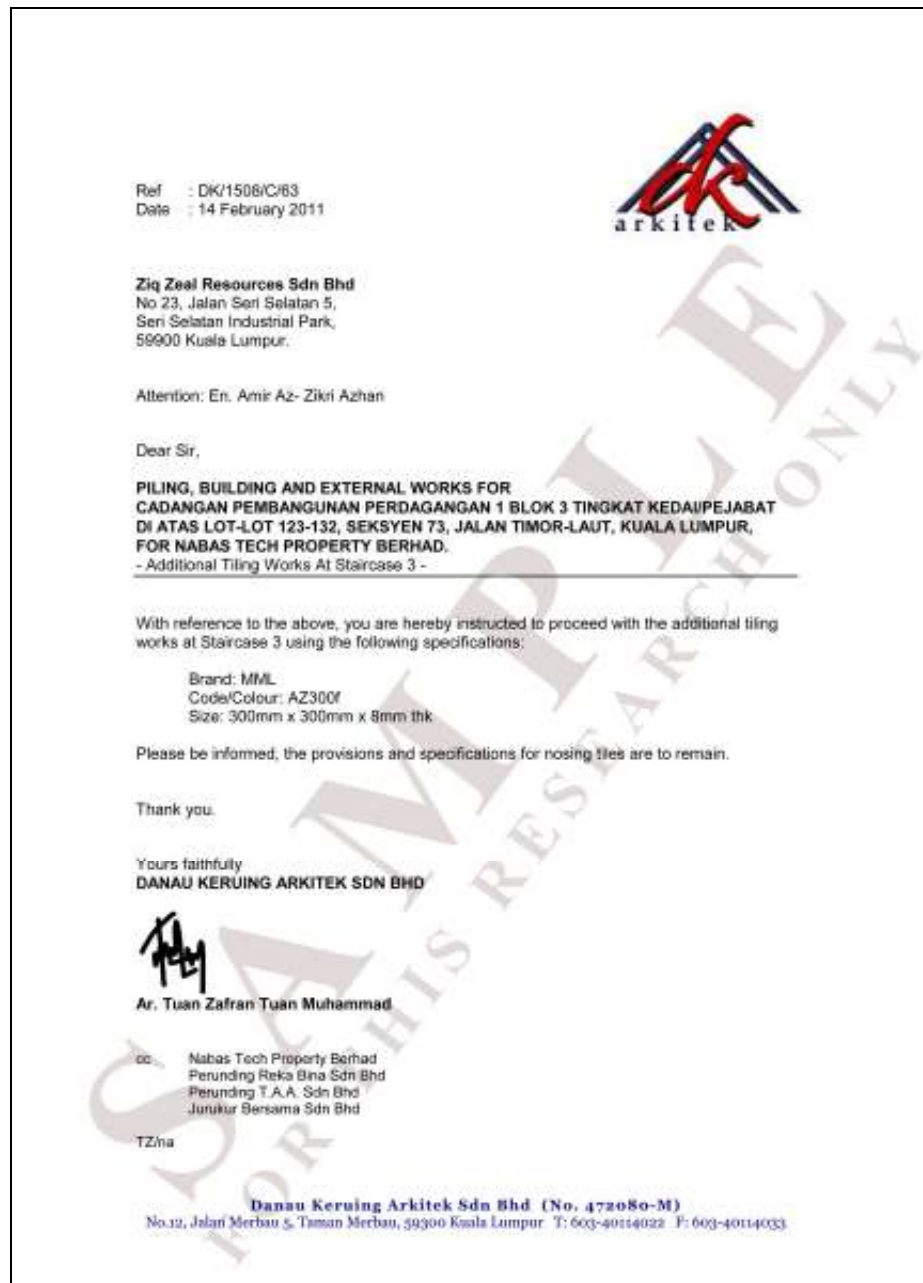


Figure 1.1: Letter 01.

This Letter is not labelled with “Architect’s Instruction.” Yet its words clearly instruct the contractor to do something. In PAM 1998 and PWD 2007, it is still a valid instruction by the architects (and S.O.).



Figure 1.2: Email 01

This Email is not labelled with “Architect’s Instruction” either. Yet it is worded to clearly instruct the contractor to do something. In PAM 1998 and PWD 2007, it is still a valid instruction by the architects (and S.O.).

**Extract From Drawing:
DK/1508/OF/W1/3**

To: Az-Zikri (Ziq Zeal Resources Sdn Bhd)

Please proceed as per the clouded amendments.

Regards, 

Tuan Zafran Muhammad (16 Aug 2010)

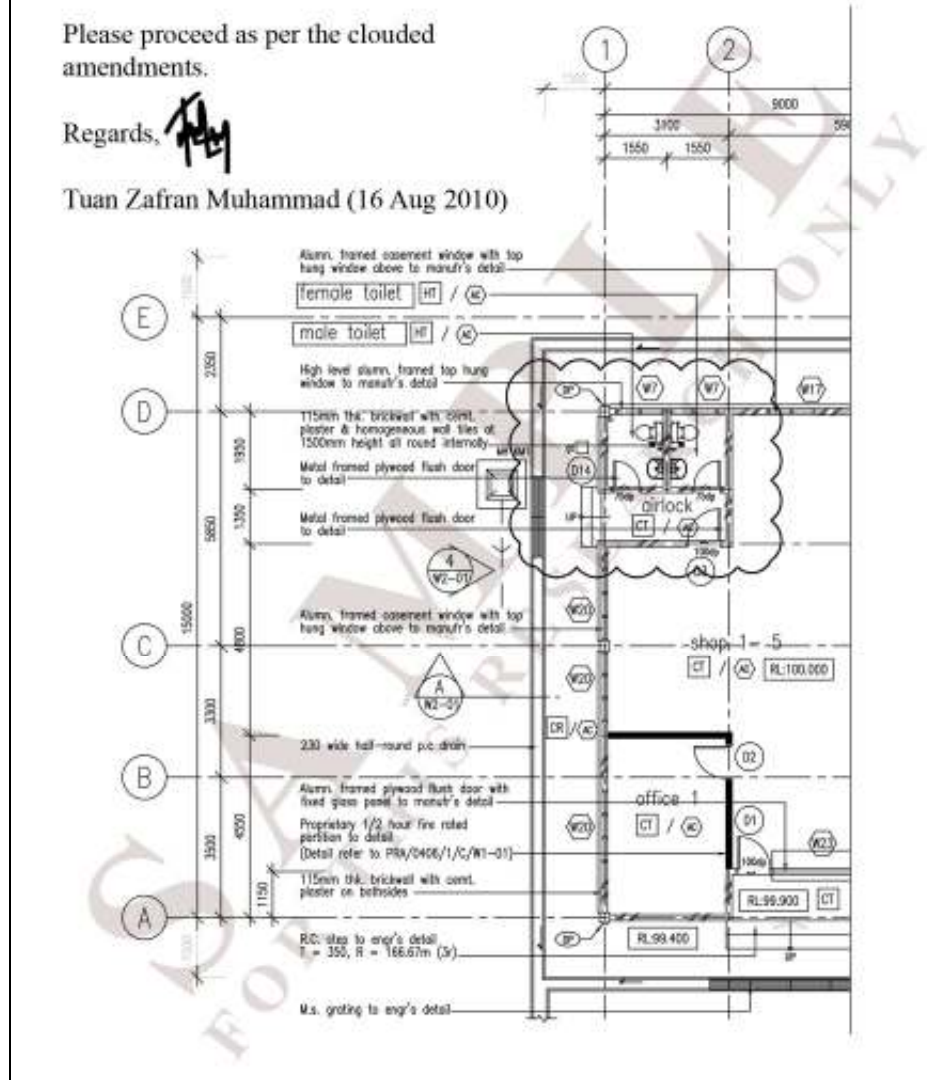


Figure 1.3: Drawing 01

This Drawing is also not labelled with “Architect’s Instruction.” Yet its words and clouded area clearly instruct the contractor to do something. In PAM 1998 and PWD 2007, it is still a valid instruction by the architects (and S.O.).

The above samples of letter, email and revised drawing clearly indicate some changes are necessary to be carried out by Ziq Zeal Resources Sdn Bhd, i.e. the contractor in the above mentioned project in the samples. Both *Letter 01* (Figure 1.1) and *Email 01* (Figure 1.2) have the word ‘instruct’ on them. The words “*you are hereby instructed*” and “*instruct you*” convey precise and clear orders for the contractor to proceed with the subject matters of the letter and email. Therefore, it is not wrong at all to remark both of them are valid and acceptable form and format of instructions by the architect. However, in the *Drawing 01* (Figure 1.3), no word of ‘instruct’ has been used. Instead, the architect uses the word ‘proceed’. Even though without the exact word of ‘instruct’, the whole sentence by the architect “*Please proceed as per the clouded amendments*” plus the graphical information on what changes to be done are clearly indicated on the drawing. Thus, it is also fair to perceive that the drawing is also a good, valid and acceptable form and format of instruction. Furthermore, the drawings is signed and dated by the architect.

However, will all of the above samples be considered as valid and acceptable form and format of AIs if they are used under PAM 2006? The simple, direct and literal answer will be ‘NO’ because none of them is labelled with the words “Architect’s Instruction.” What will happen if the contractors proceed with the instructed works on such examples? Are they entitled to claim to additional payments? If the employers decline to pay them, will they have the ground to contend these forms and format of instructions in the courts? On the other hand, what is the status of an AI, headed with the words “Architect’s Instruction” but its subject matter does not clearly communicate the instructions from the architects? For example is in the below Figure 1.4 of *Formal AI 01*. Is it still a valid and acceptable form and format of an AI in the jurisdiction view? Or can it be challenged as an invalid AI?

Ref : DK/1508/C/AI
Date : 15 December 2010



ARCHITECT'S INSTRUCTION

To Contractor : **Ziq Zeal Resources Sdn Bhd**
No 23, Jalan Seri Selatan 5,
Seri Selatan Industrial Park,
59900 Kuala Lumpur.

Project Title : **PILING, BUILDING AND EXTERNAL WORKS FOR CADANGAN
PEMBANGUNAN PERDAGANGAN 1 BLOK 3 TINGKAT KEDAI/
PEJABAT DI ATAS LOT-LOT 123-132, SEKSYEN 73, JALAN
TIMOR-LAUT, KUALA LUMPUR,
FOR NABAS TECH PROPERTY BERHAD.**

Contract No : DK/1508/C1

Instruction No : AI/10

Under the terms of the Contract we issue the following instructions. Where applicable, the Contract Sum will be adjusted in accordance with the terms of the Contract.

Instructions : **Rectification of Aluminium Frame Windows**

We have no objection for you to proceed with the proposed rectification works for the aluminium frame window as per the mock up work that we have inspected 14 December 2010.



DANAU KERUING ARKITEK SDN BHD
Ar. Tuan Zafran Tuan Muhammad

cc Client Project Manager RA/RE/COW
 Quantity Surveyor C & S Engineer M & E Engineer
 Landscape Architect Interior Designer Others

TZ/na

Danau Keruing Arkitek Sdn Bhd (No. 472080-M)
No.12, Jalan Merbau 5, Taman Merbau, 59300 Kuala Lumpur T: 603-40114022 F: 603-40114033

Figure 1.4: Formal AI 01

This AI is labelled with “Architect’s Instruction.” Yet the words used in it do not clearly communicate a firm acceptance from the architect. Hence, is it still a valid instruction by the architect?

In short, from the above discussion of this problem statement of the clause 2.2 of PAM 2006, it is not wrong to say that requesting and waiting for issuance of AIs labelled with “Architect’s Instruction” may delay the progress of works. In worse case scenarios, there are some architects and engineers who are reluctant to issue written instructions due to some reasons. For examples were in the cases of *Tharsis Sulphur and Copper Co. v. Melroy & Sons & Ors.*³⁴ and *Holland Hanned & Cubbits (N) Ltd v. Welsh Health Technical Services and Others.*³⁵ In this scenario, the contractors may not proceed with instructed works if without these formal AIs. The letters, emails, revised drawings, site memos, minute of meetings and other forms that do not label with the words “Architect’s Instruction” are no more the valid instructions. However, it must be noted that “*the construction industry is notorious for complex disputes*”³⁶ thus more and more pitfalls and unexpected arguments may occur. Thus, in the end, the practicality of this clause is practical to the users and building industries is questionable. It needs to be further studied in detail in order to elucidate possible problems. Maybe, different interpretations may be added to avoid such inherent problems. Therefore, to ease possible difficulties and bring situations back on track, this research will look for cases law and judgments on what it takes to be valid and acceptable form and format of AIs.

1.3 Previous Research

There was no previous study that specifically discussed on AIs, but there were some on instructions. One of those was the study done by Nik Nurhazirah Nik Omar (2008) on *Invalid Contract Administrator’s Instructions*. She discussed on the limitations of power of contract administrators in issuing instructions and what are

³⁴ (1878) 3 App Cas 1040.

³⁵ (1981) 18 BLR 89.

³⁶ Rajoo, S. (2010), *op.cit.*, p. 106. p.clx.

the grounds that make some instruction invalid. For her, the research was valuable for contractors so that they don't have to comply with the invalid instructions.

Another study which was also related to instruction was done by Lim Cheng Sim (2007), entitled *What Constitute A Variation In Construction From Legal Perspective*. To be enforceable, variations must be supported by instructions. However, this study aimed and researched for factors and judicial interpretations in determining variations.

1.4 Objective of Research

The approaches and objectives of the above mentioned earlier studies were different from this research. For this research, its objective is to determine the valid and acceptable form and format of AIs. Whether they have to mandatorily comply with clause 2.2 of PAM 2006 or otherwise?

1.5 Scope of Research

This research will critically discuss on the provision of clause 2.2 of PAM 2006, in comparison to the similar clauses in PAM 98 and other standard forms of contract like PWD 2003A(2007), CIDB 2000, FIDIC, JCT, SIA and others. The referred cases law in this research are also narrowed down to the scope of variation works. Thus, the judgments will be concluded into what are the form and format for valid and acceptable AIs.

1.6 Significance of Research

By referring to the normal practice in Malaysian construction industry and mostly due to time constraint, individual attitude and some standard of procedures by the employers, lots of instructions by the architects are transpired to the contractors in many forms and formats like orally, site memos, minutes of meetings, emails, letters, sketches and revised drawings. Let's term them as 'the alternative forms'. In previous PAM 1998, PWD 2007 and some other standard form, the instructions via 'the alternative forms' are valid and acceptable. The verbal instructions are also valid provided they are confirmed in writing by the architects or the contractors.³⁷ However, clause 2.2 of PAM 2006 does not recognize them as valid AIs because they are expressly entitled with the words "Architect's Instruction."

When 'the alternative forms' are not recognized as valid AIs, then the architects are normally required to issue the formal AIs especially towards the Final Account stage,³⁸ in order to formalize all directions and instructions, which were earlier given to the contractor without attaching the so-called "Architect's Instruction." However, the provision to issue instructions retrospectively is no more available in PAM 2006.³⁹ Subsequently, what will be the consequences when humans tend to forget on instructed matters in the past, or maybe when there are changes in personnel of construction organization? The previous instructions may be neglected and disputed. Hence, more and more 'history diggings' are extremely required.

However, there are few cases law had been judged that instructions via 'the alternative forms' can also be valid instructions by the architects. Therefore, this

³⁷ For examples are in clause 2.5 of PAM 1998, clause 5.2 of PWD 2007 and clause 1.1 of SIA 6th Edition.

³⁸ Clause 2.5(ii) of PAM 1998.

³⁹ Rajoo, S., Davidson, W. S. W., & Harban Singh, K. S., *op.cit.*, p. 107.

research is important in finding out and analyzing what are the essential characteristics for form and format of instructions by the architects so that they are valid and acceptable in the construction industry. The findings of this research may provide an insight understandings and recognitions of valid and accepted form and format of AIs to all parties in the construction industry, so that they know on how to proper issue and comply with the AIs. The findings may also help the contractors for better understanding on how to oblige and comply with ‘the alternative forms’ of instructions to minimize the risks of proceeding works without valid and accepted instructions. Moreover, the findings also help in terms of reducing the probability of the contractors being determined by the employer for breach in non compliance of the AIs.

1.7 Research Process and Methods of Approach

This research is an explanatory study on clause 2.2 of PAM 2006, since no study has been conducted on it. Therefore the purpose of this research is to find out whether the words “Architect’s Instruction” is mandatory to be entitled on each instruction issued by the architects, or whether ‘the alternative forms’ of instructions are still valid under PAM 2006? Thus, plausible explanations, mainly from the judgement of cases law, are carefully looked for, gathered and analysed to determine the valid and accepted form and format.

This research will be concluded based on judgements cases law, rather than empirical type that bases on statistical studies. The primary sources of this research comprise clauses in standard forms of contract, especially PAM 2006, literature reviews from the drafters and non-drafters of PAM 2006 and supporting cases law from Lexis Nexis Engine and internet pages. Although no direct case law in

Malaysia is being analysed, due to the scarcity of the case, the foreign cases law are good to be referred in finding the answer of this research.

The secondary group of data collection comprise information from books, journals, articles, internet articles that relate to the entitlement of additional payment to the contractors for additional works carried out as instructed or impliedly ordered by the architects, other contract administrators and the employers. These data have helped a lot in the literature review section. Finally, both primary and secondary data are gathered and carefully analysed to form the objective of this research. All relevant materials and findings are then composed in the written format of this research. In short, the process of researching this study is represented in below Figure 1.5:

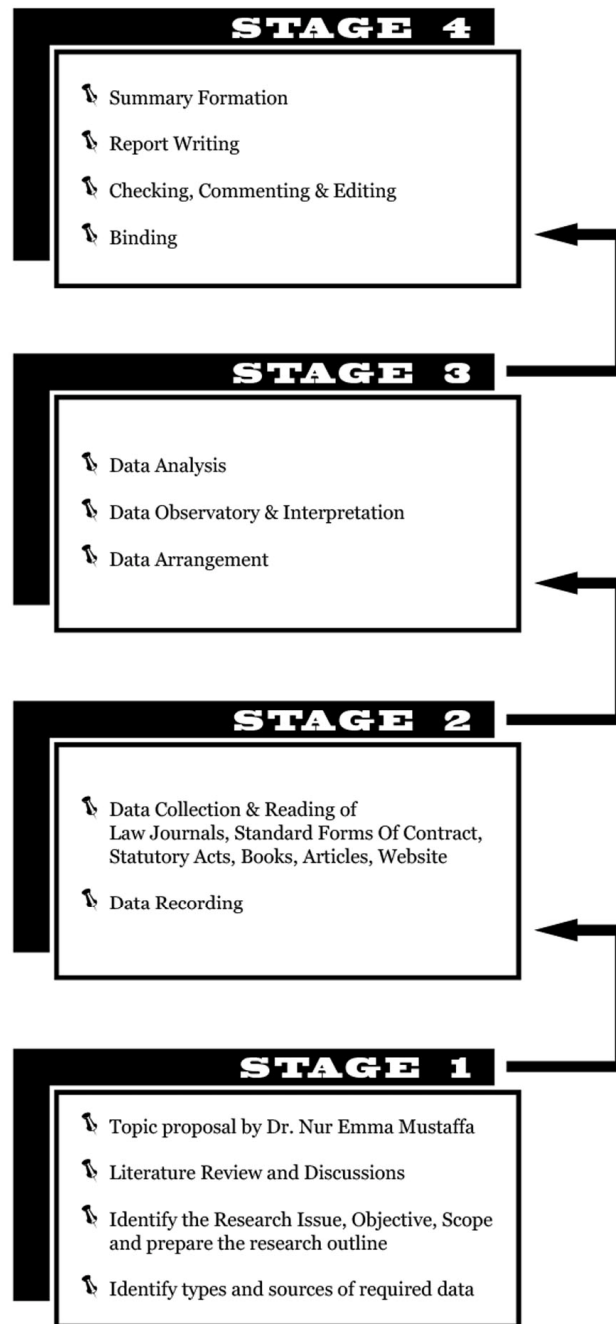


Figure 1.5: Research Process

1.8 Tentative Chapter Headings

The research will be discussed and presented into four chapters. The brief descriptions of each chapter are as follows:

1.8.1 Chapter 1: Introduction

Chapter 1 is presented as the overview of the whole research. It contains the reason on how this topic comes on board, plus its importance and significances. They are discussed in the sub chapters of ‘Background of Research’, the ‘Problem Statements and ‘Significance of Research’. This ‘Objective of Research’ is also discussed and compared against the similar topics which were done by previous researchers.

1.8.2 Chapter 2: Architect’s Instructions In Construction Industry

Chapter 2 defines who are the Architects and their duties in construction industry. The definitions of AIs from different sources are also explored. Most importantly, this chapter also explains the provisions spelt out in the standard forms of contract that empower architects to issue instruction, and why clause 2.2 of PAM 2006 formats AIs in such way.

1.8.3 Chapter 3: Analysis Of Cases Law

This chapter gathers and discusses eight cases law. The judgment of each case law is important in analyzing and outlining the characteristic for form and format of valid and acceptable AIs. The discussed cases are based on the requirement for instructions for variation works, since this aspect is the most delicate aspects if the AIs found to be invalid.

1.8.4 Chapter 4: Conclusion and Recommendation

This last chapter concludes and recommends on the findings for valid and accepted form and format of AIs base on judicial judgments of cases in Chapter 3. It also put in recommendation for future topic research.

BIBLIOGRAPHY

- Abdul Aziz Hussin. (2006). *Ahli Professional Projek Pembinaan Perspektif Undang-Undang*. Malaysia: Penerbit Universiti Sains Malaysia.
- Bartholomew, S. H. Abdul Aziz Hussin. (2001). *Construction Contracting Business and Legal Principles*. (2nd ed.) United States of America: Prentice Hall.
- Bramble, B. B., and Callahan, M. T. *Construction Delay Claims*. (3rd ed.) New York: Aspen Publishers.
- Chow Kok Fong (1980). *The Law Relating to Building Contracts: Cases & Materials*. Singapore: Quins Pte. Ltd.
- Chow Kok Fong. (2004). *Law and Practice of Construction Contracts*. (3rd ed.) Sweet & Maxwell Asia, Singapore.
- Culberston, A. N. (1983). *Contract Administration Manual for the Design Professionals*. United States of America: McGraw-Hill Book Company.
- Fisk, E. R. (2003). *Construction Project Administration*. (7th ed.) Ohio: Prentice Hall.
- Hauf, H.D. (1963). *Building Contracts for Design and Construction*. New York: John Wiley & Sons Ins.

- Lim Cheng Sim. (2007). *What Constitute A Variation In Construction From Legal Perspective*. Master of Science, UTM, Skudai, Malaysia.
- Lim Chong Fong. (2004). *The Malaysian PWD Form of Construction Contract*. Malaysia: Sweet & Maxwell Asia.
- Lim Eng Chong. (2007). *The Institution of Engineers, Malaysia, Conditions of Contract for Work Mainly of Civil Engineering Construction – 2nd Module: Comparison of item of IEM from with PAM Essentially The PAM Form*. Retrieved on February 9, 2011, from http://www.gnpgroup.com.my/download/IEM_vs_PAM_Form-COC.pdf
- Murdoch, J. (2008). *Construction Contracts: Law and Management*. London: Spon Press.
- Onn Chee Kheng. (2002). *Standard Construction Contracts in Malaysia, Issues and Challenges*. Retrieved on February 9, 2011, from http://www.gnpgroup.com.my/download/IEM_vs_PAM_Form-COC.pdf
- Speaight, A. (2010). *Architect's Legal Handbook: The Law for Architects*. Architectural Press, Oxford.
- Sweet, J. and Schneier, M. M. (2009). *Legal Aspects of Architecture, Engineering and the Construction Process*. (8th ed.) United States of America: Cengage Learning.
- Uff, J. (2005). *Construction Law*; (9th ed.) London: Edition; Sweet & Maxwell.
- Wallace, D. (1970). *Hudson's Building and Engineering Contracts*. Norwich: Sweet & Maxwell.