

EMPLOYER RIGHT IN THE EVENT OF CONTRACTOR'S LIQUIDATION

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ABSTRACT

The current crisis in the world's financial system has left the construction industry facing its toughest challenges for a generation. In regards to the construction industry, the sector that is currently experiencing a boom time perhaps more than any other is the one dealing with insolvency. Among the construction insolvency, the insolvency of a main contractor is the frequent occurrence. This has brought issues and problems to employer who would become unsecured creditor in the event of contractor's liquidation. Furthermore, several clauses in standard forms of contract are unable to protect the interest of the employer and may jeopardize the interest of the employer when the contractor goes into liquidation. Therefore, the aim of this study is to recommend amendments to certain clauses that will protect the employer's interest in the event of contractor's liquidation. The standard forms of contract chosen for the research are PWD Contract 203A, PAM Contract 2006, and CIDB Contract 2000. This study focuses on the law cases that have been determine by the court to identify the critical issue arises during the contractor's liquidation. However, this study only focuses on the critical issues specifically: direct payment, performance bond, unfixed materials and goods, set-off and determination. The critical issues are those issues that are commonly arising. Through getting familiar with those issues, the legal position of the issues can be easily determined and propose the recommendation amendments to several clauses in the standard forms of contract to protect the interest of the employer. The proposed recommendation able to give some guidance to parties involved in construction industry especially employer.

ABSTRAK

Krisis kewangan sekitar dunia kini telah menyebabkan bidang pembinaan menghadapi cabaran yang terberat kepada parti dalam sektor pembinaan. Dalam sektor pembinaan, krisis muflis adalah paling kerap berlaku berbanding dengan sektor lain-lain. Di antara kesemua jenis muflis yang berlaku dalam sektor pembinaan, kejadian kontraktor utama yang muflis adalah paling kerap berlaku. Kejadian ini telah membawa pelbagai isu-isu dan masalah-masalah kepada pihak majikan serta menjadi pemiutang tak sekure dalam kejadian sedemikian. Selanjutnya, beberapa klausa dalam borang kontrak standard tidak dapat melindungi kepentingan pihak majikan apabila kejadian kontraktor muflis. Oleh sebab itu, kajian ini bertujuan mencadangkan pindaan yang berpatutan kepada beberapa klausa untuk melindungi kepentingan pihak majikan dalam kejadian kontraktor muflis. Borang kontrak standard yang ditumpu oleh penulis kajian ini adalah Borang Kontrak Standard J.K.R 203A, PAM 2006, serta CIDB 2000. Kajian ini akan fokus ke atas kes undangan yang telah ditentukan oleh mahkamah untuk mengenal pasti kritikal isu yang berlaku apabila kejadian kontraktor muflis. Bagaimanapun, kajian ini hanya tertumpu kepada isu-isu yang tertentu seperti bayaran terus, bon pelaksanaan, pemotongan bayaran, bahan-bahan binaan, dan penamatan kontrak. Kritikal isu yang dikenal pasti adalah isu yang kerap berlaku dalam kejadian kontraktor muflis. Dengan lazimnya isu yang kerap berlaku, sah kedudukan kepada isu tertentu dapat mudah ditentukan dan penulis dapat mencadangkan pindaan yang berpatutan kepada beberapa klausa untuk melindungi kepentingan pihak majikan. Diharapkan klausa yang telah dicadangkan oleh penulis dapat memberi sedikit sebanyak bimbingan kepada parti dalam sektor pembinaan terutamanya pihak majikan.

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LIST OF ABBREVIATIONS

AC	Law Report: Appeal Cases
All ELR	All England Law Report
AMR	All Malaysia Report
BLR	Building Law Report
CA	Court of Appeal
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
ER	Equity Reports
HL	House of Lords
IEM	Institute of Engineer Malaysia
LR	Law Report
MLJ	Malayan Law Journal
MLJA	Malayan Law Journal Article
PAM	Pertubuhan Arkitek Malaysia
P.W.D	Public Works Department
S.O	Superintending Officer
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Insolvency means the inability to pay one's debts as they fall due.¹ It is usually used to refer to a corporate insolvency vis-à-vis- individual bankruptcy. Insolvency refers to the inability of a company to pay off its debts. In practice, insolvency is the situation where an entity cannot raise enough cash to meet its obligations, or to pay debts as they become due for payment.² Properly called technical insolvency, it may occur even when the value of an entity's total assets exceeds its total liabilities.³

The risk of business failure exists in every industry. However, construction companies are particularly vulnerable to bankruptcy due to the fragmented nature of the industry, excessive competitive, relatively low entry barrier, high uncertainty and risk involved, and unpredictable fluctuations in construction volume.⁴ A slump

¹ Wikipedia (2007)-*Insolvency*. The free encyclopedia

² Business Dictionary (2011)- *Insolvency Definition*. Business Dictionary.com.

³ Ibid 2

⁴ James M.W Wong and S.Thomas NG, (2010). Company Failure in the Construction industry: A critical Review and a Future Research Agenda. *Facing the challenge-Building the Capacity*. (PP 2). Hong Kong.

construction volume after 1998 has resulted in the bankruptcy of many construction companies in Malaysia and caused significant rippling effects to the economy.⁵

The current crisis in the world's financial system has left the construction industry facing its toughest challenges for a generation.⁶ Salaries are falling; job cuts; and the impacts look set to get much worse before they get better. In contrast, the present crisis economic downturn did not start in Asia or Malaysia but is due to the weaknesses in the United States financial industry which escalated into a severe international financial crisis and deep slump in global trade and global recession by late 2008.⁷ Being a small open and export-dependent economy, Malaysia has not been spared from this external shock. The negative shock was transmitted to the Malaysian economy in the fourth quarter of 2008.⁸ Exports, industrial output deteriorated, and investment declined. Consumer sentiment was also adversely affected. As a result, GDP growth in the fourth quarter of 2008 was significantly lower at 0.1% compared with an average of 5.9% in the first nine months of the year.⁹

According to Torek Sulong (Anchor for Allvoices), he summarized that a total of 11.631 registered companies in Malaysia suffered a loss and bankruptcy in the first six months of this year (2010), surpassing last year total of 11.409 companies. Of the total of 10.879 de list of companies under section 308 of the Companies Act 1965 involving the guidelines are not in operation, 737 were voluntarily closed and 15 more involving foreign companies. If this figure is taken into account, the expected total number of companies that closed this year will

⁵ Ibid 4

⁶ CIOB (Chartered Instituted of Building) Policy Brief (2009). *The Impact of the Global Financial Crisis on the Construction Industry*. Retrieved on March 7, 2011, from http://www.ciob.org.uk/filegrab/JAN009_POLICY_credit-crunch-brief_v6.pdf?ref=1134

⁷ Goh Soon Khoon and Michael Lim Mah-Hui (2010). *The Impact of the Global Financial Crisis: The case of Malaysia*. Malaysia: Third Word Network.

⁸ Ibid 7

⁹ Ibid 7

double compared to last year and could approach the record high of 27.913 were recorded in 2008.¹⁰

A multitude of problems arises when one of the parties to a building contract (usually the contractor) becomes insolvent.¹¹ When a building company becomes insolvent, it can severely disrupt construction projects. Where insolvency happens after completion, it can be expensive to remedy any defects in the work.¹² In the construction industry, contractor insolvency delays projects, increases costs and may deprive the employer of remedies and third parties of meaningful warranty protection.¹³

The main reason contractors becoming insolvent are that they rely heavily on positive cash flow to fund projects.¹⁴ Not only is construction workload reducing (most notably in the housing sector) but also tender prices are becoming more competitive, costs continue to increase and worsening cash-flow will inevitably lead to construction insolvencies, probably at an increasing rate.¹⁵ Therefore, construction projects are typically high risk with high value contracts, modestly capitalised contractors and relatively small margins.¹⁶

The Companies Act 1965 (125) governs the law relating to company's insolvency.¹⁷ Section 218(2) states that:

¹⁰ Torek Sulong (2010). *Many Companies in Malaysia Suffered and Bankrupt*. Retrieved on March 8, 2011, from <http://www.allvoices.com/contributed-news/6526835-many-companies-in-malaysia-suffered-and-bankruptcy>

¹¹ W.S.C.C (2010). *Building Contract Directive*. United Kingdom: Capital & Asset Management.

¹² Association for Project Management UK (2008). *Guide to Contractor Insolvency*. United Kingdom: Big Lottery Fund.

¹³ Freshfields Bruckhaus Deringer (2009). *Contractor Insolvency Be Prepared*. Retrieved on March 9, 2011, from <http://www.freshfields.com/publications/pdfs/2009/mar09/25426.pdf>.

¹⁴ Turner & Townsend plc (2009). *Contractor Insolvency Contract Risk Management*. Retrieved on March 10, 2011, from www.turnerandtowntsend.com/Contractor_Insolvency_Iy1KK.pdf.file.

¹⁵ Ibid 14

¹⁶ Ibid 14

¹⁷ See Parts VII, VIII and Part X, Company Act 1965 (125)

“A company shall be deemed insolvent if a creditor to whom a company owes more than RM500 and such sum is due for payment, serves a written notice is given or to secure or compound such sum to the satisfaction of the creditor”.

A company that is insolvent will cease business and go into liquidation after being wound up by the court.¹⁸ The company will be struck-off from the register of companies¹⁹ and if the company has any property, it all vests in the ROC (Registrar of Companies).²⁰ The proceeds of the sale will be distributed according to law²¹. Whilst most of the general principles of corporate insolvency law in Malaysia are found in company's liquidation provisions within the Company Act 1965.

The personal insolvency procedures applicable in Malaysia are contained in the Bankruptcy Act 1967.²² A person can be made a bankrupt through either a debtor's petition²³ or a creditor's petition²⁴. Besides that, summary administration is available for small bankruptcies²⁵. Furthermore, a composition or a scheme can be adopted by the debtor as an alternative to bankruptcy²⁶. The Official Assignee administers all personal insolvency administrations²⁷.

The insolvency procedures arrangement and reconstructions, receivers and managers, and winding up are available in Company Act 1965²⁸. Winding-up can

¹⁸ Stephanie Liew (2008). *Winding up*. Retrieved on May 10, 2011, from <http://www.law.com.my/2011/03/winding-up-company-syarikat-sdnbh/>

¹⁹ Section 308, Company Act 1965 (125)

²⁰ Section 310(1), Company Act 1965 (125)

²¹ Section 218(2), Company Act 1965 (125)

²² Act 360

²³ Section 7, Bankruptcy Act 1967 (360)

²⁴ Section 6, Bankruptcy Act 1967 (360)

²⁵ Section 106, Bankruptcy Act 1967 (360)

²⁶ Section 18, Bankruptcy Act 1967 (360)

²⁷ Section 104(4), Bankruptcy Act 1967 (360)

²⁸ Act 125

be a court procedure²⁹ or a voluntary procedure³⁰ (under the control of members for a solvent company or under the control of creditors for an insolvent company). Private practitioners can be appointed by, in windings-up, for instance, the Official Receiver can act as a liquidator and is a default liquidator if no other liquidator is acting³¹. When a company goes into insolvency particularly liquidation, there are matters transaction that may not be able to execute as in its solvent period. The company's management that takes over by the liquidator have conferred power to sell the company's property, carry on the company's business and others³². Furthermore, when a company subject to liquidation, scheme of arrangement or receivership, the primary concerns of the court are the interests of the creditors of the insolvent company as a whole and the insolvent's company subject to *pari passu* distribution where assets must be distributed prorates amongst all creditors.

1.2 Problem Statement

There are several types of standard form of contract available in Malaysia, such as PWD 203A, PAM Contract 2006 (with qualities), CIDB Contract, IEM Contract etc. These forms of contract were drafted by the professional institutions of architects and civil engineers and consequently drafted primarily to represent the employer's interest.³³ Each of the standard form of contract, there are clauses associated with the contractor's insolvency. These include the determination of contract by employer, performance bond, set-off, unfixed materials and goods, and direct payments clause.

However, some of these clauses may not be effective in protective the employers' interest in the event of contractor's liquidation due to standard forms

²⁹ Section 217, Company Act 1965 (125)

³⁰ Division 3 of Part X, Company Act 1965 (125)

³¹ Section 10-11, Company Act 1965 (125)

³² Section 236(1), Company Act 1965 (125)

³³ J.C. Broome (1005). *A Comparison of the Clarity of Traditional Construction Contracts and of the New engineering Contract*. Retrieved on June 16, 2011, from: <http://lexinter.net/WEB7/ks-constr.htm>

does not specifically provide for effects of liquidation. This is mainly liquidation law and statutory provision that run against contractual right. The general rule limited freedom of contract and the contract terms cannot contract out of the statutory provision. In this study, it will focus on three (3) standards forms of contract only which is PWD form 203A, PAM form 2006, and CIDB form 2000.

The first issue is direct payments made by the Employer to Subcontractor when the Main Contractor in the contractual chain becomes insolvent.³⁴ Section 27.6 in PAM 2006, makes limited provision for direct payment to the nominated sub-contractor by the employer of amounts previously certified but not paid by the contractor.³⁵ In practice, subcontractors will rank as unsecured creditors of contractors when they become insolvent.³⁶ Consequently, a direct payment by an employer to a subcontractor in the event of a contractor's insolvency offends the *pari passu* rule and is therefore illegal. Even if the employer has already paid the subcontractor, it will have to pay the liquidator as well.³⁷

Thean J. in the latest case *Joo Yee Construction Pte Ltd (In Liquidation) v. Diethelm Industries Pte Ltd & Ors*³⁸ held that upon liquidation of the contractor, any attempt by the employer to exercise the power to pay direct would contravene the insolvency law under section 280(1)³⁹ and 327(2)⁴⁰ of the Singapore's

³⁴ Baker & MC.Kenzie. (2002). *Direct payment to subcontractor*. Retrieved on May 10, 2011, from <http://www.bakernet.com/NR/rdonlyres/BBE4E4D7-FA7A-4DB2-9FCD-D6E7BF980DEA/28344/DirectPaymentstoSubcontractors28Oct0229.pdf>

³⁵ Pertubuhan Akitek Malaysia (2006). PAM Agreement and Conditions of Building Contract 2006.

³⁶ Simon Levis (1999). *Direct Payment or Bust*. Retrieved on May 10, 2011, from <http://www.building.co.uk/news/finance/direct-payment-or-bust/9165.article>

³⁷ Ibid 36

³⁸ [1990] SGHC 16

³⁹ As soon as possible after making a winding up order, the Court shall settle a list of contributories and may rectify the register of members in all cases where rectification is required in pursuance of this part and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

⁴⁰ In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the wind up and make such claims against the company as they respectively are entitled to by virtue of this section.

Companies Act 1988. The liquidator was not bound by the clause and consequently any payment made there under to the sub-contractors is void as against him. The High Court found that it was not bound by *Re Wilkinson, ex p Fowler*⁴¹ and *Re Tout & Finch Ltd*⁴² as the question of *pari passu* was not referred to in those cases. Therefore, the direct payment in such circumstances (contractor's insolvency) is seemed like contrary to public policy as stated in the *Joo Yee* case.

The next issue is concerned with set-off by employer against any payment due to the contractor at the time when he goes into liquidation. According to PAM 2006 clause 30.4, the employer shall be entitled to set-off all cost incurred and loss and expense and any set-off by the employer shall be recoverable from the contractor as a debt. When a set-off is exercised by a potential creditor company against the insolvent company, the effect is to 'promote' that creditor above others, to the detriment of those others who may have higher-ranking claims or even be secured.⁴³ This flies in the face of the underlying principle of *pari passu* (i.e. that there should be no preference between creditors).⁴⁴ The property of a company shall, upon its winding up, be applied *pari passu* in satisfaction of its liabilities.

Base on the case of *Melville Dundas Limited (in receivership) and others v. George Wimpey UK Limited and others*.⁴⁵ Lord Hoffman stated that:

“ in practice, if once the employer has paid the contractor, then the money has gone, and to claim it back once the contract has been completed by another contractor would mean that the employer would have to wait in line with the contractor's others unsecured creditors.”

⁴¹ [1905] 2 KB 713

⁴² [1954] 1 All ER 127

⁴³ R. Pearce (1997). Set-off and Insolvency. *All For One or One For All*. (Issue No: 19) P. 2.

⁴⁴ Shirley Quo (2007). *Insolvency Law: A Comparative Analysis of the Preference Tests in the Hong Kong Special Administrative Region (HKSAR) and Australia*. John Wiley & Sons, Ltd.

⁴⁵ [2007] UKHL 18

The next issue is about unfixed materials and goods. Base on the clause 20.0 of PWD 203A, where the value of materials and goods have been included in any interim certificate under which the employer has effected payment, such materials and goods shall become the property of the employer. Nonetheless, there are still problems that would arise in particular due to the prevalence of retention of title clause in the contract of merchants and suppliers. Many of these contracts contain a term whereby the seller retains title to the goods until he has been paid for them. This right is recognized in section 25(1) of the Sale of Goods Act 1957. Therefore, when the contractor goes into liquidation, the employer may loss the title of the materials and goods if the contractor not yet paid to the supplier.

This clause is similar to the clause between the employer and the main contractor in the *Dawber Williamson Roofing Ltd v. Humberside Country Council*⁴⁶ case. The decision in that case will apply to prevent title in the goods passing to the employer in a situation where the supplier who has not been paid seeks to rely on a 'romalpa' clause.

Next, the use of performance bonds in the construction industry continues to cause difficulty. One problem concerns the employer's recourse under the bond following a main contractor's insolvency.⁴⁷ In PAM form 2006 Clause 37.5 stated that determination of the employment of the contractor in the event of contractor breach of contract, the employer may claim the performance bond for reimbursement of loss and/or expense. However, the standard terms in standard form of contract do not treat the insolvency of the contractor as an event of default by the contractor, but only an event entitling the employer to automatic termination of the building contract.⁴⁸

⁴⁶ [1979] 14 BLR 70

⁴⁷ Geoff Brewer (1999). *Performance Bonds*. Retrieved on May 13, 2011, from <http://www.fticonsulting.co.uk/global/case-law/cj-9916-38357.aspx>

⁴⁸ Jane Jenkins and Pauline Page (2009). *Protection Against Contractor Insolvency By Bonds*. Const.L.J.No.5 2009 Thomson Reuters (legal) Limited and Contributors.

In case of contractor's insolvency, the employer may determine the contractor employment pursuant to the terms of the contract. However, the determination clause due to contractor's insolvency in the standard form does not consider as a default of the contractor according to the terms of the bond. Therefore, since the contractor is not in breach, the surety does not become liable under the bond.⁴⁹ The employer is powerless rely on the clause of performance bond to claim the reimbursement of loss and/or expense after determination the employment of the contractor in the event of contractor's insolvency.

In the case of *Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd*⁵⁰, the Supreme Court of New South Wales stated that:

"A bond incorporating the terms of the building contract could only be called upon if the defendant became contractually entitled to exercise its rights under the contract in respect of the security and that had not been assumed in that case."

Therefore, an employer entitles to call a bond only in the circumstances the contractor's insolvency as consider as a "default" and clearly stated in the clause of standard form of contract, otherwise, the contractor may not liable upon the bond.

Under CIDB 95 Clause 31.2, the automatic termination in the event of contractor's insolvency is to be brought about by written notice from the employer rather than being automatic. Even then, however, that notice may be considered by a liquidator as invalid.⁵¹ In PAM Contract 2006, when the contractor becomes insolvency or other events systematic of insolvency, the contractor's employment will be automatically determined⁵². The automatic determination may directly

⁴⁹ *Perar BV v General Surety and Guarantee Co Ltd* (1994) 66 BLR 72

⁵⁰ [1991] APCLR 1.

⁵¹ Nigel M Robinson. (1996). *Construction Law in Singapore and Malaysia* (2nd Edition), P. 381. Butterworths Asia.

⁵² Clause 25.3, Agreement and Conditions of PAM Contract 2006

terminate the contract once the contractor becomes insolvent but similarly automatic termination does not give the right to the employer to terminate the contract. In practice, suppose the employers should exercise only after taking professional advice as to whether that course of action is the most appropriate in all the circumstances of the particular project and parties.⁵³ Furthermore, Company Act 1965 (125) gives liquidator power to disclaim or continue contract and to continue business⁵⁴. Therefore, automatic determination is considered invalid.

The cases supporting this proposition have been cited by the case of *Joo Yee Construction Pte Ltd (In Liquidation) v. Diethelm Industries Pte Ltd & Ors*⁵⁵. However, in *Willment Bros Ltd v. North West Thames Regional Health Authority*⁵⁶, the action proceeded on the basis that automatic determination had occurred: the result of the case may well have been different had that not been so. In *Farley v. Housing and Commercial Development Ltd*⁵⁷, an apparent reliance on automatic determination was not contested by the liquidator. Thus, practice appears to favour the operation of the terms of the standard forms, if only because the liquidator, in the exercise of his statutory discretion, is content that it should be so.⁵⁸

Based on the clause direct payment, determination, unfixed materials and goods, performance bond, and set-off, these clauses are not for the interest of the employer and they operate only effectively in insolvent situation. However, when the contractor goes into insolvency, this clause does not operate. Therefore, it comes to an objective of study.

⁵³ Issaka Ndekugri and Michael Rycroft (2009). *The JCT Standard Building Contract Law and Administration (second Edition)*. United Kingdom: Elsevier Ltd.

⁵⁴ Section 236(1), Company Act 1965 (125)

⁵⁵ [1990] 2 MLJ 66

⁵⁶ [1984] 26 BLR 51

⁵⁷ [1984] BCLC 442

⁵⁸ Nigel M Robinson. (1996). *Ibid*. Butterworths Asia. P. 382.

1.3 Objective of Study

To recommend amendments to certain clauses that will protect the employer's interest in the event of contractor's liquidation.

1.4 Scope and Limitation of Study

Given the legalistic nature of this study, the approach adopted in this research is case law based. This research is focusing only the issue related to the amendment to certain clause to protect the employer's interest in the event of contractor's liquidation. The case used for this research, including Malaysia, Singapore, English, United States cases and others relevant cases. Besides that, there are only three (3) standard forms of contract chosen for this research which are PWD Form of contract 203A 2007, PAM Form of Contract 2006, and CIDB Form of Contract 2000.

1.5 Significant of Study

Basically, this study is expected to answer some of the issues related to the contractor's liquidation. The contractor's liquidation may arise risk to the employer for any claim of loss and/or expense and jeopardize the interest of the employer. Hence, this study will analysis certain clause in standard form of contract adopt in Malaysia and proposes some recommendation amendment to certain clause to protect the interest of the employer in the event of contractor's liquidation. In accordance to that, issues will be analyzed based on the interpretation and judgment by the courts. In general, the reason why this research is carry out in the event of contractor insolvent due to the certain clause in standard form of contract unable to protect the interest of the employer in term of contractor's insolvency. Thus, by identify the certain clauses and recommend amendment to those clauses

that may able to assist the future drafter of the standard form of contract to understand the existing problem of such clauses and may able to make a more comprehensive clause that will protect the interest of the employer in the event of contractor's liquidation.

In additional to that, it can be as a basic guidance for those who are involved in construction industry for instance, architects, quantity surveyors, engineers, sub-contractor and etc. in relation to the issue of contractor's liquidation. Finally, hopefully it can assists in avoiding unnecessary disputes while assuring project success and better relationship among the contractual parties.

1.6 Research Methodology

The methodology of this research is by way of literature review and case law analysis. In order to achieve the objective of this study, a systematic process of conducting this study had been organized. Basically, this study process comprised of four major stages, which involved identifying the study issue, literature review, data collection, data analysis, conclusion and suggestions.

1.6.1 Stage 1: Identifying the research issue

The study issue arises from intensive reading of books, journals, and articles which can be attained from the UTM library, Building Construction Information Centre (BCIC) and Resource Centre of Alam Bina (RC). Based on the study issue, the objective of the study has been identified. In addition to that, this research is executed to review the relevant court decisions, with the intention of identifying and recommending amendment to certain clauses that will protect the employer's interest in the event of contractor's liquidation.

1.6.2 Stage 2: Literature Review

Collection of various documentation and literature regarding the study field is of most important in achieving the research objectives. Besides, secondary data is collected from reading materials in printing form like books, journals, research paper, magazines, reports, proceedings, seminar paper as well as information from internet. It is important to identify the different type of insolvency in Malaysia context base on the provision in Company Act 1965 and the important term in standard form of contract associated to contractor's liquidation such as set-off, direct payment, performance bond, unfixed materials and goods, and determination will be discuss accordingly. Based on the purpose of this research, it is important to identify the relevant clauses in various type of standard form of contract regarding to contractor insolvency, the important term related to contractor's liquidation.

1.6.3 Stage 3: Research Analysis

In this stage, after identifying all the background and relevant issues through literature review and data collection procedure, legal cases based on written opinions of courts, which are related to the study issue, will be collected from different sources such as All England Law Reports, Malayan Law Journals, Singapore Law Report and etc. via UTM library electronic database, namely Lexis-Nexis Legal Database. Once the related court cases under Malayan Law Journal and others form of journal are collected, it will be conducted by reviewing and clarifying all the facts of the cases. The focus will be on the problem or issues will be analyzed based on the interpretation and judgment by the courts. Throughout the relevant cases, recommend certain amendment on certain clause to secure the interest of the employer when contractor's liquidation. After issues presented by each cases, thorough discussion and comparison will be done in order to achieve objectives of this study.

1.6.4 Stage 4: Conclusion and Suggestion

Conclusion and suggestion is the final stage of the research. In this stage, the findings would be able to show the result of the research. The author may base on the previous issue discussion, recommend amendment to certain clause that will protect the employer in the event of contractor's liquidation. Besides, the conclusions need to be drawn in-line with the objectives of the research. At the same time, some appropriate recommendations related to the problems may be made for a better solution in relation to the said problem, or for further research purposes.

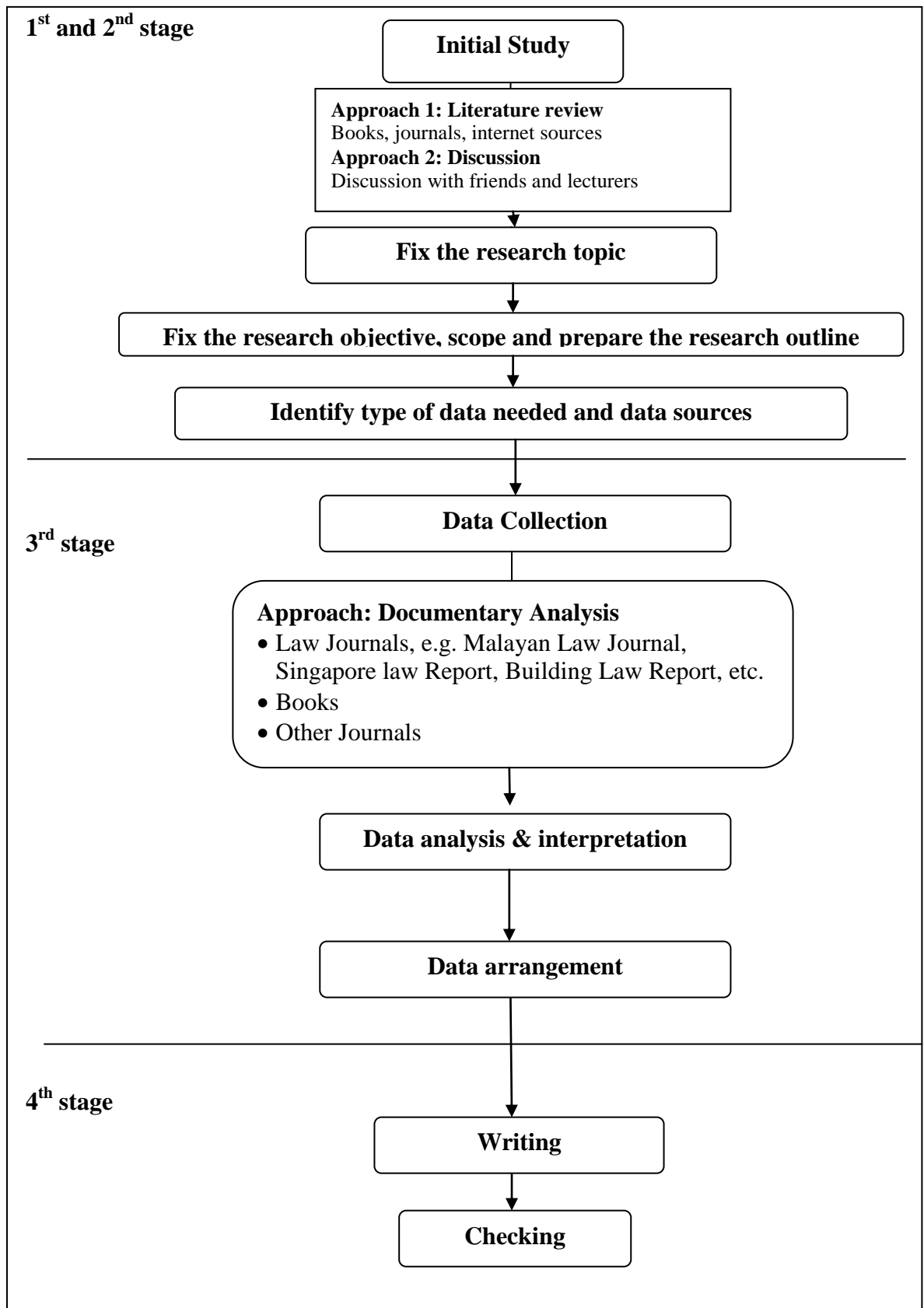


Figure 1.1: Research Process and Methods of Approach

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