

VALID AND INVALID VARIATION OMISSION OF WORKS

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To my beloved Appa and Amma

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ABSTRACT

An agreement cannot generally be varied or changed unilaterally by either one of the contracting parties unless there is an express variation provision in the contract. A significant feature of a construction contract is the inclusion of a variation order (VO) provision. A VO may be an addition, omission or substitution of the work. A VO must also be valid to be tenable at law. Employers often abused the VO term by issuing invalid omissions causing contractors to incur losses in terms of profit and overhead expenses. Ultimately, the first step that contractors shall do is to verify whether instructions omitting works are valid VOs. However, provisions in standard forms of contract do not set limits on the permissible extent of omissions of work that an employer may issue. Thus, the objective of this study is to identify valid and invalid omission of works issued under VO clauses. The research methodology undertaken is by documentary analysis of law cases reported in law journals. The cases identified are from five jurisdictions: United States of America, Australia, United Kingdom, South Africa and Malaysia. The research identified twelve cases related to the invalid variation omissions. There is no case law reported on valid omission. The findings of the analysis are: one, it is invalid for employers to omit works and award them to third parties contractors for commercial reasons, or dissatisfaction with the contractors' performance; it appears that any omission of works provided under provisional sum, is also invalid. Two, a magnitude of omission that substantially or fundamentally alters the scope of work is also invalid. Three, omissions that amount to a virtual cancellation of the contract is similarly invalid. This study also found that all the courts in the five jurisdictions had used five principles in holding the omissions invalid; they are: the omission must first be bona fide; second, it must not hinder the contractor's right to perform the work and earn his profit; third, it cannot be used to terminate the contractor's employment; and fourth, it cannot virtually lead to total cancellation of the contract. In conclusion, it is suggested that these limitations to variation omission are expressly stated in the standard forms of contract to reduce disputes.

ABSTRAK

Perjanjian tidak boleh diubah secara unilateral oleh salah satu pihak yang berkontrak melainkan jika terdapat peruntukan perubahan dalam kontrak itu. Satu ciri penting dalam ubah suaian kepada kontrak pembinaan adalah peruntukan arahan perubahan kerja (APK). APK boleh menjadi tambahan, peninggalan atau penggantian kerja. APK mesti sah untuk dipertahankan oleh undang-undang. Majikan sering menyalah guna kuasa APK dengan mengeluarkan APK peninggalan yang menyebabkan kontraktor mengalami kerugian dari segi perbelanjaan keuntungan dan overhead. Mutlakanya, langkah pertama yang kontraktor harus lakukan adalah untuk memastikan sama ada APK peninggalan adalah yang sah. Walau bagaimanapun, rujukan kepada borang kontrak standard tidak menetapkan had ke atas tahap yang dibenarkan untuk APK bagi peninggalan kerja. Oleh itu, objektif kajian ini adalah untuk mengenal pasti peninggalan sah dan tidak sah kerja-kerja yang dikeluarkan di bawah klausa VO. Metodologi kajian yang dijalankan adalah dengan analisis dokumentari kes undang-undang yang dilaporkan dalam jurnal undang-undang. Kes-kes yang dikenalpasti adalah dari lima bidang kuasa: Amerika Syarikat, Australia, United Kingdom, Afrika Selatan dan Malaysia. Kajian ini mengenal pasti dua belas kes yang berkaitan dengan APK peninggalan tidak sah. Tidak ada kes yang dilaporkan pada peninggalan sah. Hasil analisis ini adalah: satu, ia adalah tidak sah bagi majikan untuk mengeluarkan APK peninggalan dan menganugerahkan kepada kontraktor lain untuk tujuan komersil, atau rasa tidak puas hati dengan tahap prestasi kontraktor; ternyata bahawa apa-apa peninggalan kerja-kerja yang diperuntukkan di bawah peruntukan sementara, juga tidak sah. Dua, magnitud peninggalan yang ketara atau asasnya mengubah skop kerja juga tidak sah. Tiga, peninggalan yang jumlahnya seolah membatalkan kontrak itu sendiri. Kajian ini juga mendapati bahawa semua mahkamah dalam lima bidang kuasa tersebut telah menggunakan lima prinsip dalam memegang peninggalan yang tidak sah; iaitu: APK peninggalan haruslah menjadi bona fide; kedua, ia tidak menghalang hak kontraktor untuk melakukan kerja dan mendapatkan keuntungan beliau; ketiga, ia tidak boleh digunakan untuk menamatkan pekerjaan kontraktor; dan keempat, ia tidak hampir membawa kepada jumlah pembatalan kontrak. Kesimpulannya, adalah dicadangkan bahawa batasan-batasan ini untuk variasi peninggalan yang dinyatakan dengan jelas dalam bentuk standard kontrak untuk mengurangkan pertikaian.

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CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Contracts Act 1950 defines ‘contract’ as ‘an agreement enforceable by law’¹. However, not all agreements are contracts as Section 2 (g) of the Contracts Act 1950 stated that an agreement not enforceable by law is void. Only agreements that contain the “essentials of contract” are contract. The essentials of contract are specified in Section 10 of the Contracts Act 1950 and common law. Section 10 defines an agreement as contract if it is made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and is not hereby expressly declared as void.

Similarly to the formation of any other contract, a construction contract is formed when a number of key elements as narrated above are in place. There are major modifications to the features of a construction contracts. Chow Kok Fong² has summarises these features of a construction contract as follows:-

1 Section 2 (h) of the Contracts Act 1950

2 Chow Kok Fong [2012], Law and Practice of Construction Contracts – 4th Edition, Sweet and Maxwell, pg 85

- a. A construction contract operates as an entire contract which is an indivisible contract. The contractor has to complete the entire performance of his obligations before he can call on the employer to fulfil his part. In *Gilbert-Ash v Modern Engineering*³, Lord Diplock described a building contract 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 is done.*”
- b. Construction contracts contain provisions for progress payments which provide for the contractor to be paid at regular intervals⁴. The objective to this modification of its feature is because to enable both the execution and financial risks associated with the project to be distributed on a more efficient basis between the parties.

Chow Kok Fong further added that other than the above two major modifications to the construction contracts, another significant feature lies in the contractual provisions which empower the contract administrator to order what is called variation work⁵. Variation work entitles the employer to issue instructions for the addition, omission or substitution of any work. Prof. Vincent Powell-Smith describes variation as any changes to the works as detailed or described in the contract documents⁶. The essential element of what constitutes variations is that there must be a change effected that must be in relation to the scope of work as stipulated in the contract document⁷. The legal effect of these powers is that the contractor must comply with these variation orders.

3 [1974] AC 689

4 JKR Form 203A [2010] - Clause 28 Payment to Contractor and Interim Certificates / PAM Contract With Quantities [2006] - Clause 30 Certificates and Payment / CIDB [2000] - Clause 42 Payment

5 Chow Kok Fong [2012], Law and Practice of Construction Contracts – 4th Edition, Sweet and Maxwell, pg 88

6 Powell Smith etc. [1989], An Engineering Contract Dictionary, Legal Studies and Services Ltd, pg 562

7 Ir Harbans Singh [2010], Engineering and Construction Contract Management – Post Commencement Practice, Lexis Nexis, pg 426 – pg 427

Contracts are legally binding on the contracting parties. Once the parties have entered into a contract they are contractually bound to perform their promises as stated in the contract⁸. The general position is that the agreement cannot be varied and changed unilaterally by either one party of the contract unless there is an express provision in the contract that allows such right to vary the terms under the contract. Therefore, a party to a contract cannot unilaterally amend its terms or scope without an express variation clause in the contract. No change could be made to the agreement unless both parties have consented to alter or modify the agreement. In *Antara Elektrik Sdn Bhd V Bell & Order Bhd*⁹, the issue before the High Court was whether the plaintiff should be paid according to the PAM form as stated in the Clause 5.2 of the Contract or the CCG Special Conditions for Subcontractors form ('the CCG form'). The defendant argued that the plaintiff had verbally agreed to adopt the CCG form. The High Court held that the terms of payment should be in accordance with the PAM form of payment as stated in Clause 5.2 of the Contract. Judge Azmel stated that:

"...As such, parties are bound by what they have agreed and neither party can go against what they had earlier agreed unless it was mutually varied. A variation of a written agreement must be made in writing. No such written variation had ever been produced in court. Therefore, it can be concluded that there were no such variation of the terms of payment. ..."

It is submitted that this variation clause is not particularly unique or distinct to construction contracts. There are other contracts that also provide for express variation clause that entitles one of the parties to unilaterally change terms in the contract. One such contract is contracts of employment. In the contract of employment between Thesigan a/l Nadarajan and Kumpulan ACTS Bhd (the company), the issue of whether Thesigan was a volunteer worker or an employee of the company was brought to the Industrial Court of Kuala Lumpur¹⁰. The company changed unilaterally the employment of Thesigan from ongoing employment to a

8 Section 38 of the Contracts Act 1950

9 [2002] 3 MLJ 321

10 Thesigan a/l Nadarajan v Kumpulan ACTS Bhd [2013] 3 ILJ 416

less favourable new contract for a 6 month fixed term. The company submitted that there was no evidence to show that Thesigan had agreed conditional upon any terms and conditions to serve the company in his capacity as an employee of the company. The Judge Gulam Muhiaddeen held, allowing the claim and awarding Thesigan in backwages and compensation in lieu of reinstatement. The Judge reasoned that:

“...it is clear that the company is guilty of a breach which goes to the root of the contract. It is trite law that one party cannot make unilateral changes to a contract.”

Further, in the case of ***Bateman v Asda Stores***¹¹, the contract of employment between Asda Stores and Batemen contained the following term:

“The company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation...”

Asda had introduced a new pay structure that had brought the pay structure of a minority of employees into line with the majority. Asda had given several months notice to the employees and had undertaken consultation. The employer also sought to ensure that the employees did not suffer a reduction in their overall pay, although some did. The court held that the term was clear and unambiguous and entitled the employer to implement the changes.

In another contract of employment is case of ***Wandsworth London Borough Council v D’Silva***¹². In this case the Court of Appeal held, obiter, that:

11 [2010] IRLR 370, EAT

12 [1998] IRLR 193

“The general position is that contracts can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort.”

Thus, a clause may entitle a party to unilaterally alter terms in a contract; the exercise of such term is subject to certain conditions. Generally, the exercising party must first, serve a notice of the intended amendment to the other party and the amendment must be reasonable in relation to the contract. Thirdly, the variation term’s language must be clear.

The general position is that the agreement cannot be varied unless one of two eventualities is present as follows¹³:

- a. Both parties agree to the variation.
- b. The contract contains provisions allowing the variations to be carried out, i.e. variation provision.

In the absence of variation provision, a party to a contract cannot unilaterally amend its terms or scope. Thus, all contemplated changes to a contract must be negotiated separately in a written supplementary agreement and will not form part of the original contract. In *Astilleros Canarios v Cape Hatteras Shipping*¹⁴, there is some authority for the proposition that where falling outside the ambit of the original contract have been ordered and the employer is aware of this, the contractor may be able to recover a reasonable price for such work on a fresh contract. Thus, an employer need to enter into collateral or a new contract (to renegotiate the contract

13 Tony Ventrella LLB MA *Barrister* [1994], *A Contractor’s Guide to Contract Law*, Dannick Publications in association with Thomas Telford, pg 27

14 [1982] 1 Lloyd’s Rep 518

price and/or rates and possibly even time, as the case may be) every time an alteration or addition to the contract works is contemplated. Where there is no provision for a variation, then the contractor is not obliged to accept the variation and has a choice of either outright refusal or of negotiating a variation to the contract or a separate contract to deal expressly with the additional work.

This provision of variation works is very important to a construction contract. Even if carefully planned, the inherent characteristics of construction are that change is inevitable that there will be changes to the contract as work progresses because of the peculiar nature of the contract. The general obligation of the contractor in a building contract is to complete the work specified in the contract and also any other work that may reasonably be inferred as necessary works for the contract to be completed. It is usually impossible for the contract to proceed as originally contemplated. The needs of an employer may vary during the duration of the contract. In *Barter v Mayor of Melbourne*¹⁵, the learned Chief Justice Stawell defined variations as “*works which are not contemplated by the parties at the time of the execution of the contract.....*”

Variation orders can arise as result of as follows:

- a. Surface conditions.

Variation order due to surface conditions are because of non-satisfactory ground conditions that only surface after the contractor begins work. These conditions are discovered only when the contractors has proceeded with a substantial portion of the work. These include the site topography, site access, soil conditions, geology, site surroundings and the presence of natural and artificial objects which may affect the construction of the works.

15 [1870] 1 ALJR 160

b. Additional quantities of work or materials.

A works-done which was extra than the contractual performance required from the contractor, he is then entitled to claim these extra's for additional payment. In most cases, additional work arises from revisions to the requirements of the employer during the course of a contract. In *Brodie v Cardiff Corporation*¹⁶, the architect refused to issue a written order for extras on the ground that work required to be carried out was included in the contract price. On a reference, the arbitrator awarded sums of money to be paid in respect of the extras despite the absence of an order in writing and their decision was upheld.

c. Statutory changes

In Malaysia, the planning and control of land development are exercised primarily by the local and state authority. Thus, the developments in a local area are subjected to various statutes, bye-law and local authorities' requirements. An implementation of new bye-law or an amendment to the existing regulations will cause changes to be made in the design or work procedure of the ongoing project that has been approved previously.

d. Reduction of works

A contractor may claim for reduction in the quantity of work pursuant to a variation order omitting certain parts of the contract works. In *Arcos Industries Pty Ltd v The Electricity Commission of New South Wales*¹⁷, the Court of Appeal acknowledged that it may be necessary to give a restricted or qualified meaning to 'variations' where the parties use that term with a schedule of rates and unanimously held that the variation clause was

16 [1919], AC 337, HL

17 [1973] 2 NSWLR 186

concerned only with variations in the nature of the work to be done and not with variations in the quantities which were needed to perform that work and therefore the approval of Arcos was not required.

e. Alteration or Modification and Substitution.

In *General Railways Signal Co v Washington Metropolitan Area Transport Authority*¹⁸, a contractor was engaged on a lump sum contract to install trackside equipment and cables for part of a subway system. The owners subsequently decided to use duct banks for the cable and to eliminate entirely the planned trench work. The contractor and the owners agree that the variation provision allows for the variation substitution. The dispute however was on the how the eliminated work was to be accessed.

These changes are instructed by the contract administrator¹⁹. However, though relatively uncommon in practice, contractor may also initiate a variation especially in ‘package deal’ type of contracts that are due to changes in contractor’s proposals in line with design development²⁰.

The provisions of variation works was provided in all standard forms of contract²¹. Under the terms of the contract, once a valid variation order has been issued, the contractor is bound to execute the varied work. In the event the contractor incurs additional cost or expense, he may then seek financial compensation in accordance with the provisions as set out in the contract. The gist of the variation provisions may be summarized, not exhaustive as follows²²:-

18 [1984] 598 F Supp 595

19 JKR Form 203A [2010] - Clause 24.1 Variations / PAM Contract With Quantities [2006] - Clause 11.2 Variations - Provisional and Prime Cost Sums / CIDB [2000] - Clause 28.1 Variations

20 CIDB [2000] - Clause 28 Variations – Option Module D Works Designed By The Contractor

21 JKR Form 203A [2010] - Clause 24 Variations / PAM Contract With Quantities [2006] - Clause 11 Variations, Provisional and Prime Cost Sums / CIDB [2000] - Clause 28 Variations

22 Ir Harbans Singh [2010], Engineering and Construction Contract Management – Post Commencement Practice, Lexis Nexis, pg 426 – pg 427

- a. Definition of variation and the precise scope of the variation provision that sets the extent or limit in relation to the work under the original contract.
- b. Party or parties authorised to instruct a variation works.
- c. Procedural requirements for issuance of variation works.
- d. Measurement and valuation of variations works.
- e. Payment of variation works-done.

Common beliefs among the construction professionals especially the contract administrator or an employer assumes that the variation provision of “*no variation shall vitiate the Contract*”²³ gives them extensive power to order unlimited variations. However, the employer and/or the contract administrator power to vary the works are subject to limitations imposed by the law. In ***Blue Circle Industries PLC v Holland Dredging Company***²⁴, the construction of an island using disposed materials from dredging works was deemed as works wholly outside the scope of the original dredging contract and therefore it was subject to a separate agreement. Thus, the power to order variations which derives from the terms of the construction contract is exhaustive.

A variation to be tenable at law, it must be valid foremost. Grace Xavier described invalid variation order as a variation order issued contrary to the terms of the contract or ultra vires the powers of the architect or engineer who issues it²⁵. Chow Kok Fong also agreed that a variation order which contradict the terms of the power or which fall outside the scope of the power is an invalid variation order²⁶.

23 Ir Harbans Singh [2010], Engineering and Construction Contract Management – Post Commencement Practice, Lexis Nexis, pg 426

24 [1987] 37 BLR 40

25 Grace Xavier [1994] 3 MLJ exc, Variations In The Construction Industry, Malayan Law Journal Articles, pg 1

26 Chow Kok Fong [2012], Law and Practice of Construction Contracts – 4th Edition, Sweet and Maxwell, pg 277

Murdoch and Hughes have plainly describes as follows²⁷:-

“The power to change the specifications, known as a variation, is a feature of general contracts. This gives the contract administrator the power to change the work required of the contractor. The recitals to the contract give a brief description of the whole project and any material alteration to these would go to the root of the contract, and therefore could be challenged by the contractor. This is despite the common practice in standard form contracts of stating that no variation can vitiate or invalidate a contract. If a change makes fundamental alterations to the contractor’s obligations, and it could not have been foreseen at the time the contract was entered into, it is beyond the scope of a variation clause....”

The invalid variation order may be in the form of invalid omissions²⁸, changes affecting the scope of contract²⁹, establishment of the very fact of a variation itself³⁰, misrepresentation in issuing variation³¹ and etc. It is prudent and advisable to exercise caution and pay special attention to the precise scope of the variation before ordering a variation to the works since these invalid variation works, especially in regards to the invalid omission of works has created lots of disputes. Thus, a study on valid and invalid variation omission of works is worthy to be undertaken to reduce the disputes between the contracting parties.

27 John Murdoch and Will Hughes [2007], Construction Contracts Law and Management - 4th Edition, Routledge, pg 36

28 Carr v JA Berriman Pty Ltd [1953] 27 ALJR 274

29 Blue Circle Industries Plc v Holland Dredging Co [1987] 37 BLR 40

30 Molloy v Liebe [1910] 102 LT 616

31 Simplex Concrete Piles Ltd. Borough of St Pancras [1958] 14 BLR 80

1.2 Problem Statement

Variation order clause in a typical construction contract allows the contract administrator to instruct addition, omission, substitution and modification of part of the works. Standard forms of contract in general provide for the work to be varied, including omissions.

JKR Form 203A [2010], Clause 24.1 Variations:-

“The term ‘Variation’ means a change in the Contract Document which necessitates the alteration or modification of the design, quality or quantity of the Works as described by or referred to therein and affects the Contract Sum, including (a) the addition, omission or substitution of any work (b).....”

PAM Contract With Quantities [2006], Clause 11.2 Variations, Provisional and Prime Cost Sums:-

“The Term ‘Variation’ means the alteration or modification of the design, quality or quantity of the Works including (a) the addition, omission or substitution of any work (b).....”

CIDB [2000], Clause 1 Definitions and Interpretations - Variation:-

“Any change in the original Contract intention as deduced from the Contract Documents as a whole describing or defining the Works to be carried out and shall include but is not restricted to: (a) an increase and/or decrease in the quantity of any part of the works (b) an addition to or omission from the Works.....”

Prof. Vincent Powell Smith has famously written that³²:-

“In the context of engineering contracts, ‘omissions’ refer to work or materials which have been priced by the contractor and included in the

32 Powell Smith etc. [1989], An Engineering Contract Dictionary, Legal Studies and Services Ltd, pg 481

contract sum, but which the employer no longer requires. The engineer issues an instruction to omit the work or materials and the omitted work is valued and an appropriate adjustment made in the next financial certificate.”

The omission involves a decrease in:-

- a. Quantity of the works.

In *Arcos Industries Pty Ltd v The Electricity Commission of New South Wales*³³, Elcom (Client) contracted with Arcos (Contractor) to build a power station under a Schedule of Rates contract. Schedule of Rates contract is typically applied when the nature of work is known but cannot be quantified. Therefore, in the absence of an estimate, tenderers quote unit rates against a document that is intended to cover all likely activities that might form part of the works.

Clause 11 of the contract on variation clause stipulates that Arcos was to vary the work by way of addition or omission when only instructed by the Superintendent. Without Arcos' approval, the total value of the additions or omissions from the works was not to exceed 10 per cent of the contract sum. However, during the execution of the works it was found that the actual quantities of earthworks and concrete works fell short of the quantities that had been estimated in the schedule by more than 10 percent. Arcos argued that the shortfall in actual quantities was an omission which had not received approval by Arcos within clause 11.

The Court of Appeal acknowledged that it may be necessary to give a restricted or qualified meaning to 'variations' where the parties use that term with a schedule of rates and unanimously held that the variation clause was concerned only with variations in the nature of the work to be done and not

33 [1973] 2 NSWLR 186

with variations in the quantities which were needed to perform that work and therefore the approval of Arcos was not required.

b. Quality of the works.

*Chadmax Plastics Pty Ltd v Hansen & Yuncken (SA) Pty Ltd*³⁴ was a case in which there was a main contract for an eight story building for some 7.8 million dollars which provided a schedule of finishes including the application of ‘wallflex’ in a small area. The main contractor entered into a subcontract with a subcontractor to supply and apply wallflex. A variation was directed under the main contract whereby the wallflex was to be substituted with a plaster and paint finish. The main contractor sought to pass down this variation to the subcontractor by omitting all wallflex work from its scope of work. This had the effect of omitting all but 1.26 per cent of the work that the Subcontractor was to perform.

Justice Brebener held that:-

“.....The contract gave power to make adjustments to the sub-contract works, but not a power to cancel, or virtually to cancel, the sub-contract works.....”

c. Scope of the works.

In *Hunkin Conkey Construction v US*³⁵, the construction of a dam encounters a high water table and this meant that additional work was required to overcome this issue. The government contracted separately with one of the other specialist firms. The Court held that the work had not been provided for under the terms of the contract (as argued by the Contractor) and

34 [1984] 1 BCL 52

35 [1972] 461 Fed. Rep. 2d 1270

that the government was not in breach of the contract for not directing the Contractor to perform the work.

d. Nature of the works.

In *J& W Jamieson Construction Ltd v Christchurch City Council*³⁶, Justice Cook observed in relation to the principle that it is a question of construction regarding the extent of a variation power that:

“To my mind, if a variation may fairly be said to be a change to the Works as these described, whether it comprised an addition, reduction or substitution of the Works or affects the carrying out of the Works (to quote the definition) then it is a variation which the contractor is under an obligation to carry out; if it is beyond that it is not. If the contract is for a single dwelling house, then that is what work is covered by the contract. It is not changing the nature of the contract by ordering variation which would normally be associated with a dwelling house; a second dwelling house would be an entirely different thing.”

The three key areas of risk on a construction project are scope of works, time and pricing, and it is unsurprising that each of these can be affected differently by variations³⁷. Contractors often argue that they should be entitled to claim the loss of the profit that they would have earned on such works whenever variations are ordered to omit works. Contractor’s argument based on the ground that they lose an opportunity of earning the profit and overheads element which was built into the value of the work which was omitted. The contractor may find that the omission of works substantially affects his profit level for the whole contract and thus seeks compensation for any adverse change in profitability. This being the case, the contractor claims from the employer the loss they allege to have been suffered.

36 Unreported, Christchurch High Court, 8 November 1984, pg 42

37 Australian Construction Law Newsletter – Issue #53 November/December 2013, Swap Exchange Pty Ltd Australia, pg 6

However, ultimately the first step that the contractors shall do is to determine whether the instruction omitting the works was a valid variation order.

Standard forms in general use provide for the work to be varied, including omissions, and therefore there is no scope for claiming damages for breach of contract³⁸. Notwithstanding, the dispute however arise when the employer via the contract administrator orders an invalid variation for omission of works. The invalid omission, not exhaustive as follows:-

- a. To arrange for the work omitted from the contract to be undertaken by another contractor at a lower price. In *Carr v J.A. Berriman Pty Ltd*³⁹, the Court held that plaintiff's omission of fabrication of the structural steel from the defendant's part of the works was a breach of contract since the omitted part of the works was awarded to some other contractor.
- b. To prevent the contractor from carrying out the work under the original terms of the contract. In *Commissioner for Main Roads v Reed & Stuart Pty Ltd*⁴⁰, the Court held that the Commissioner was in breach of contract by arranging the work of importing top-soil onto the site, which was the contractor's part of the works, to be done by a third party at cheaper rates.
- c. The scale of omissions which caused a substantial change of the works under the contract. In *Melbourne Harbour Trust Commissioners v Hancock*⁴¹, the High Court held that the Engineer's instruction for an omission of significant amount of work in connection to a construction of wharf was an invalid omission since the omission caused a fundamental change to the contract.

38 Roger Knowles [2012], 200 Contractual Problems and Their Solutions, Wiley-Blackwell, pg 170

39 [1953] ALJR 273

40 [1974] 12 BLR 55

41 [1927] 39 CLR 570

This however, provisions in the standard forms of contract do not set any limits on the permissible extent of variation omissions. Only CIDB Form expressly stated that variation instructing for omission is invalid in the event that the omitted works from the contract is to be undertaken by another contractor at a lower price. Reference could be made to Clause 1.1 (b) CIDB Form [2000 Edition] that defines the term ‘variation’ as follows:-

“...an addition to or omission from the Works (but not if the omitted work is to be carried out by the Employer or by another Contractor)...”

However, CIDB Form also fails to expressly state the other type of invalid omission and remedies by the contractor in the event invalid omission by employer and/or contract administrator.

This issue may also be encountered where the omitted work relates to those work items which carry attractive profit margins. If the contractor finds that the omission of these work items substantially affect his profit level and/or has changed the character of the contract substantially, he may be expected to vigorously resist their omission from the contract and seek compensation for any adverse change in profitability. In the absence of such a clause what remedy, if any, do contractors have where work included in their contract is omitted and the employer arranges to have it carried out by others?

The dilemma a contractor would face in such an instruction for a variation omission is that what constitute a valid and an invalid variation omission of works. The employers and contract administrators often uses the landmark variation provision of *“no variation shall vitiate the contract”* as a shield to administer the contract to a one sided contract when in response to a variation claim by the contractors. There will be instances where omissions in the contract documents are not resolved to the satisfaction of the parties involved with the works. This variation works instructing for an omission would then give rise to possible contractual

ramifications in addition to the commercial consequences.

In addition, different contract administrators would construe the implied terms of the contract differently in the absence of a clear cut guidelines to administer an instruction requiring for a variation omission of works. Contract administrator and contractor themselves would have confused themselves to identify which are the valid and invalid variation omission of works.

Thus, references shall be made to the various common law principles, which would be finding of this thesis that may be of aid should the relevant provisions in the contract may be either inadequate or ambiguous.

If the contractor could identify the valid and invalid variation omission of works, he would refuse the performance by not to comply with the invalid variation omission and avoid risking a wrongful repudiation by refusing to proceed with the contract administrator's instruction⁴². A better understanding of this issue especially by contract administrator and contractor should lead to a more efficient system of contract administration and a reduction in disputes.

42 Peter Kiewit & Sons v Eakins Construction Ltd [1960] SCR 361

1.3 Research Question

The following question arises in inspiring the research problem:

- i. What constitute an instruction for variation omission of works as valid and invalid variation omission?

1.4 Objective of the Study

The objective of this study is:

- i. To identify valid and invalid variation for omission of works.

1.5 Scope of the Study

The identified scopes of this study are as follows:-

- a. Contractual provisions in the three major standard forms of construction contracts in Malaysia; JKR Form 203A [2010], PAM Contract with Quantities [2006], CIDB [2000].
- b. Cases law regarding contracting parties variation omission disputes reported in LexisNexis and World Wide Web (WWW).

- c. Variation omission of works refers to omission of the part of the works or the whole works and does not include the reduction in the works.

1.6 Significance of the Study

The writer regards that this study is mutually benefiting to all the stakeholders in the construction industry especially the employers, contract administrators and the contractors briefly as follows:-

a. Employers

The employers normally do not have necessary skills and expertise in the construction industry and thus employ a set of consultants to advise them and administer the contracts. This study would bring knowledge to the employers whether they possess absolute power to instruct a variation omission of part of the works or the whole works. The employers may also understand the legal reasoning behind such limitations in ordering a variation omission.

b. Contract administrators

Contract administrators are engaged by the employers, normally formalised by a services agreement. A contract administrator carries responsibility on account of the confidence placed in his skill, knowledge, judgment and integrity. The role of a contract administrator has a dual role in which as an agent of the principal in issuing directions and supervising the work and as an independent certifier, valuer and assessor in respect of the assessment, valuation of claims and issuing certificates. Therefore, a contract administrator must be impartial to both sides of the contracting parties by administering a contract in accordance to the agreed contract terms and

conditions. However, an incompetent contract administrator often brings a contract into disputes especially in relation to variation issues, for example by instructing an invalid variation omission of the works. This study could assist contract administrators to have knowledge to administer a contract and advise both the employers and contractors on variation omission of the works. In addition, the contract administrators would also self-develop in contract administration when dealing with this matter in dispute vis a vis.

c. Contractors

The contractors importantly could have the knowledge on his rights and positions whether to follow an instruction for a variation omission, blindly. Frequently, small contractors do not argue to proceeds with any instructions from the contract administrators due to lack of contractual knowledge. In addition, frequently the contractors are forced to abide the employers will for their commercial gain. Consequently, an instruction for variation omission of works would take a hard hit to their already small profit margin due to omission of contract sum. A contractor has no remedy for loss of profit on omitted work. With this study, the contractors then would have the knowledge on their contractual rights and positions to challenge an invalid variation omission of works. If the contractor could identify the valid and invalid variation omission of works, he would refuse the performance by not to comply with the invalid variation omission and avoid risking a wrongful repudiation by refusing to proceed with the contract administrator's instruction.

1.7 Research Methodology

The research methodology section is one of the most important parts in any of the research report. This section describes instruments and procedures used in the research to help in the data collection and data processing. This research methodology has been clearly written so that other researchers who are interested to conduct the research in the same area would be able to exactly follow the procedures.

The research design process has to be determined utmost before starting to collecting data. Flawed research design will lead to misleading in data collection and the results will be a failure. As such, objective of the study and findings will be totally deviated. Thus, in order to get the best possible outcome, I have identified few processes in data collection and data processing that consists of:

- 1.7.1 Stage 1: Initial study and finding the research topic.
- 1.7.2 Stage 2: Collecting data and research design.
- 1.7.3 Stage 3: Analysing and interpreting data.
- 1.7.4 Stage 4: Finding and recommendations.

1.7.1 Stage 1: Initial Study and Finding the Research Topic

Stage 1 of this research involves initial study to identify few suitable issues. The writer's personal interest is towards variation issues since at the time of this study conducted, the writer was assisting his superior in administering an infrastructure contract and was in a project phase of instructing and valuing variations works. The writer believes a study on variation issues would enormously assist in his contract administration works specifically in variations works and at the same time motivated to complete this research study.

The writer has then conducted two approaches to finalise the area of study in variation works which are:-

- a. Consultation with colleagues, lecturers and construction industry's contacts from different background of work places (contractors, QS consultants, claims consultants, etc.)
- b. Browsing previous studies conducted by researchers especially UTM students as can be found in UTM PSZ Library database of thesis collections on variation issues. The writer founds that majority of the studies on variations are focused on types of variations in the construction projects⁴³, procedural requirements in variations works⁴⁴, techniques of valuation for variations works⁴⁵, limitations (in general) to variations works and variations works from legal perspectives⁴⁶.

The writer then found that no detailed study has been carried out for variation order that is specific to omission of works and/or part of the works. Co-incidentally the writer experienced at the time of this research proposal is that to draft an instruction requiring an omission of part of the works from the main contractor scope of works to be awarded to other works contractors due to interfacing issues and works programme constraints between the contractors. This triggered the writer's thought to conduct a detailed study on variation omission to identify valid and invalid variation omission of works. Therefore, the writer has now identified the area of his research in variation omission of works and the objective is to identify an instruction for a variation omission of works as valid and invalid variation omission.

43 Sofiyah Ahmad [1989], Thesis: Variation Order in Construction Project, Fakulti Kejuruteraan Awam UTM

44 Sharil Amran Amir Mohamed [1986], Thesis: Management of Variation Order in Public Work Department Malaysia Construction Project, Fakulti Alam Bina UTM

45 Zulkhairi Ismail [1968], Thesis: Techniques for Valuation of Variation Works, Fakulti Alam Bina UTM

46 Lim Cheng Sim [2007], Thesis: What Constitute a Variation in Construction From Legal Perspective, Fakulti Alam Bina UTM

Background of the study which comprises problem statement, objective, significance and its scope has already been detailed in the first chapter. This is very important as it will be the main lead in determining the direction of this research. Processes taken herein after should be relating to the problems and objectives to get the desired results.

1.7.2 Stage 2: Collecting Data and Research Design

Data collection is a process of collecting data from different sources. Data are valuable pieces of information collected in a study. Data is divided into two categories which are primary data and secondary data. For the purpose of this study, the writer has only utilised secondary data for both his literature review and data collection.

Literature review on variation order would cover extensively on variation provision in standard forms of contract, cases law pertaining to variation works and other written sources for variation works that would sets general understanding to the definitions, scope of the variation provision, party or parties authorised to instruct a variation works, procedural requirements for issuance of variation works, measurement and valuation of variations works, and payment of variation works-done. An individual chapter for literature review on variation omission of works is also provided to set the understanding to the topic in discussion specifically.

Data collection would be in the form of standard forms of contracts and cases law. Standard forms of contracts:-

- a. JKR Form 203A [2010] available for purchase in Works Ministry (JKR) Head Quarters located in Jalan Sultan Salahuddin, 50582 Wilayah Persekutuan Kuala Lumpur.

- b. PAM Contract with Quantities [2006] are available for purchase in Malaysian Institute of Architect (PAM) Head Quarters located in Wisma Bandar, 50100 Kuala Lumpur.
- c. CIDB [2000] is readily available online at their official website, WWW.cidb.gov.my

Searches for cases law are conducted in LexisNexis as follows:-

- a. Malaysian construction cases law:
 - i. Access to LexisNexis official website via UTM PSZ services under Online Database.
 - ii. In the tab of 'Search & Cases', key keywords of 'building contracts and variation and omission' to filter carefully relevant Malaysian cases law regarding disputes on variation omission.
 - iii. Save the documents in Words or PDF format to be used in data analysis.
- b. International construction cases law:
 - i. Access to LexisNexis official website via UTM PSZ services under Online Database.
 - ii. In the tab of 'Search & Cases', click 'International Cases' and key keywords of 'construction contracts and variation and omission' to filter carefully relevant international cases law regarding disputes on variation omission.
 - iii. Save the documents in Words or PDF format to be used in data analysis.

Searches for Malaysian and international cases law are also made in World Wide Web in Google platform. Keywords such as "variation order", "variation order and omission", "list of variation order cases" are used to extract relevant cases law as well as related journals and articles to support the discussion of those cases.

1.7.3 Stage 3: Analysing and Interpreting Data

Data processing and analysing is to organise, categorise and/or code, and record the collected primary data. This would be then presented using illustrations such as table, chart and graph. The data collection from standard forms of contracts and cases law would be scrutinized in details to get the essence of what constitute valid and invalid variation omission of works. Therefore, data analysis would be conducted in the form of documents analysis. Various written and published documents such as books, journals and previous thesis, if any, would be discussed to support the Writer's arguments.

1.7.4 Stage 4: Finding, Conclusion and Recommendations

Through the processes that have been detailed, it will be more than enough to make finding which is to identify the valid and invalid variation omission of works. The writer would also make few recommendations from findings of this study to contract administrators and contractors that would be commercial gains to contracting parties and consequently the construction industry.

The process of the research methodology is described in the **Table 1.1**.

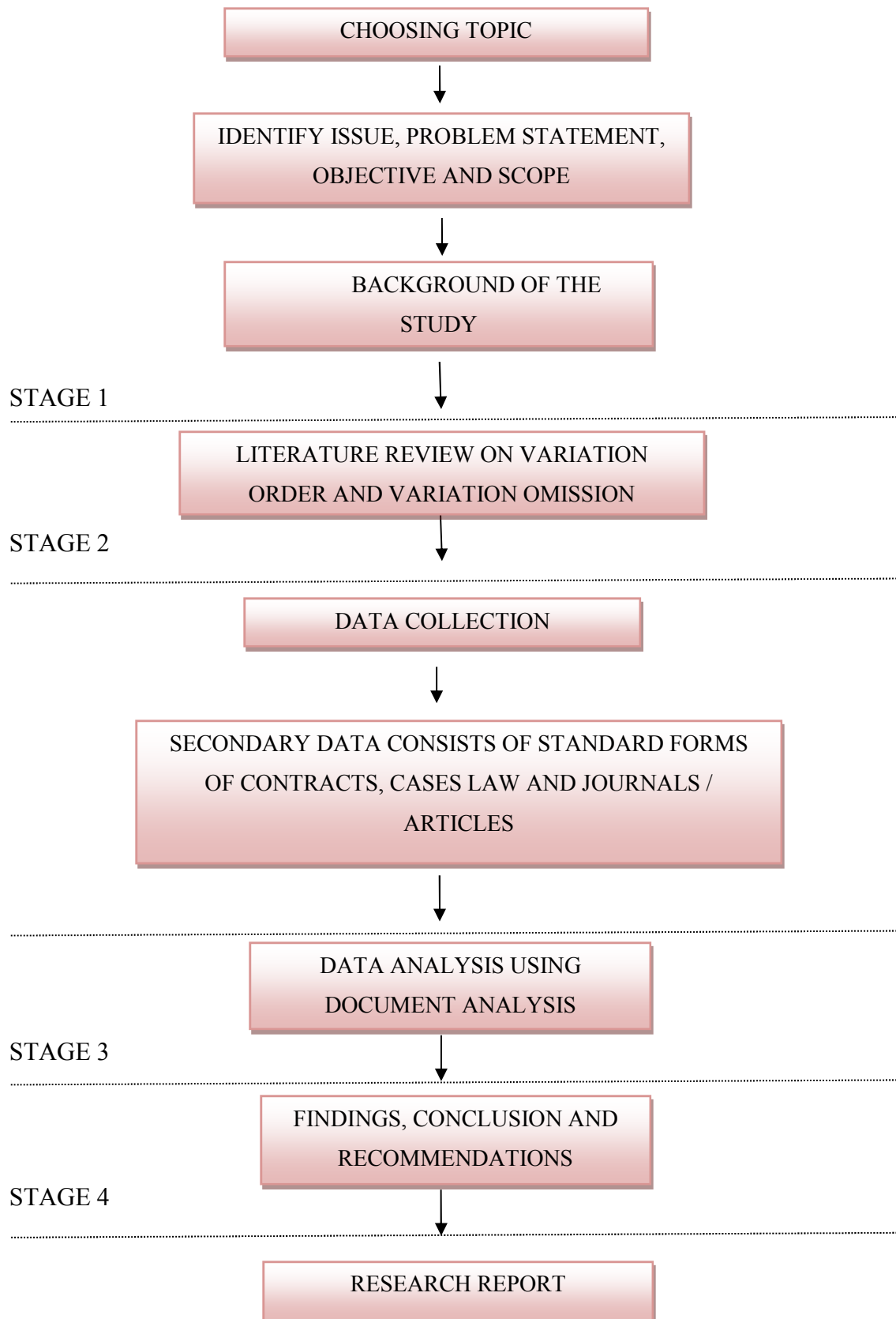


Table 1.1: Research Methodology Process

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