

ASSESSMENT OF LOSS AND EXPENSE FOR EXTENSION OF TIME

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Specially dedicated to my lovely family:

MohdSofian Bin Misni, husband

SabariahBtYusof, mother

SitiZuraidahbt Abu Bakar, mother in law

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.

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ABSTRACT

Delays are fairly common place during the construction process. Contract delays are classified as excusable, inexcusable or compensable. Excusable delays are those which are determined to be unforeseeable and uncontrollable by the contractor, inexcusable delays are not compensable for time or money since they are due to the contractors own negligence and not the responsibility of the owner and the compensable delays are those which are caused by the actions or inaction of the owner. In construction contracts will generally provide for the contractor to claim direct loss and/or expense as a result of the progress of the works being materially affected by relevant matters for which the clients responsible. These delay or extension of time can be very costly to the final expenditure of the construction projects. They can also cause problems in the administration of the projects and become sources for disputes and claims. The objectives of this research are to determine what can be claimed under loss and expense for extension of time and how they are evaluate the loss and expense for preliminaries item. The scope of the research is only limited to government construction projects. The methodology is based on the selected case studies of the government projects that used the PWD203/203A (10/83) Standard Form of Contract. For the first objective is items can be claims cause of delays is loss of profit, finance charges, overheads and loss of productivity or uneconomic working. As the second objective is to determine the methods has been used by clients in evaluate the loss and expense. In common practice there have three methods in evaluate the loss and expense; base on amendment contract basis, formula basis and negotiation basis, it depends to the contract and clients in evaluate the loss. However, it is contractor burden to proof the loss to the client with submission of evidence documents.

ABSTRAK

Kelewatan merupakan perkara yang agak biasa semasa proses pembinaan. Kelewatan kontrak diklasifikasikan kepada kelewatan yang dibenarkan, tidak dibenarkan serta kelewatan yang membolehkan pampasan. Kelewatan yang dibenarkan adalah kelewatan yang tidak dapat diramalkan dan tidak terkawal oleh kontraktor, kelewatan yang tidak dibenarkan adalah disebabkan oleh kesilapan dan kelalaian pihak kontraktor bukan kesilapan daripada pihak pemilik, manakala kelewatan yang membenarkan pampasan adalah disebabkan oleh kesilapan dan kecuain pemilik dan kelewatan ini membenarkan pihak kontraktor membuat tuntutan kerugian disebabkan oleh kelewatan pemilik. Di dalam syarat kontrak pembinaan biasanya terdapat klausa yang membenarkan pihak kontraktor membuat tuntutan terhadap kerugian atau perbelanjaan secara lansung akibat daripada kelewatan yang disebabkan oleh pemilik yang bertanggungjawab. Kelewatan ini boleh menyebabkan lanjutan masa diberikan dan terdapat penambahan kos pada projek tersebut. Kelewatan ini juga boleh menyebabkan masalah dalam pentadbiran kontrak dan projek dengan menimbulkan pertikaian dan tuntutan. Objektif kajian ini adalah untuk mengenalpasti perkara-perkara yang dapat dituntut oleh pihak kontraktor dan bagaimana penilaian tuntutan bagi kerja-kerja awalan dilakukan oleh pemilik.. Skop kajian hanya terhad kepada pembinaan projek-projek kerajaan. Metodologi ini adalah berdasarkan kajian kes yang dipilih dalam projek-projek kerajaan yang digunakan PWD203/203A (10 /83) Borang Kontrak . Hasil kajian ini mendapati terdapat beberapa perkara yang boleh dituntut oleh pihak kontraktor iaitu, kerugian terhadap keuntungan, caj kewangan, perbelanjaan kontraktor, serta kehilangan produktiviti kerja. Adalah menjadi tanggungjawab kontraktor untuk membuktikan kerugian yang dialami disebabkan kelewatan majikan atau pemilik.

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LIST OF ABBREVIATIONS

BLR	-	British Law Reports
MLJ	-	Malaysian Law Journal
SMM	-	Standard Method Of Measurement
PAM	-	PertubuhanArkitek Malaysia
PWD	-	Public Work Department
SO	-	Superintending Officers
Cl	-	Clause
AC	-	Appeal Cases, House of Lords
All ER	-	All England Law Reports
BuildLR	-	Building Law Reports
Ch	-	Law Reports: Chancery Division 1991-
CLJ	-	Current Law Journal (Malaysia)
Con LR	-	Construction Law Reports
CSOH	-	Outer Hose, Court of Session
ER	-	Equity Reports
Exch	-	Exchequer Reports
HL	-	House of Lords
Hudson	-	Hudson Law Reports

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CHAPTER 1

INTRODUCTION

1.1 Background Study

Time is an extremely important issue in construction. Together with cost and quality, it is a primary objective of project management, and a major criterion by which the success of a project is judge (Charmer 1990). It's contractor duty to carry out the works and complete the works within the times.

Contractual requirements on time differ greatly in status and on the consequences which flow from their breach. Failure to meet times performances may attract sanctions raging from repudiation to damages. The contractor obligations to proceed the works regularly and diligently and complete the works by the completion time. However, when the employer is in breach way of interference or prevention arising from late supply information, failure to give full possession of the site and the like, the result for the contractor is delay, disruption and involvement in loss and expense or extra cost. The contractual remedy give the contractor recovery of his provable loss and expense or extra cost and, in appropriate circumstance an extension of time for completion.

In the provisions of contract the contractors obligations begin with the obligations to construct the works in accordance with the documents within the required time except to the extent that he is prevented from doing so by the employer or is given relief by the express provisions of the contract. Because the obligations to complete the works of a contract on time rests with the contractor and because the essential purpose of an extension of time clause to maintain a fixed time for completion it is understandable that most extension of time clause are drafted so as to be applicable only to extending the time for the contractors obligations.¹ It is a fact that most extension of time clauses permit extension for delays caused by events beyond the control of the contractors as well as for acts of prevention by the employer.

The purpose of extension of time provisions is further complicated and widely confused by the linkage in the industry of extension of time and claims for loss and expense or extra cost. This is not a legal link, nor is it in most standards forms a contractual link, since the extension of time clauses and the financial claims clause usually stand alone. However the contractor has developed a maxim over the years that get the time first and the money will follow. The contract administrator also found extension of time a useful peg on which to hang claims when justifications for approval of payment have to be made to the employer.²

Most of the standard forms constructions contracts currently in use contain detailed provisions under which the contractor can claims against the employer for any losses suffered if the works is disrupted due to specific causes. These provisions often bear some resemblance to those under which an extension of time may be claimed, but there are at least two important distinctions between the two issues;

- i. An extension of time will only granted where the contract administrator believes that completion of the works is likely to be

¹ Brian Enggleston, "Liquidated Damages and Extensions of Time in Construction Contracts." 2nd edition. (Blackwell Science, 1997).12-13.

² Brian Enggleston, "Liquidated Damages and Extensions of Time in Construction Contracts." 2nd edition. (Blackwell Science, 1997).10-11

delayed, whereas compensation for disruption does not depend upon any such delay.

- ii. Clauses which deal with extension of time for completion frequently apply to various neutral events as well as to those causes of delay which are employer's responsibility.

By contrast the vast majority of contractual provisions compelling an employer to pay financial compensation to the contractor relate only to disruption that is caused by the employer. A contractor is entitled under the contract to be paid for work done including the ascertained value of any variations ordered or the contractor may be able to make other claims against the employer.

A contractor may choose to claim under such provisions in the contract or bring legal action for damages resulting from the breach of contract. In simple terms, loss and/or expenses items may include the; prolongation costs, disruption costs, Additional Preliminaries; Overheads; Profit; Finance charges; and other additional costs not reimbursable under the contract. Its employer obligations under construction contract are monetary to pay the contractor what is due for work done and in certain circumstances to compensate the contractor for loss and expense.

In Malaysia most standard forms of contract state an entitlement on the part of the contractor to extension of time and loss and/or expenses. Common examples of the relevant provisions in the standard forms of contract is PAM 2006 Form state in the Clause 23 for Extensions of Time and under Clause 24 – Loss and/or Expenses, its clearly explain about application and ascertainment. In JKR/PWD 203A – Rev 1/2010 Form clause 43 Delay and Extension of time and Clause 44 – Loss and Expenses, it's also express notification, ascertainment and specific events entitlement for claims; IEM Form Contracts Clause 43; and CIDB Form of Contract for building works clause 1.1 – Definition, Loss and Expenses, Clause 31.1- the reason for Loss and/or Expenses Claims.

1.2 Problem Statement

Construction delay is anything that impedes the ability of a contractor to maintain a schedule. The major causes of delay can be identified and categorized as client related, contractor related, consultant related, material related, labour related, contract related, contract relationship-related and external factors.³ Because of the delay some of the effects have been identified as time overrun, cost overrun, and dispute in contract, arbitration, litigation, and total abandonment.⁴

Normally the delays will arise the claims in construction contract however it's depends on the type of delays. If the delays not caused by a party or caused by the owner the contractor are entitle to claim. Usually a contractor may claim against the employer for more time and money (loss and expenses).

As a discussion above, we know that mostly standard forms of contracts usually allow provisions for the extension of time and claims direct loss and expense. However, the standard form of contracts only explains and describes the events and notice requirement for the claims extension of time and direct loss and expense. The provisions did not describe relationship between extension of time and direct loss and expense or the definition direct loss and expense. Because of this situation a contractor often claims loss and expense at the same time as an extension of time because a contractor consider an extension of time is a bonus for them to earn extra money by claims delay and disruption works.

Besides that the provisions in standard forms of contract are not clear about heads of claims, potential of claims and procedure for assessment or valuation for claim loss and/or expense. Due of lack information has caused misunderstanding in

³ Murali Sambasivan, Yau Wen Soon (2006), Causes and effects of delays in Malaysian Construction Industry, *International Journal of Project Management* 25 (2007) 517–526.

⁴ Murali Sambasivan, Yau Wen Soon (2006), Causes and effects of delays in Malaysian Construction Industry, *International Journal of Project Management* 25 (2007) 517–526.

direct loss and expense application either a proper document then the application being rejected.

Because of the problems the foregoing discussion will leads to pertinent questions. What heads of claims under loss and expense” for extension of time according to the PAM 2006 and PWD 203A/ 203 Rev (1/2010) and how loss and expense associated with preliminaries item are evaluated based on the common practice.

1.3 Objective

The objective of this study is

1. To determine heads of claims under loss and expense for extension of time.
2. To determine how loss and expense associated with preliminaries item are evaluated.

1.4 Scope of Study

This research will be focused on following matter:-

1. The related provisions in the standard forms of contract used in Malaysia, Standard Form of Contract to be used for Contract Based on Drawings

and Specifications P.W.D. Form 203 (10/83), Standard Form of Contract Where Drawings and Specifications Form Part of the Contract (Revision 1/2010), Standard Form of Contract to be used for Contract Based on Bills of Quantities P.W.D. Form 203A (10/83) and Standard Form of Contract Where Bills of Quantities Form Part of the Contract P.W.D. Form 203A (Revision 1/2010)

2. Court case related to the issue particularly Malaysian cases. Reference is also made to cases in other countries such as United Kingdom, Brunei, Singapore, Australia and Hong Kong and others countries as long as the case is related to claims of Loss and/or Expenses and it was reported in the Malaysia Law Journal.
3. Case studies relating to claims due to extension of time based on construction project for Government of Malaysia in Kuantan area only.
4. The discussion about procedure valuation and assessment will focus on prolongation cost in preliminaries items only.

1.5 Significant of the research

The significant of the research is to give an insight of the method of assessment used to calculate *loss and/or expense* claim. It may help the players in the construction industry to have more complete understanding on the method used in this type of claim. Furthermore, it can be a guideline to the innocent party to claim damages under the contract.

1.6 Research Methodology and Method of Approach

Research process and method of approach will be used as guidelines so that the research could be done in a systematic way to achieve the research objective. The research process generally consists of four (4) stages, i.e. initial study, data collection, data analysis, and writing-up. The following will be the research process and the methods of approach used for this research.

1.6.1 First Stage: Initial Study

First stage of research involves initial study before the identification of research topic. Two approaches will be used here, i.e. discussion with friends and lecturers regarding what research topic can be done, and initial literature review on the issue of this research. After the research issue is obtained, the objective and scope of the research are determined as well as the research outline is formulated to guide the process of the whole research.

1.6.2 Second Stage: Data Collection and Data Recording

After identifying all the background and relevant issues through literature review, legal cases based on previous court cases which are related to the research issue will be collected. The previous court cases which are related to the recovery of

loss and expense in Malaysian, United Kingdom, Brunei, Singapore, Australia and Hong Kong and others countries and it was reported in the Malaysia Law Journal.

Primary data is collected mainly from Malayan Law Journal, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis Legal Database.

Data is also collected from the secondary source which is obtained from the latest reading materials in printing from research done by third parties other than the writer. Sources of secondary data consist of books, act, articles, research paper and seminar papers

1.6.3 Third Stage: Data Analysis

In this stage, all the collected data, information, ideas, opinions and comments will be arranged, analysed and interpreted. This process is to study and convert the data collected to information that is useful for the research. The proper arrangement of data tends to streamline the process of writing up.

1.6.4 Fourth Stage: Writing-Up

This is the final stage of the research process. It involves mainly the writing up and checking of the written work. Lastly, conclusion and recommendations will be made based on the findings from the analysis of data.

1.7 Organisation of the Chapters

This research covers five (5) segments as follows:

1.7.1 Chapter 1: Introduction

This segment introduces the foci of the research. The definition, events of loss and expense is discussed in this chapter. The objective undertaken for this research is presented in Chapter 1. It also presents the scope and limitation; significance of study; as well as the methodology and the outline of this research.

1.7.2 Chapter 2: Delays and Extension of time

Chapter Two (2) is explain definition of delays and extension of time. This chapter also explain types of delays and event that allow extension of time to be granted. Besides that these segments describes the relationship between extension of time and claims for extra cost and explain how do construction claims arise due to delays or extension of time.

1.7.3 Chapter 3: Loss and Expense

Chapter Three (3) is examine definition of Loss and Expense according to standard forms of contract used in Malaysia and definition by common law case. It also explains heads of claims, principles of damages, potential heads of claims, conditions precedent in claims direct loss and expense.

1.7.4 Chapter 4: Assessment for Loss and Expense in prolongation cost under preliminaries items.

Chapter Four (4) examine how the client makes an assessment for loss and expense claims. This segment will describe what prolongation cost is and preliminaries item including the principles of assessment and valuation loss and expense based on common law and common practice.

1.7.5 CONCLUSION AND RECOMMENDATION

Chapter Five (5) conclude all the discussion in all chapters and in this chapter also have a suggestion for next further study for this topic research.

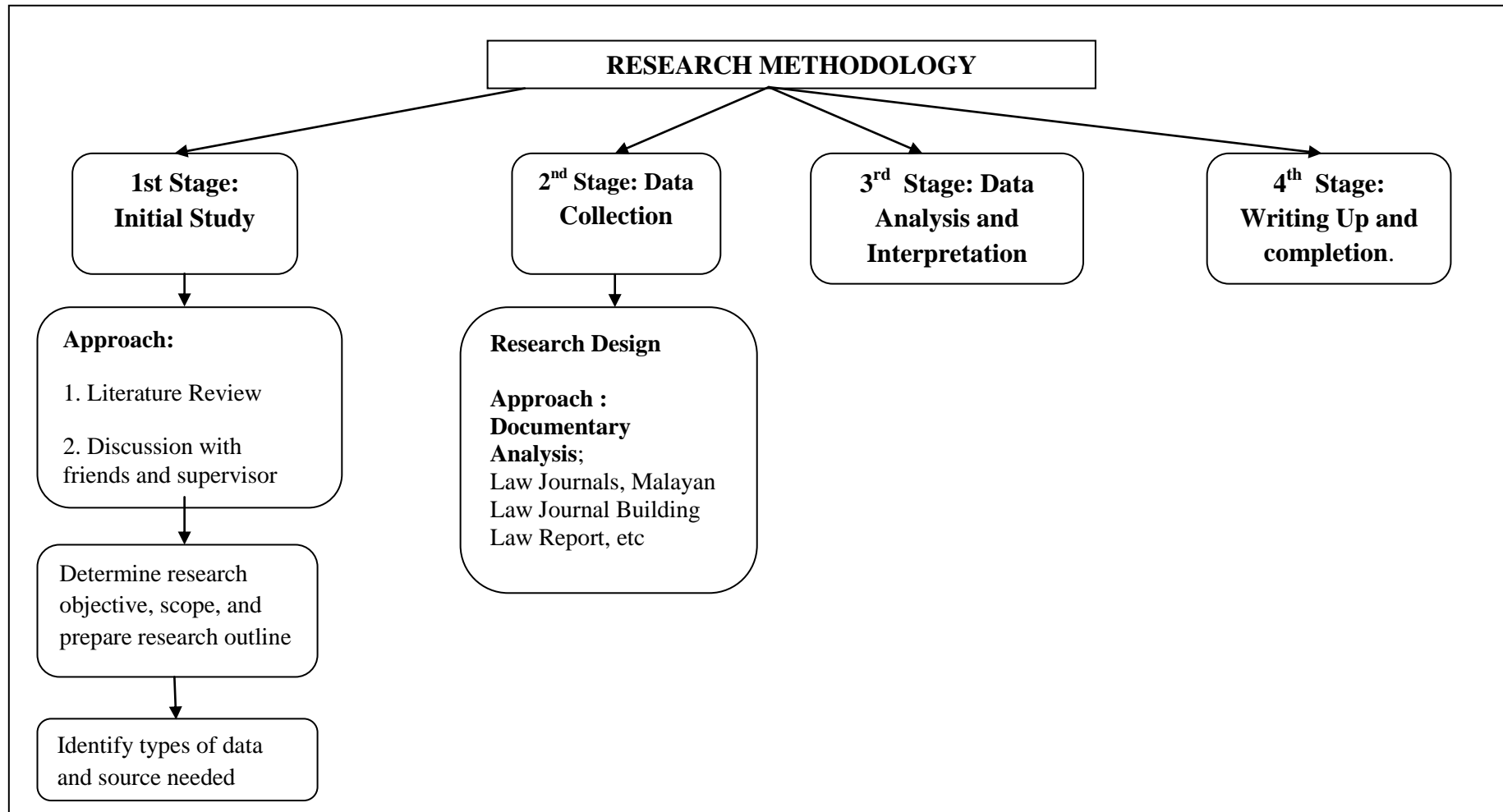


Figure 1.1: Research Methodology

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