

APPLICATION OF GOOD FAITH AS NECESSARY LIMITS IN
EXERCISING THE TERMINATION FOR CONVENIENCE CLAUSE

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Special dedicated to....
My beloved FAMILY

Thanks for everything!!

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ABSTRACT

The right of the contracting party to terminate a contract for convenience is not a common feature in any jurisdictions. It is now a settled law that the exercising of the termination for convenience clause is valid, provided that the contractor is given consideration for his performance under the contracts. Besides, there is an important qualification on this right which is that the employer must terminate for convenience in accordance with an implied duty of good faith. Thus, the objective of this study is to determine the necessity of “good faith” on the part of a terminating party when exercising his right to terminate a contract under “termination for convenience” clause. The research methodology undertaken is by documentary analysis of law cases reported in law journals. The review of the cases are identified from three jurisdictions; United States, Australia and United Kingdom. The findings of the analysis are: first, an employer is entitled to terminate a contract for convenience purposes but it depends on whether a term of good faith is implied into the contract. Second, the duty of good faith is indeed subject to any local law prohibitions. Third, in the USA, it is generally accepted that an implied good faith is necessary as a limit to exercise termination for convenience clause. Forth, the United Kingdom and Australia are in the same position that the employer may terminate the contract ‘in its sole discretion’ or ‘at any time and for any reason’ will not be subject to an implied term of good faith. The lessons to be learnt from this review of cases law is that the importance to check our terms and conditions whether the contract provisions a right to terminate for convenience and whether good faith clauses is applied as limits. In circumstances where we may wish to rely on good faith obligations, such clauses need to be specific.

ABSTRAK

Hak pihak berkontrak untuk menamatkan kontrak bagi tujuan penyelesaian bukanlah suatu ciri biasa dalam mana-mana bidang kuasa. Ianya kini merupakan suatu undang-undang yang termaktub di mana pemakaian klausa penamatan kontrak bagi penyelesaian adalah sah, dengan syarat bahawa kontraktor itu diberi pertimbangan atau balasan bagi pelaksanaan di bawah kontrak. Selain itu, terdapat kelayakan penting terhadap hak ini di mana majikan tersebut hendaklah menamatkan kontrak bagi tujuan penyelesaian berdasarkan kewajipan tersirat niat yang baik. Oleh itu, objektif kajian ini adalah untuk menentukan keperluan "niat yang baik" di sebelah pihak yang menamatkan apabila mengamalkan haknya untuk menamatkan kontrak di bawah klausa "penamatan bagi penyelesaian". Kaedah kajian yang dijalankan adalah dengan analisis dokumentari kes undang-undang yang dilaporkan dalam jurnal undang-undang. Kajian semula kes-kes yang dikenalpasti daripada tiga bidang kuasa; Amerika Syarikat, Australia dan United Kingdom. Hasil analisis adalah: pertama, pihak majikan berhak untuk menamatkan kontrak bagi tujuan penyelesaian tetapi ia bertakluk kepada sama ada terma niat yang baik adalah tersirat ke dalam kontrak. Kedua, kewajipan niat yang baik memang tertakluk kepada apa-apa larangan undang-undang tempatan. Ketiga, di Amerika Syarikat ia diterima secara umum bahawa niat yang baik yang tersirat adalah perlu sebagai had untuk pemakaian klausa penamatan bagi penyelesaian. Keempat, United Kingdom dan Australia berada dalam kedudukan yang sama bahawa majikan boleh menamatkan kontrak mengikut budi bicaranya sendiri, pada bila-bila masa dan untuk sebarang alasan dan tidak tertakluk kepada terma tersirat niat yang baik. Pengajaran yang boleh dipelajari dari kajian ini adalah bahawa kepentingan untuk memeriksa terma dan syarat sama ada peruntukan kontrak hak untuk menamatkan bagi penyelesaian dan klausa niat yang baik adalah terpakai sebagai had. Dalam keadaan di mana kita mungkin ingin bergantung kepada kewajipan niat yang baik, klausa sedemikian adalah perlu khusus.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF TABLES	xii
	LIST OF FIGURES	xiii
	LIST OF CASES	xiv
	LIST OF ABBREVIATIONS	xviii
1	INTRODUCTION	1
	1.1 Background of the Study	1
	1.2 Background of Problem Statement	13
	1.3 Problem Statement	18
	1.4 Research Question	20
	1.5 Objective of the Study	20
	1.6 Scope of the Study	21
	1.7 Significance of the Study	21

CHAPTER	TITLE	PAGE
	1.8 Research Methodology	22
	1.8.1 Stage 1: Initial Study and Finding the Research Topic.	22
	1.8.2 Stage 2: Collecting Data and Research Design	23
	1.8.3 Stage 3: Analysing and Interpreting Data	23
	1.8.4 Stage 4: Finding, Conclusion and Recommendations	23
	1.9 Conclusion	25
2	CONSTRUCTION CONTRACT	26
	2.1 Introduction	26
	2.2 Definition of Construction Contract	26
	2.3 Elements of Contract	27
	2.3.1 Offer and Acceptance	28
	2.3.2 Intention to Create Legal Relation	29
	2.3.3 Consideration	30
	2.3.4 Certainty	31
	2.3.5 Capacity	31
	2.4 Discharge of Contract	32
	2.4.1 Discharge of Contract in Contract Act 1950	32
	2.4.1.1 Discharged by Performance	32
	2.4.1.2 Discharged by Agreement	34
	2.4.1.3 Discharged by Impossibility of Performance	36
	2.4.1.4 Discharged by Breach	37
	2.4.2 Discharge of Contract at Common Law	39
	2.4.2.1 Discharged by Frustration	39

CHAPTER	TITLE	PAGE
	2.4.2.2 Discharged by Repudiation	44
	2.4.2.3 Discharged by Agreement	47
	2.5 Terms and Conditions of a Contract	49
	2.6 Standard Forms of Contracts in Malaysia	52
	2.7 Conclusion	54
3	TERMINATION FOR CONVENIENCE	55
	3.1 Introduction	55
	3.2 Termination for Convenience	55
	3.3 Reasons Behind Incorporation of Termination for Convenience Clause and the Doctrine of Executive Necessity	61
	3.4 Legal Standing of Termination for Convenience	64
	3.5 Formalities for Exercising Termination for Convenience	71
	3.6 Effects of Termination for Convenience	74
	3.7 Conclusion	77
4	GOOD FAITH	79
	4.1 Introduction	79
	4.2 Good Faith in Contracts	80
	4.3 Good Faith in Courts Standing	84
	4.4 Conclusion	87
5	RESEARCH METHODOLOGY	89
	5.1 Introduction	89
	5.2 Research Methodology	89

CHAPTER	TITLE	PAGE
	5.2.1 Stage 1: Initial Study and Finding the Research Topic	90
	5.2.2 Stage 2: Data Collection and Research Design	92
	5.2.3 Stage 3: Analysing and Interpreting Data	94
	5.2.4 Stage 4: Finding, Conclusion and Recommendations	95
	5.3 Conclusion	95
6	APPLICATION OF GOOD FAITH IN EXERCISING TERMINATION FOR CONVENIENCE IN CONSTRUCTION CONTRACTS	96
	6.1 Introduction	96
	6.2 Application of Good Faith in Exercising Termination for Convenience in Construction Contracts	96
	6.2.1 Application of Good Faith in Exercising Termination for Convenience Clause: The United States of America's Stand	98
	6.2.2 Application of Good Faith in Exercising Termination for Convenience Clause: Australia's Stand	105
	6.2.3 Application of Good Faith in Exercising Termination for Convenience Clause: The United Kingdom's Stand	110
	6.3 Exclusion of Good Faith by Express Terms	115
	6.4 Conclusion	116
7	DATA ANALYSIS & FINDINGS	118
	7.1 Introduction	118
	7.2 Data Analysis – Lists of Cases Discussed	118
	7.3 Data Analysis – Summary of Cases in Accordance to the Jurisdictions	121

CHAPTER	TITLE	PAGE
	7.4 Data Analysis – Summary of Case on Courts Standing Towards Application of Good Faith in Exercising the Termination for Convenience Clause in the United States	122
	7.5 Data Analysis – Summary of Case on Courts Standing towards Application of Good Faith in Exercising the Termination for Convenience Clause in the United Kingdom	127
	7.6 Data Analysis – Summary of Case on Courts Standing towards Application of Good Faith in Exercising the Termination for Convenience Clause in the Australia	129
	7.7 Findings	132
	7.8 Conclusion	134
8	CONCLUSION AND RECOMMENDATIONS	135
	8.1 Introduction	135
	8.2 Summary of Research Findings	135
	8.3 Problems Encountered During Research	137
	8.4 Future Research	138
	8.5 Conclusion	138
	REFERENCES	140
	BIBLIOGRAPHY	143

LIST OF TABLES

TABLE NO.	TITLE	PAGE
7.1	Lists of Cases Discussed	119
7.2	Summary of Cases in Accordance to the Jurisdictions	121
7.3	Summary of cases on courts standing towards application of good faith in exercising the termination for convenience clause in the United States	122
7.4	Summary of courts applied test to proof employer's bad faith in exercising termination for convenience clause	125
7.5	Summary of cases on courts standing towards application of good faith in exercising the termination for convenience clause in the United Kingdom	127
7.6	Summary of cases on courts standing towards application of good faith in exercising the termination for convenience clause in the Australia	129

LIST OF FIGURES

FIGURES NO.	TITLE	PAGE
1.1	Research Methodology Process	24

LIST OF CASES

CASE NO	TITLE	PAGE
1	A&D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd [2000] 16 Construction LJ 199	6
2	Abbey Developments v PP Brickwork [2003] EWHC 1987	16, 69 & 97
3	Affin Credit (M) Sdn Bhd v Yap Yuen Fei [1984] 1 MLJ 169	71
4	Anderson Formrite Pty Ltd v Boulderstone Pty Ltd (No 7) [2010] FCA 921	70
5	Apple Communications v Optus Mobile [2001] NSWSC 365	106
6	Aseambankers Malaysia Berhad & Ors v Shencourt Sdn Bhd & Anor [2013] MLJU 1538	85
7	Associated Metal Smelters Ltd. v. Tham Cheow Toh [1971] 1 MLJ 271	50
8	Avery v Bowden [1855] 26 Law Journal Queen's Bench 3	46
9	Bolton v Mahadeva[1972] 2 All ER 1322 Pg. 177.	33
10	Brown & Docherty v Whangarei Country [1988] 1 N.Z.L.R. 33	7
11	Carr v J.A. Berriman Pty Ltd [1953] 89 CLR 327	16 & 97
12	Chiemgauer Membran und Zeltbau GmbH (formerly Koch Hightex GmbH) v The New Millennium Experience Company Ltd (formerly Millennium Central Ltd) 15 December 2000 Chancery Division – unreported.	75

CASE NO	TITLE	PAGE
13	Colonial Metals Co. v United States 494 F.2d 1355 (Ct. Cl. 1974)	100
14	Corliss Steam-Engine Co. v. United States 10 Ct. Cl. 494 (1874), aft'd, 91 U.S. 321 (1875)	98
15	D. & C. Builders Ltd v Rees	48
16	Davis Contractors Ltd v Fareham Urban District Council [1956] 2 All ER 145	2 & 40
17	Dr. A. Dutt v Assunta Hospital [1981]1 MLJ 304	60
18	G. L. Christian & Associates v. United States 312 F.2d 418 (Ct. Cl. 1963)	73
19	Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903	105
20	GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1	106
21	General Aviation Inc v Cessna Aircraft Co 703 F. Supp. 637 at 644 (W.D. Mich. 1988)	99
22	Gibson v Manchester City Council [1979] 1 ALL ER 972	65
23	Goon Kwee Phoy v J & P Coats [1981]2 MLJ 129	13 & 60
24	Hadley Design Associates Limited v The Lord Mayor and Citizens of the City of Westminster [2003] EWHC 1617	111
25	Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433 at 439, [1988] 1 All ER 348, [1988] 2 WLR 615	115
26	J. M. Hill & Sons Ltd v London Borough of Camden [1981] 18 BLR 31	47
27	Jacobs v. United States 353 U.S. 652 (1957)	100
28	Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd [2007] VSC 200	107
29	Krygoski Construction Company Inc v United States 94 F. 3d 1537 (Fed. Cir.1996)	103

CASE NO	TITLE	PAGE
30	Leighton v Arogen [2012] NSWSC 1370	108
31	Macon Works & Trading Sdn Bhd v Phang Hon Chin [1976] 2 MLJ 177	66
32	MacRobertson Miller Airline Services v Commissioner of Taxation (WA) (1975) 133 CLR 125.	68
33	Mersey Steel & Iron Co. v Naylor, Benzon & Co [1884] 9 App Cas 434	44
34	Mertens v Home Freeholds Co. Ltd [1921] 2 KB 526	42
35	Metropolitan Water Board v Dick, Kerr & Co. Ltd [1918] AC 119	43
36	Metropolitan Water Board v Dick, Kerr & Co. Ltd [1918] AC 119	42
37	Mid-Essex Hospital Services NHS Trust v Compass Group UK Limited [2013] EWCA Civ 200	111
38	Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420	65
39	Multiplex Construction (UK) Ltd. V Cleveland Bridge UK Ltd and Another [2006] EWHC 1341 (TCC)	8
40	Pacific Brands Sport & Leisure v Underworks [2005] FCA 288	106
41	Pasuma Pharmacal Corpn. V. Mc. Alister & Co. Ltd [1966] 1 MLJ 221	50
42	Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd [2013] 2 MLJ 620	117
43	Placer Development Ltd v Commonwealth (1969) 21 CLR 353.	15 & 67
44	Preston Corporation Sdn Bhd v Edward Leong [1982] 2 MLJ 22, FC	64
45	Questar Builders Inc v CB Flooring LLC 978 a 2d 651 (md, 2009)	102
46	Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234	108

CASE NO	TITLE	PAGE
47	Sir Lindsay Parkinson & Co. Ltd v Commissioners of Works and Public Buildings [1950] 1 ALL ER 208	43
48	Sri Kajang Rock Products Sdn Bhd v Maybank Finance Bhd [1992] 1 CLJ 204	70
49	Suisse Atlantique Societe d' Armement Maritime SA v NV Rotterdamsche Kolen Central [1966] 2 All ER 61	45
50	Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd (2000) 16 BCL 130	108
51	Thomas Feather & Co. (Bradford) Ltd v Keighley Corporation [1953] 53 Local Government Reports 30	5
52	Tigerswan Inc v The United States 110 Fed. Cl. 336 (2013)	104
53	Torncello v United States 681 f 2d 756 (Ct Cl, 1982)	69 & 101
54	TSG Building Services PLC v South Anglia Housing Ltd [2013] EWHC 1151 (TCC)	112
55	United States v. Behan 10 U.S. 338, 343 (1884)	62
56	United States v. Penn Foundry & Mfg. Co 37 U.S. 198 (1949).	76
57	Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15	115
58	White & Carter (Councils) Ltd v McGregor [1961] 3 All ER 1178	45
59	Woodar Investment Development Ltd v Wimpey Construction UK Ltd [1980] 1 WLR 277	9
60	Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB)	113
61	Yong Ung Kai v. Enting [1965] 2 MLJ 98	50

LIST OF ABBREVIATIONS

AC	-	Law Reports Appeal Cases
ALL ER	-	All England Law Reports
BLR	-	Building Law Report
CA	-	Court of Appeal
CB	-	Common Bench Reports
CIDB	-	Construction Industry Development Board
CLR	-	Construction Law Report
FC	-	Federal Court
FIDIC	-	The International Federation of Consulting Engineers (Fédération Internationale Des Ingénieurs-Conseils)
HL	-	House of Lords
IEM	-	Institution of Engineer, Malaysia
JKR	-	Jabatan Kerja Raya
KB	-	King Bench
LJ	-	Law Journal
LR	-	Law Reports
LT	-	Law Times Reports
MLJ	-	Malayan Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PSZ	-	Perpustakaan Sultanah Zanariah
PWD	-	Public Work Department
QB	-	Queen Bench
SCR	-	Supreme Court of Canada
SLR	-	Singapore Law Reports
UTM	-	Universiti Teknologi Malaysia
WLR	-	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Contracts Act 1950 defines ‘contract’ as ‘an agreement enforceable by law’¹. A contract does not end automatically. This must generally be brought about by some act of the parties.

Discharge is a general term for the release of contractual obligations, when the parties become freed from the obligations to do anything further under the contract². The contracting parties could not rely on the contractual terms, but can only enforce whatever rights may arise from the discharge. Discharge of contract may be brought about in four ways:

1 Section 2 (h) of the Contracts Act 1950

2 Hudson, A.A.; Wallace I.N. [1970], Hudson’s Building Contract - 11th Edition, Sweet & Maxwell, Pg. 205

- i. By performance; if the parties perform all their obligations the contract is said to be discharged by performance³. This is the ideal way of bringing a contract to an end whereby contracting parties have carried out their obligations under the contract and nothing further remains to be done. The purpose for which they entered into the contract has been accomplished and the contractual relationship ceases.
- ii. By consent or agreement between the parties; when the contracting parties are entering into another contract, a supplementary agreement to end the contract. A mutual agreement to end the contract may be because the parties gain something from so doing, thus satisfying the requirement for consideration as an essential element of the contract.
- iii. By frustration; if an event during the course of the contract renders performance impossible or sterile, it may be frustrated⁴. Lord Radcliffe in *Davis Contractors Ltd. V Fareham Urban District Council*⁵ held that:

“(It) occurs wherever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”
- iv. By breach; serious breach by one party may lead to the contract being discharged⁶.

3 Section 38 of the Contracts Act 1950

4 Section 57 (2) of the Contracts Act 1950

5 [1956] AC 696

6 Section 40 of the Contracts Act 1950 & *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697

The most common way in which a contract is ended is with the performance by the parties of their respective obligations under that contract. The promises are performed and the contractual obligations are satisfied. Contrarily, there are circumstances a party may find it necessary to terminate a construction contract where the other contracting party is unable to fulfil his obligations under the contract or where the other contracting party commits a breach so serious as to undermine the fundamental objectives of the innocent party under the contract. The Section 40 of the Contracts Act 1950 defines breach of contract as:

‘When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.’

A party repudiates a contract when he intimates by words or conduct that he does not intend to honour his obligations as and when they fall due, that is, he has decided to unilaterally put an end to the contract.

Breach of conditions or warranties needs to be discussed. On the one hand, a term is a condition if it is so important that its breach by a party entitles the other to treat the contract as repudiated⁷. On the other hand, warranty is a term of less importance than a condition that its breach does not entitle the innocent party to terminate the contract as he is only entitled for damages⁸. A court may decide that a term is a condition or a warranty because it has been categorised as such by statute or binding judicial precedent.

7 Carr v J.A. Berriman Pty Ltd [1953] 89 CLR 327

8 Multiplex Construction (UK) Ltd. V Cleveland Bridge UK Ltd and Another [2006] EWHC 1341 (TCC)

Consequently, a contract may be determined either under the common law or by exercising rights of termination expressly provided for under the contract. Professor Vincent Powell-Smith (1989) perfectly describes termination as follows⁹:

“...The bringing to an end of something, for example, the determination of a dispute... The word is commonly used in the context of civil engineering contracts to refer to the ending of the contractor’s employment. Both parties have a common law right to bring the contract to an end in certain circumstances but most standard forms give the parties additional and express rights to determine upon the happening of certain events...”

As detailed by Professor Vincent Powell-Smith (1989) above, a party may terminate the employment of the defaulting party under the contract or common law. In Malaysia, termination is expressly provisioned in standard forms of conditions of contract and is a remedy available to and exercisable by contracting parties¹⁰. In addition, a party may also choose to terminate the employment of the defaulting party under the common law (an act of rescission as oppose to contractual determination) where¹¹:

- i. the other party has repudiated the contract before the contract has been fully performed so that there is nothing to be gained by the innocent party continuing with the contract;
- ii. the other party has committed a fundamental breach, that is, a breach which undermines the every foundation on which the contract was transacted; and

9 Powell Smith etc. [1989], An Engineering Contract Dictionary, Legal Studies and Services Ltd, Pg. 109 – 110

10 JKR Form 203A [2010] Clause 51 Events and Consequences of Default by the Contractor & Clause 55 Events and Consequences of Default by the Government / PAM Contract [2006] Clause 25 Determination of Contractor’s Employment by Employer & Clause 26 Determination of Own Employment by Contractor /

CIDB [2000] Clause 44 Determination by Employer & Clause 45 Determination by the Contractor
11 I.N. Duncan Wallace [1995]. Hudson’s Building and Engineering Contract – 11th Editions. Sweet and Maxwell, Para 12.002

- iii. there has been a breach of fundamental term, that is, a term which the parties have expressly agreed or by implication to be so important that its breach should entitle the innocent party to treat himself as discharged from further performance.

It is essential to remember that the grounds for termination under the contract would not all amount to fundamental breaches at common law. A specific contractual provision for termination is essential because to rely on common law, repudiation can be very uncertain. Notwithstanding, contractual termination must not be thought to end all problems in that respect because deciding whether the precise grounds have been satisfied can bring its own problems of interpretation of the clauses and of the facts itself.

The acceptance of the repudiation under the common law entitles the innocent party for damages whereas to terminate under the contract simply entitles the party to whatever remedies the contract stipulates. In *Thomas Feather & Co. (Bradford) Ltd v Keighley Corporation*¹², it has been held that the party determining is entitled only to such remedy as the contract itself specifically provides and damages for breach of contract they were not so entitled. Chief Justice Lord Goddard said that the contract clause conferred a specific right on the Corporation.

“...that is that they can put an end to the contract once and for all. I would have expected to find, if it was intended that, in those circumstances, the contractor would be liable for damages, that there would have been an express provision put in to that effect. I think that this provision simply gives the Corporation a right to terminate the contract, which they would not otherwise have had and that it gives them nothing more”

To terminate under the contract may be considered to be an affirmation of the contract, whereas a party accepting repudiation is saying that the terms of the contract no longer govern either party.

The terms ‘termination of a contract’ and ‘determination of a contract’ are to be understood as shorthand for the ending of the primary obligations under the contract¹³. These obligations consist of the contractor’s obligation to carry out and complete the works and the employer’s obligation to pay the contract price in accordance with the conditions of the contract.

However, the contract itself does not come to an end because its secondary obligations and the right to refer to adjudication/arbitration and/or litigation remain unaffected. The contracting parties are still bound by the contract, although most of its terms would not be applicable after the termination.

In *A&D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd*¹⁴, HHJ Wilcox QC held in reliance upon *Heyman v Darwins Limited* [1942] AC 356 that adjudication, by analogy to arbitration, survived determination of the contract. Arbitration agreements are generally considered to be independent of the contract in which they are contained and, in the absence of the contrary intention of the parties, survive termination of the underlying contract. This puts beyond all doubt that the clauses dealing with consequences of termination continue to apply.

13 Issaka Ndekuri, Michael Rycroft [2009], *The JCT 05 Standard Building Contract Law and Administration* 2nd Edition, Butterworth-Heinemann, pg. 419
14 [2000] 16 Construction LJ 199

All standard forms of contract expressly provision the principles in practicing the termination clauses¹⁵. An employer who seeks to determine the employment of his contractor must follow the procedures as prescribed in the contract precisely. It is prudent and advisable to exercise caution and pay special attention to the precise scope of the termination before ordering to determine the employment under the contract since these terminations has created lots of disputes.

Importantly, termination must not be carried out unreasonably or vexatiously. ‘Vexatiously’ suggests an ulterior motive to oppress or annoy¹⁶. ‘Unreasonably’ has been held to be taking advantage of the other side in circumstances in which, from a business point of view, it would be totally unfair and almost smacking of sharp practice¹⁷.

These express provisions also stress that all the notices of termination must be in writing and given by actual, special or recorded delivery. Case law suggests that a notice in general terms, but which clearly directs attention to what amiss is sufficient. The notice must state clearly the default in question, but also to specify the applicable clauses of the contract¹⁸.

A typical example of the principles that apply when considering termination clauses can be found in the case of *Brown & Docherty v Whangarei Country*¹⁹, which is still relevant and applicable till today. Justice Smellie held that:-

15 JKR Form 203A [2010] Clause 51 Events and Consequences of Default by the Contractor & Clause 55 Events and Consequences of Default by the Government / PAM Contract [2006] Clause 25 Determination of Contractor’s Employment by Employer & Clause 26 Determination of Own Employment by Contractor / CIDB [2000] Clause 44 Determination by Employer & Clause 45 Determination by the Contractor
 16 John Jarvis Ltd v Rockdale Housing Association Ltd [1986] 36 BLR 48
 17 Hill v London Borough of Camden [1980] 18 BLR 31
 18 Hounslow London Borough v Twickenham Garden Development Ltd [1970] 3 WLR 538
 19 [1988] 1 N.Z.L.R. 33

- i. Determination clauses must be interpreted strictly.
- ii. For a determination to be valid under the contract, the correct procedure must be complied with.
- iii. A professional consultant must act fairly and impartially in the exercise of any discretion to issue a contractual certificate or notice that may be relied upon by the Employer as grounds for determination.
- iv. The contractor must be given fair warning that continuation of his conduct may result in determination and should not be lulled into assuming that he would be permitted to continue with the work.
- v. A certificate or notice issued by the architect or engineer in reliance upon incorrect or irrelevant information or grounds will be invalid.

Provision for termination must be the subject of clear words, because otherwise it would be an intrusion into the contractor's right to finish the work. This is because under the common law, in principle a wrongful termination will not terminate the contract unless the other party accepts the breach as having this effect.

In *Multiplex Construction (UK) Ltd. V Cleveland Bridge UK Ltd and Another*²⁰, the defendant contended that the claimant main contractor's failure to make payment amounted to a repudiatory breach and served notice to terminate the subcontract by a specified date. Justice Jackson rejected the contention and held that it was rather the defendant who had, by serving the notice of termination and then stopping work committed a repudiatory breach. The usual remedy for wrongful termination will be an action for damages.

²⁰ [2006] EWHC 1341 (TCC)

However, it was suggested in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*²¹ that a purported termination under the contract based on an honest but mistaken interpretation does not always amount to a repudiatory breach. Lord Wilberforce explained:

“So far from repudiating the contract, the appellants were relying on it and invoking one of its provisions, to which both parties had given consent. And unless the invocation of the provision was totally abusive, or lacking in good faith (neither of which is contended for), the fact that it has proved to be wrong in law cannot turn it into repudiation. Repudiation is a drastic conclusion which should be only held to arise in clear cases of refusal, in a matter going to the root of the contract, to perform.”

The above issues and problems encountered in a contract determined either under the common law or by exercising rights of termination expressly provided for under the contract termination is likely to delay the completion and increase the costs of the project. It is obviously one of the most serious provisions in a construction contracts. Therefore, parties would be well advised to obtain proper legal advice whenever termination is considered.

Owing to the difficulties and complicated nature in ordering termination for breaches i.e. “termination for default”, most contract provisions, especially the employer who has bargaining power in the private construction contracts seek to modify the grounds for termination. Lately, there has appeared in some standard forms of contract and most non-standard form of contract a new category of determination called “**termination for convenience**”.

21 [1980] 1 WLR 277

It is an arrangement between the parties expressly built into the contract whereby usually the employer is unilaterally empowered to determine the employment of the contractor without the occurrence of any default whatsoever on the part of contractor²². Consequently, a contract may be terminated for convenience where commercial circumstances under which the original contract was executed have changed or where the working relationship between the parties in that particular contract has deteriorated²³.

The right of the contracting parties to terminate a contract for convenience is not a common feature in any jurisdictions. Under common law, both parties will be bound by the contract until discharge, which will mean substantial performance of all contractual obligations. Therefore, this kind of right is an exceptional right which must be embodied in the contract.

In order to contractually enforce the termination for convenience clause, suitable provisions are appropriately drafted and provisioned in the relevant conditions of contract. A few standard forms of contract and non-standard form of contract used locally which provisions termination for convenience clause, not exhaustive, is as follows:

i. FIDIC Construction Contract 1st Edition (1999 Red Book)

Clause 15.5 Employer's Entitlement to Termination:

“The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor...”

22 Ir. Harbans Singh [2010], Engineering and Construction Contract Management – Post Commencement Practice, Lexis Nexis, Pg. 51

23 Hudson, A.A.; Wallace I.N. [1970], Hudson's Building Contract - 11th Edition, Sweet & Maxwell, Pg. 88

ii. CIDB Contract [2000]

Clause 46.1 Right of the Employer to Terminate:

“The Employer may at any time, give to the Contractor 30-Day notice of termination of the Contract. Upon the expiry of 30 Days from the receipt of such notice the Contract shall be terminated.”

iii. Perbadanan Putrajaya Conditions of Contract Based On Drawings and Specifications

Clause 60.0 Termination for Convenience:

“At any time, in his absolute discretion, the employer may terminate the contractor’s performance of work under the contract in whole, or in part, by notice in writing (Notice of Termination for Convenience), whenever the employer shall determine that such termination is in the best interest of the employer in which event the Employer’s Representative shall determine the value of work carried out but not then paid which sum shall be added to the value of work certified in the last Interim Certificate”.

iv. Projek Mass Rapid Transit Lembah Kelang: Jajaran Sungai Buloh – Kajang, Conditions of Contract for Work Package Contract

Clause 53A.0 Termination for Convenience:

“Without prejudice to the provisions of Clauses 51, 52 or 53 and notwithstanding any other provision in this Contract, the Project Delivery Partner may, subject to the Owner’s consent, at any time by giving thirty (30) days notice in writing to the Works Package Contractor, terminate all or any part of the Works Package Contractor’s appointment under this Contract at its convenience without assigning any reason.”

Typically, a termination for convenience clause states that an employer may at any time and for any reason terminate contractor's services and work at his own convenience. The clause intended to provide the party with the superior bargaining power the option to terminate the contract, without need to prove a breach by the other party, and then also establish the amount of compensation to be paid.

Consequently, a contract may be terminated for convenience where commercial circumstances under which the original contract was executed have changed or where the working relationship between the parties in that particular contract has deteriorated, thus avoiding the expense and risks of a contested default determination while sacrificing some of its financial procedural advantages²⁴.

Although these clauses are increasingly being used to provide flexibility in contracts, they have been given little judicial consideration. This research seeks to examine a number of concerns and difficulties which these clauses raise, including the legal standing of termination for convenience and importantly, limit which good faith may place upon the broad unfettered termination power of these clauses.

²⁴ Hudson, A.A.; Wallace I.N. [1970], Hudson's Building Contract - 11th Edition, Sweet & Maxwell, Pg. 88

1.2 Background of Problem Statement

It is not unusual for contracts to include a clause granting one of the parties a unilateral right to terminate, for example, as can be commonly found in employment contracts. These contracts are usually set within a framework of statutory rights and obligations. In the case of employment contracts, the prevailing framework of statutory rights and obligations would protect an employee from wrongful termination or unfair dismissal. An employee termination or dismissal of a staff must be with just cause and excuse.

Under Malaysian labour laws, such a contractual provision does not give the employer the absolute right to fire his employee. The common law principle of ‘*termination simpliciter*’²⁵ is not applicable in view of Section 20 of the Industrial Relations Act. The Federal Court, in the case of *Goon Kwee Phoy v J & P Coats*²⁶ held in concurrence:

“...we do not see any material difference between a termination of the contract of employment by due notice on a unilateral dismissal of a summary nature. The effect is the same and the result must be the same.”

In *Dr. A. Dutt v Assunta Hospital*²⁷, it was held that:

“...there is no material distinction between dismissal and termination. Either must be with just cause and excuse must be justifiable...”

25 “Termination Simpliciter” refers to the absolute right of an employer to terminate the employee by virtue of the termination clause contained in most employment contracts.

26 [1981]2 MLJ 129

27 [1981]1 MLJ 304

Therefore, employees cannot be terminated without just cause or excuse either summarily or with notice. However, in construction contracts subject to termination for convenience clauses there is often no such protection extended to the contractors involved.

In construction contracts, terminations for convenience clause are increasingly being used to provide flexibility in contracts. The main difference between termination by employer and termination by the contractor is that a terminating contractor is not entitled to terminate for convenience. The critical concern remains on such unfettered power to terminate for convenience unilaterally. Where a termination for convenience clause applies, the promises exchanged by the parties could arguably be said to be undermined because the employer can terminate the contract at will or without assigning any reason.

In amplification, many of the principles of the contract law were developed by the courts under the prevailing classical doctrine of freedom of contract. Under doctrine of freedom of contract, the parties are free to enter into whatever transactions they wish with a minimum of interference by the state or the courts. It is not seen to be the function of the law to protect the parties to a contract from the consequence of a 'bad' bargain.

One of the concerns raised about termination for convenience clauses is that contracts containing such clauses are void because such a broad termination power renders the consideration for that contract illusory. A strict interpretation of a termination for convenience clause would render an entire agreement void and therefore unenforceable²⁸. This argument is based on the premise that, as the clause would permit the employer to terminate the agreement at any time at its convenience, the employer's performance of its obligations is arguably 'optional': the employer

28 John Scala, Paul Lang, Deborah Browit (2008, 3 June). Termination for Convenience. Australian Government Solicitor. Volume 27 Pg. 1

promises nothing and thus provides no consideration for the agreement; hence, there is no agreement²⁹.

It was entirely at the employer's option whether he performed his obligations or not. This was illustrated in *Placer Development Ltd v Commonwealth*³⁰. In this case, the plaintiff made an arrangement with the Commonwealth to form a company that would import and export timber. The Commonwealth agreed to pay a subsidy 'of an amount or at a rate to be determined by the Commonwealth from time to time'. Since this clause gave scope for the Commonwealth to refuse to pay the subsidy at all, the majority of the High Court held that the clause did not amount to a contractual obligation. Justice Kitto explained as follows:

"...wherever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought at all..."

Thus, the exercise of the termination for convenience clause defies the fundamental legal principle of 'mutuality of contract' which accords that all rules must apply to all parties to a contract for the contract to be enforceable; otherwise the contract must be rejected by all parties. This is to ensure no party is allowed to have unfair advantage of partially applied rules under any legal contract.

In the United Kingdom, the government has sanctioned Unfair Contract Terms Act 1977 to impose further limits on the extent to which under the law civil liability for breach of contract can be avoided by means of contract terms. In

29 Lucy Garrett (Summer 2013). Termination for Convenience. Keating Chambers Construction Update. 3rd Edition Pg. 2
30 (1969) 21 CLR. 353.

Malaysia, the Unfair Contract Terms Act 1977 is not part of the Law of Malaysia³¹. The reason is that the existing contract laws as supplemented by local decisions are more than adequate³². How the termination for convenience clause which upheld unilateral termination without cause does prevail when it is disputed? However, they have been given little judicial consideration. In short, is there any fetter on a termination for convenience right? For the avoidance of any doubt, there is no common law right to terminate for convenience.

Further, although a termination for convenience clause may not render a contract void, there is concern that an employer may abuse its power and seriously undermine the promises made under the contract. The main problem in practice arises where the employer has exercised or wishes to exercise his right to terminate for convenience in order to give the work to an alternative contractor, either because he is able to get a cheaper deal or because he has concerns as to the performance of his current contractor and wishes to avoid contention as to whether that performance is sufficiently bad to trigger the termination for default clause.

In the Australian case of *Carr v J.A. Berriman Pty Ltd*³³, there was an express clause providing for omission of any work. The Court held that this power could not be exercised so as to remove work from the contractor to give it to another contractor as this would be a “*most unreasonable*” use of the power.

Separately, in case *Abbey Developments v PP Brickwork*³⁴ the English Court decided that there was no overall principle that work could not be taken from the contractor to be given to someone else but rather the issue must be decided upon the construction of the contract. “*Convenience*” or “*Omissions*” clause needs “*reasonably clear words*” to allow an employer to transfer work from one contractor

31 Wee Lian Construction Sdn Bhd v Ingersoll – Jati Malaysia Sdn Bhd [2005] 1 MLJ 162

32 Richard Malanjum J in Standard Chartered Bank v Boomland Development Sdn Bhd [1997] 4 AMR 3442

33 [1953] 89 CLR 327

34 [2003] EWHC 1987

to another. Judge Humprey Lloyd QC suggested that the other clause may have been a termination for convenience clause and might have permitted Abbey to suspend the works and re-tender. The Judge opines that there might be a possibility that “*sound technical or commercial reasons for omitting the work*” which would justify an otherwise unlawful omission.

However, the contract between Carr and Berriman and, Abbey and PP Brickworks does not provide for termination for convenience clause. If the contract in the Carr and Abbey matter had included a termination for convenience clause, the employer would have been allowed to terminate the contract and subsequently award the work to a third party contractor.

Notwithstanding to the unfettered power in termination for convenience clause, there is an important qualification on this which is that the employer must not terminate the contract in a bad faith. Termination must be in accordance with an implied duty of good faith. However, the duty of good faith is still subject to any local law prohibitions, bringing with it a host of arguments dealt with differently in various jurisdictions, namely the United States of America (civil law country) – England (common law country) – Australia (common law country). Consequently, it is open to the contracting parties to dispute whether exercising of the termination for convenience clause in a construction contract is unfettered or subjected to the application of the duty of good faith.

In review on the courts standing in three jurisdictions between the United States, Australia and United Kingdom towards application of good faith in exercising of the termination for convenience clause will shed light on this subject matter. Thus, a research on termination for convenience is worthy to be undertaken to clear the air between the contracting parties and construction industry as whole. This research seeks to examine a number of concerns and difficulties which these clauses raise, including the limit which good faith may place upon the broad termination power of these clauses.

1.3 Problem Statement

The writer was inspired in investigating this subject matter due to at the time of this research carried out, the author was assisting his superior in administering an iconic infrastructure contract. Due to the big scale of this infrastructure project, it was divided into numbers of work packages. Each individual works package contractor's performance in completing the scope of works within budget and time is crucial in delivering this project successfully.

In the course of this project phase, the client was having problem with one of the works package contractors due to a number of reasons, summarised as follows:-

- i. the progress of the works are in delay and disrupting interfacing works of other works package contractor;
- ii. lack of co-operation extended by the works package contractor; and
- iii. communication problems whereby meetings to discuss issues are often postponed due to absence without any reasons on the part of the works package contractor.

Subsequently, at a point of time the client grew frustrated and worried on the successful delivery of this project in time. The client then considered to terminate the employment of this works package contractor, however there is no valid grounds for termination as provided under the contract due to default of the works package contractor.

Consequently, the client was advised by his team of legal department to exercise the termination for convenience as the contract provided both the termination due to default of the works package contractor and without default, i.e. termination for convenience. However, the client was not convinced to invoke the clause as in his minds there are few of his concerns, summarised as follows:-

- i. in Malaysia, there is no reference for prima facie case reported involving exercising of the termination for convenience clause;
- ii. the necessary limits in invoking this clause, particularly in the subject matter of application of good faith;
- iii. process and procedures of exercising the termination for convenience clause as it was not clearly spelled under the contract; and
- iv. risks involved in exercising this clause.

The concerns of the client remains as there are no solid documents prepared by the client's team to convince him in invoking the termination for convenience clause.

Notwithstanding, this study seeks to investigate the subject matter of necessity of "good faith" on the part of the client to exercise the termination for convenience clause by investigating the termination for convenience practised in other jurisdictions, in the vain hope to shed some light into what would likely happen locally.

1.4 Research Question

1. What is the legal standing of termination for convenience clause?
2. Even though termination for convenience expressly provisioned in the contract, what is the court interpretation and standing on the validity of termination for convenience?
3. Is the duty of good faith will be applied by the courts as a limitation to the employer's unfettered power in exercising termination for convenience clause?

1.5 Objective of the Study

The objective of this study is:

To determine the necessity of "good faith" on the part of a terminating party when exercising his right to terminate a contract under "termination for convenience" clause.

1.6 Scope of the Study

The identified scope of this study is as follows:-

Jurisdiction between United States, Australia and United Kingdom on the courts attitude towards application of good faith in exercising termination for convenience clause.

1.7 Significance of the Study

The purpose of this research is to increase the awareness of the employers in relation to the issue of unilateral termination; termination for convenience clause in construction contract. The findings of this research can also provide a better understanding to the contractors and the employer of their legal positions in the case of the employer choose to exercise his right under clause termination for convenience.

Furthermore, this research is very important as a basic guideline to those who are involved in the construction industry especially contract administrators. Thus, this research perhaps would contribute towards enhancement of knowledge of the contracting parties by shedding some information and knowledge regarding their rights.

1.8 Research Methodology

Careful thought and planning in the preparation of the research methods, data collection techniques and measurements is very important for conducting research. Thus, in order to achieve the objective of the research, a systematic process of conducting this research had been structured. Briefly, the research process will be divided into four (4) stages as shown in the Figure 1.1 that consist of the following processes:

- i. Stage 1: Initial study and finding the research topic;
- ii. Stage 2: Collecting data and research design;
- iii. Stage 3: Analysing and interpreting data; and
- iv. Stage 4: Findings, conclusions and recommendations.

1.8.1 Stage 1: Initial Study and Finding the Research Topic

The initial study will be carried out to identifying the research issue from the problem statement by extensive reading on variety sources of published materials. Inputs on the current issues in termination from professors and industry players will be sought that will provide better resolution of the pandemic issues relating to the topic. From the issue, the objective of this research has been identified.

1.8.2 Stage 2: Collecting Data and Research Design

Once the issues and objectives of the topic have been established, the second stage of the research will be conducted where it involves an extensive review of available literatures. Data for the study will be reviewed mainly from journals, books, newspaper, previous thesis, law or business reports and the internet. Other than that, report court cases found through the access of Lexis Nexis Legal Database which is available in the UTM Library website.

1.8.3 Stage 3: Analysing and Interpreting Data

Careful and detailed study and analysis on books, journals and case laws from various jurisdictions will be conducted in this stage. The analysis will cover the material facts collected from the literatures, approach and decisions of the Courts and interviews in connection to the issues of the subject of study.

1.8.4 Stage 4: Finding, Conclusion and Recommendations

This is the final stage where findings, conclusions and recommendations to the construction players on the topic will be presented. The whole process will be reviewed and finalized to determine whether the objective of the study has been achieved or not. In addition, further study has been suggested for the next research to be carried out.

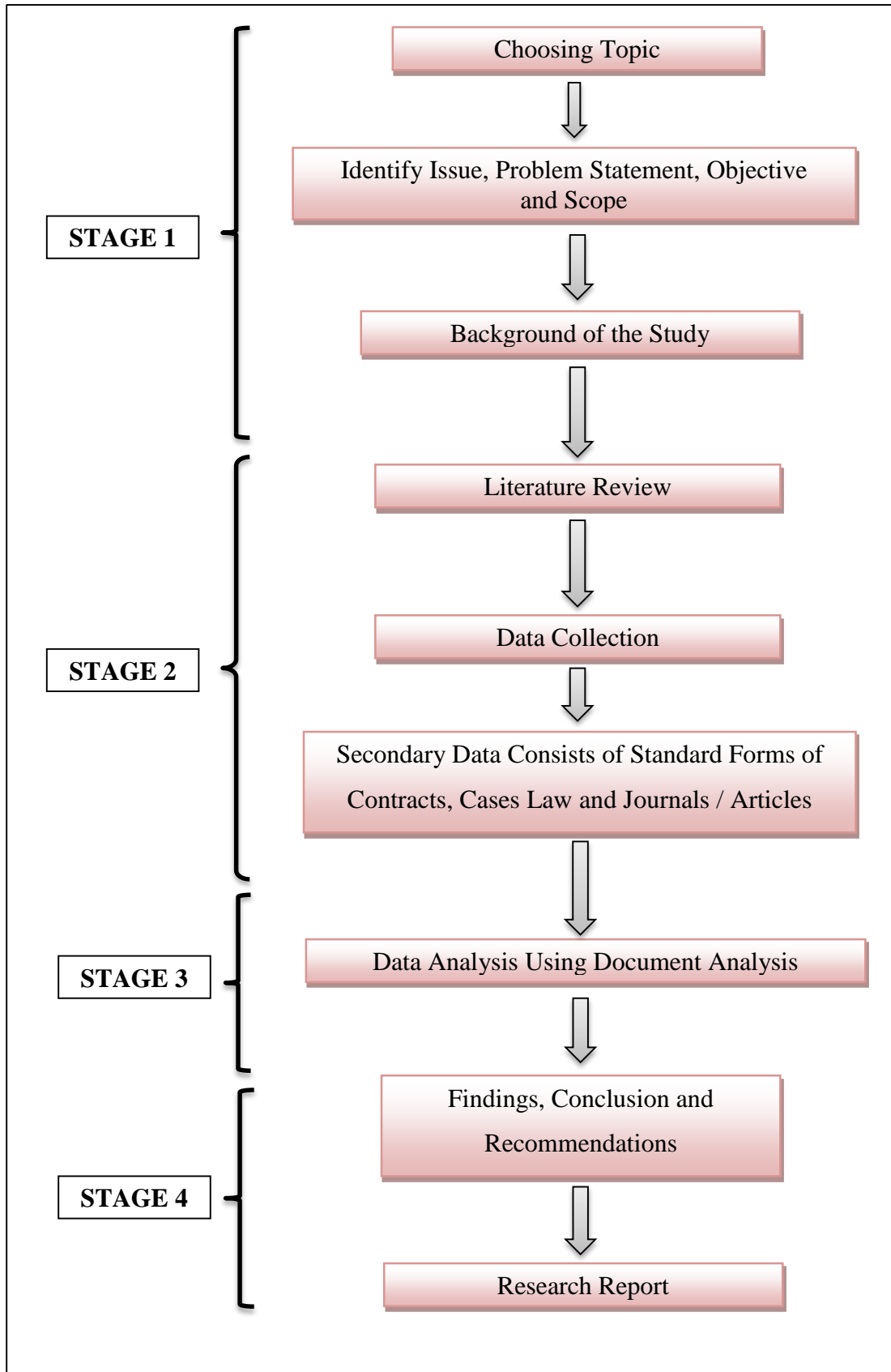


Figure 1.1: Research Methodology Process

1.9 Conclusion

The first chapter is the introduction to the whole study whereby it consists of the background of the study, problem statement, research questions, and objective of the study and the scope of the study. In addition, the author discussed the significance of the study and how the author conducted the research based on research methodology. In the next chapter, the author discussed about the construction contract i.e. what is the construction contract, elements of contract, discharge of contract, terms and conditions of contract and standard forms of contract.

REFERENCES

- Alfred Arthur Hudson [1994]. *Hudson's Building and Engineering Contract – 12th Edition*. Sweet and Maxwell.
- Allan Ashworth. [2001]. *Contractual Procedures in the Construction Industry. 4th Edition*. Pearson Education Limited. England.
- Angelo Capuano [2005]. 'Not Keeping the Faith: A Critique of Good Faith in Contract Law in Australia and the United States'.
- Ashley R. Gordon. *6 Key Elements of a Contract*. Retrieved on 23 March 2011, from: <http://ezinearticles.com>
- Awang Muhamad Jambol [2011], Thesis: *Mutual Termination of Contract in Construction Projects*, Fakulti Alam Bina UTM.
- Beatrix Vohrah and Wu Min Aun. [2004]. *The Commercial Law of Malaysia*. Longman. Kuala Lumpur.
- Bespoke Conditions of Contract Perbadanan Putrajaya.
- Bespoke Conditions of Contract PMRTLK for Works Package Contract.
- Bruce d Page [2008]. "When Reliance is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government". 61 Air Force Law Review 1.
- C P Thorpe and J C L Bailey. [1996]. *Commercial Contracts, A practical Guide to Deals, Contracts, Agreements and Promises*. Woodhead Publishing Limited. England.
- Catherine Elliot and Frances Quinn. [2005] *Contract Law. 5th Edition*. Pearson Education Ltd. Great Britain.
- Deborah Smithies.[2007]. *Contract: the elements of a contract*. Retrieve on 23 March 2011, from: <http://tutor2u.net>
- Frederick W. Claybrook Jr. [1997]. *Good Faith in the Termination and Formation of Federal Contracts*. 56 Md. L. Rev. 555.

- Geoffrey Kuehne [2006]. *Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?* University of Western Australia Law Review 63.
- Guest, A G [1975]. *Anson's Law of Contract*. Clarendon Press, Oxford.
- Harbans Singh [2009]. *The PAM 2006 Form of Building Contract: An Overview*. The Malaysian Bar Council.
- Hudson, A.A.; Wallace I.N. [1970]. *Hudson's Building Contract - 11th Edition*. Sweet & Maxwell.
- I.N. Duncan Wallace [1995]. *Hudson's Building and Engineering Contract – 11th Edition*. Sweet and Maxwell.
- Ir Harbans Singh [2010]. *Engineering and Construction Contract Management – Post Commencement Practice*. Lexis Nexis.
- Issaka Ndekuri, Michael Rycroft [2009]. *The JCT 05 Standard Building Contract Law and Administration 2nd Edition*. Butterworth-Heinemann.
- John Scala, Paul Lang, Deborah Browit [2008, 3 June]. *Termination for Convenience*. Australian Government Solicitor, Volume 27.
- Lee Mei Pheng [2005]. *General Principles of Malaysian Law . 5th Edition*. Oxford Fajar Sdn. Bhd. Malaysia.
- Liew, Li Ming [2009], Thesis: *Time Essence and Termination in Construction Contract*. Fakulti Alam Bina UTM.
- Lucy Garrett [Summer 2013]. *Termination for Convenience*. Keating Chambers Construction Update, 3rd Edition.
- Malaysia (1950). Contracts Act.
- McKendrick. *Contract Law (9th Edition)*.
- Murdoch, J and Hughes, W. [1997]. *Construction Contracts: Law and Management. E & FN Spon*. London.
- Nor Marina binti Rosli [2007]. Thesis: *The Use of Standard Form Of Domestic Subcontract In Malaysian Construction Industry*. Fakulti Alam Bina UTM.
- Powell Smith etc. [1989]. *An Engineering Contract Dictionary*. Legal Studies and Services Ltd.
- Richard Stone [2013]. *The Modern Law of Contract (10th Edition)*. Routledge.
- Standard forms of contract CIDB [2000].
- Standard forms of contract FIDIC Construction Contract 1st Ed (1999 Red Book)
- Standard forms of contract JKR Form 203A [2010].

Standard forms of contract PAM Contract with Quantities [2006].

Steven J. Burton [1994] *Breach of Contract and the Common Law Duty to Perform in Good Faith*. 94 Harv. L. Rev. 369.

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

Syed Ahmad Alsagoff [2010]. *Principles of the Law of Contract in Malaysia (3rd Edition)*. Lexis Nexis.

Tay, Lee Yong [2006], Thesis: *Determination of Contract by Employer in Construction*. Fakulti Alam Bina UTM.

Traverse Smith [2013], "*Good Faith*": *What does it mean?*

Wan Nordiana Wan Ali [2006], Thesis: *Determination of Contract by Contractor*. Fakulti Alam Bina UTM