

**THE USE OF STANDARD FORM OF DOMESTIC SUBCONTRACT
IN MALAYSIAN CONSTRUCTION INDUSTRY**

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Specially dedicated.....

To my parents..... 'mak' & 'abah'

To my sisters..... 'along' & 'angah'

To my brothers..... 'Abang Z' & 'Shap'

To my lovely friend.....

.....Thank you for everything

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ABSTRACT

Malaysian Construction Industry has never had any standard form of domestic subcontract. The contract between Main Contractor and Domestic Subcontractor are mainly based on non-standard form drafted by the Main Contractor. Many problems have arise from the use of these non-standard form of subcontract. In September 2006, the CIDB has published the Model Terms of Construction Contract for Subcontract Work with aim to reducing these problems. In relation to these, the objectives of the study are to determine the problems faced by domestic subcontractors associated with the use of non-standard form of domestic subcontract and also to determine whether the use of 'Model Term' will reduce the problems. The study shown that the problems faced by domestic subcontractor due to the non-standard form are problem with payment clause, termination clause, variation and also arbitration. The most frequently problem is problems related with payment clause. Most of the disputes arose because of lack of term and the parties are not fully understand the terms. The study also shows that the 'Model Term' will be able to reduce the problems. For example the payment clause is clearly stated all the right, obligation and duties of the parties. By using the plain English also can help the parties understand the contract they had entered.

ABSTRAK

Industri Pembinaan Malaysia tidak mempunyai borang setara untuk subkontrak domestik. Kontrak di antara kontraktor utama dan subkontraktor biasanya adalah borang yang di rangka oleh kontraktor utama. Terdapat banyak masalah daripada penggunaan borang subkontrak yang tidak setara. Pada bulan September 2006, CIDB telah mengeluarkan “*the Model Terms of Construction Contract for Subcontract Work*” dengan tujuan untuk mengurangkan masalah-masalah yang dihadapi oleh subkontraktor akibat dari penggunaan borang yang tidak setara. Berkaitan dengan ini, kajian ini dijalankan adalah untuk mengenalpasti masalah yang dihadapi oleh subkontraktor domestik akibat penggunaan borang yang tidak setara. Kajian ini turut bertujuan untuk mengenalpasti sama ada “*Model Terms*” dapat mengurangkan masalah yang dihadapi. Daripada kajian, masalah yang biasa dihadapi oleh subkontraktor domestik adalah masalah yang melibatkan terma pembayaran, terma penamatan, perubahan, dan timbangtara. Masalah yang paling kerap dihadapi adalah masalah pembayaran. Masalah-masalah ini biasanya berlaku akibat dari kelemahan terma dan pihak-pihak tidak memahami terma sepenuhnya. Berdasarkan objektif kedua, kajian ini menunjukkan bahawa “*Model Term*” mampu untuk mengurangkan masalah yang dihadapi sebelumnya. Sebagai contoh, terma untuk pembayaran dengan jelas menyatakan hak, tanggungjawab dan tugas pihak yang berkontrak. Dengan menggunakan Bahasa Inggeris yang mudah dan jelas, ini akan membantu pihak yang berkontrak untuk lebih memahami kontrak diantara mereka.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
Build LR	Building Law Reports
Cal LR	California Law Review
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
ER	Equity Reports
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
FMSLR	Federated Malay States Law Reports
HL	House of Lords
JKR	Jabatan Kerja Raya
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
QB	Queen Bench

SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background Studies

Construction projects can best be understood in the context of the whole industry which is technological complexity ranges from the familiar, well known materials and trades through to highly complex facilities involving multiple interacting sub-systems.¹ The construction industry is that sector of an economy which constructs, alters, repairs and demolishes buildings, civil engineering works and other similar structures.² The construction industry also includes the assembly and installation on site of prefabricated components and building engineering services.³

¹ Murdoch, J. *Construction Contract : Law and Management*. 3rd Edition. UK : E 7 FN Spoon, (2000), p. 2.

² Fadhlin Abdullah. *Construction Industry & Economic Development: The Malaysian Scene*. Universiti Teknologi Malaysia, (2004), p. 3.

³ *Ibid*

The construction process involves three principal actors who are developer (or the client), the consultant and the contractor.⁴ The consultant and contractor are drawn together by a common purpose to build a building project for a person or an organization called the client.⁵ Once a project is completed and handed over to the client, their work end there.

The construction process is often described in the basic terms: the owner pays, the designer designs and the contractor builds. This description is not entirely accurate. Generally, the general contractor's role certainly is critical, particularly in contractual, financial, and administrative matters, but the general contractor perform only a small portion of the hands-on work in the field.⁶ Letting work to subcontractors is a very common practice in construction industry.⁷ Sub-contracting as a phenomenon is not unique to the construction industry. Indeed, practice in the construction industry seems to be following in the footsteps of many other non-construction businesses.⁸

Subcontractor work based on direction given by the main contractor and the works will carry out on behalf of the main contractor works.⁹ In the construction contract, there are two nature of subcontractor which is nominated sub-contractor and domestic sub-contractor.¹⁰ Nominated subcontractor was select by employer through the contract administrator. The selected person then will enter in to subcontracts with the main contractor.¹¹ Meanwhile, a domestic sub-contractor is one in whose selection and

⁴ Chow, Kok Fong. *Law and Practice of Construction Contract Claims*. Longman Singapore, (1993), p. 2.

⁵ Rosli Abdul Rashid. *The Liability of Construction Project Manager and the Design Teams to the Clients and Buyers*. University of Reading, (1988), p. 6.

⁶ Ng, Chu Yin. *Problems Associated with Nominated Subcontractors in Malaysian Construction Industry*. Universiti Teknologi Malaysia, (2006), p. 2.

⁷ *Ibid*

⁸ Murdoch, J. and Hughes, W. *Construction Contract: Law and Management*. 3rd Edition. Spoon Press, (2000), p. 259.

⁹ Coller, K. *Construction Contract*. New Jersey: Prentice Hall, (2001), p. 28.

¹⁰ Lord Smith, J.P. *Avoiding Claims in Building Contracts*. London: Butterworth Architecture, (1994), p.111.

¹¹ Murdoch, J. and Hughes, W. *Construction Contract: Law and Management*. 3rd Edition. Spoon Press, (2000), p. 275.

appointment the employer normally plays no part, other than simply giving consent where there is required under the terms of the main contract.¹²

The duties and responsibilities of the parties, who enter into the contract, are bound as stipulated in the contract which agreed in the earlier stage. The contract may be entirely in writing, entirely orally or partly in writing and partly oral.¹³ In Malaysia construction industry, there are several choices of standard forms of main contracts¹⁴ and also for nominated subcontract¹⁵ yet there has never been any published standard form of domestic subcontract. Most of the subcontract between main contractor and domestic subcontractor are unpublished ‘in house’ contracts, ad-hoc or ‘one-off’ contract.¹⁶ Domestic subcontracts are frequently entered into on most informal basis. Such contracts have provoked fierce criticism from trade associations representing subcontractors, as being one-sided to the point of unfairness.¹⁷ One of the studies¹⁸ was find out that one of the problems faced by domestic subcontractor is poor contractual terms. It’s due to the non-standard form of domestic subcontract.

Refer to the book of Construction Law in Singapore and Malaysia¹⁹, the ‘Standard forms’ have the following obvious advantages:

- a) They were originally drafted by the experts.

¹² Murdoch, J. and Hughes, W. *Construction Contract: Law and Management*. 3rd Edition. Spoon Press, (2000), p. 263.

¹³ Syed Ahmad Alsagoff. *Principle of the Law of Contract in Malaysia*. Malaysian Law Journal Sdn. Bhd. (2003), p 160.

¹⁴ PAM 98, IEM, PWD-203 series, CIDB 2000, PWD-Design & Build/ Turnkey.

¹⁵ JKR 203N, CIDB.B (NSC)/2002.

¹⁶ Sr. Noushad Ali Naseem Ameer Ali. Seminar on Model Terms of Construction Contract for Sub-contract Work 2006. Puteri Pacific Hotel, Johor Bahru, (December 2006).

¹⁷ Murdoch, J. and Hughes, W. *Construction Contract: Law and Management*. 3rd Edition. Spoon Press, (2000), p. 263.

¹⁸ Chong, Jun Fah. *A Study on Domestic Subcontractor*. Universiti Teknologi Malaysia, (2006).

¹⁹ Robinson, Nigel M. *Construction Law in Singapore and Malaysia*. Butterworth: Singapore, Malaysia, Hong Kong, (1998) , p. 6.

- b) If successful, they enjoy a long life during which they are revised periodically to close the loopholes that are inevitably exposed in litigated disputes and thus they become increasingly reliable.
- c) Similarly, over their life-span they accumulate a body of case law which provides authoritative interpretation and explanation of their detailed provisions.
- d) They become familiar to practitioners, so that they may be used to advantage and known pitfalls avoided, their terminology gradually becomes part of the everyday language of the industry and tends to shape attitudes and relationships towards a readily recognizable pattern.

Because there is no universally accepted standard form for domestic subcontracting works, CIDB has published the Model Terms of Construction Contract for Subcontract Work. The publication is timely and in line with the strategic recommendations in the Construction Industry Master Plan, CIMP 2006-2015 to enhance professionalism and improve standards in the construction industry.²⁰ The drafting started on a blank sheet (screen actually) in 2003. The last few versions were in May 2006, August 2006, September 2006, and the final one in May 2007. There are many benefits of having standardized terms of contracts. The advantages include:

1. It becomes more economical as there is no need to draft new terms of contract every time a contract is let out.
2. It provides more certainty when tendering.
3. Familiarity makes it easier and quicker to be priced.
4. It creates the possibility of a more balanced allocation of risk between the contracting parties.
5. There is a higher chance of avoiding unwarranted disputes in court or arbitration.

²⁰*The CICC Model Terms of Construction Contract for Subcontract Work 2007*. Construction Industry Development Board (CIDB), May 2007.

1.2 Problem Statement

Construction projects involve many parties namely the contractors, consultants, clients, suppliers, subcontractors and so forth. The main contractor normally sublet the works to the subcontractors to transform the risks. The relationship between the main contractor and subcontractors at times are problematic with the subcontractors at the mercy of the main contractor.²¹

Domestic Subcontractors are often using non-standard form for their subcontract. Basically, the contract term was drafted by the main contractor. Many contractors impose their own standard terms on sub-contractors.²² These often contain one-sided provisions which place the subcontractors at a disadvantage in a dispute.²³

Based on the empirical study²⁴, common complaints and disputes relate to such matters as wide ranging provisions under which contractor may deduct from monies due in respect of cross claims, domestic subcontract seldom involves the contract administrator appointed under the main contract but leave such matters as interim payments, extension of time and claims for loss and expense to be disputed by the contractor and subcontractor.

Parties sometimes attempt to incorporate terms by reference to other documents, such as a standard form sub-contract with which they are familiar or the main contract itself. This may impose an unnecessary burden on the subcontractor whose contract may

²¹ Chong, Jun Fah. *A Study on Domestic Subcontractor*. Universiti Teknologi Malaysia, (2006).

²² Uff, J. *Construction Law*. 8th Edition. London: Sweet & Maxwell, (2002), p. 317.

²³ *Ibid*

²⁴ Murdoch, J. and Hughes, W. *Construction Contract: Law and Management*. 3rd Edition. Spoon Press, (2000), p. 263.

bear no relation in size to main contract.²⁵ Such as the provision for liquidated damages.²⁶ For example, a main contract worth RM 1,000,000.00 may have a liquidated damage clause for delay of RM 10,000.00 per week. It would be unreasonable to expect the same level of damages from a subcontractor with a RM 50,000 contract.

To address these problems, a standard form was introduced in United Kingdom, Australia, Singapore and other countries. The standard form is like for example JCT Standard Form of Domestic Subcontract 2002 Edition (DSC/C). In Malaysia construction industry, Construction Industry Development Board (CIDB) is also trying to avoid all the disputes arise by using non-standard form of subcontract.

On 13 September 2006, the Minister of Works was launched the Model Terms of Construction Contract for Subcontract work published by the Construction Industry Development Board Malaysia (CIDB). One of the advantages of this 'model terms' is there is a higher chance of avoiding unwarranted disputes in court or arbitration. There are a lot of questions should be asked before the model term is applicable into the industry such as:

1. Is it comparable to what is now being used by major contractors?
2. Can it solve the problem faced by domestic sub-contractor due to non-standard form of domestic subcontract?
3. Can it solve the current problem of relationship between main contractor and sub-contractor?

From the above statement, the questions are, what is the problem faced by domestic sub-contractors due to the non-standard form of domestic sub-contract which is

²⁵Group of IT & T Department, Oriel Street. *Forum on Public Procurement*.

²⁶ McGuinness, J. *The Law and Management of Building Subcontracts*. London: Athena Press, (2004), p. 15.

the contract term was draft by main contractor? Is the 'model term' can resolve this problem? So, this study will be looking into the problems that faced by domestic subcontractors due to the non-standard form of domestic sub-contract based on cases reported and can the 'model term' solve this problem?

1.3 Objective of Research

From the problem statement, the following is the objective of the study: -

1. To determine the problem faced by domestic sub-contractors associated with the use of non-standard form of domestic subcontract.
2. To determine whether the use of CIDB form of Domestic Subcontract will reduce the problems.

1.4 Scope and Limitation of Research

1. The area of research is between Main Contractors and Domestic Sub-contractors in Construction Industry.
2. This Model Terms is most recent published in year 2006. There is no specific and related book discuss about this Model Terms before.. The information generally acquire from the seminar paper, journal and discussion with the expert in the industry.

1.5 Research Process and Methods 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 4 stages, i.e. 1st stage: initial study and fixing research topic, objective, scope and outline, 2nd stage: data collection and recording, 3rd stage: data analysis and interpretation and 4th stage: writing. The following will be the research process and the methods of approach used for this research (refer to figure 1.1).

1.5.1 1st Stage

First stage of research involves initial study. Two approaches will be used in the initial study, i.e. discussion with friends and lecturers regarding what research topic can be done, and initial literature review to get idea of the research topic. After the initial study, the rough idea of the research topic is obtained. The objective and scope of the research are fixed then. Further to this, a research outline will be prepared in order to identify what kind of data will be needed in this research. Also, data sources will be identified as well.

1.5.2 2nd Stage

During this stage, data collection can be started. There are two types of data being collected, namely primary data and secondary data.

1.5.2.1 Primary Data

Primary data collected mainly from Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis Nexis law database. All the cases relating to the research topic will be collected.

1.5.2.2 Secondary Data

Secondary data is data obtained from research done by third parties other than the writer. Sources of secondary data consist of books, act, articles and seminar papers. These sources are important to complete the literature review chapter.

(a) Books

Books are the main secondary data sources. Books relating to contract between main contractor and domestic subcontractor, also book discuss about subcontracting will be read and understand to know in depth the theories relating to the research field. All the relevant books will be obtained from the library of University of Technology Malaysia.

(b) Seminar Papers And Articles

Seminar papers and articles will be the sources to strengthen the theories found in books especially paper from the workshop and forums which were conducted by CIDB in way to introduced the new Model Terms.

(c) The Model Terms of Construction Contract for Subcontract Work

This model terms is an important source to support the literature review chapter and analysis done.

1.5.3 3rd Stage

3rd stage of research involves data analysis, interpretation and data arrangement. This process is to process and convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process of writing of the paper.

1.5.4 4th Stage

4th stage of the research is the last stage of the research process. It mainly involves writing up and checking of the writing.

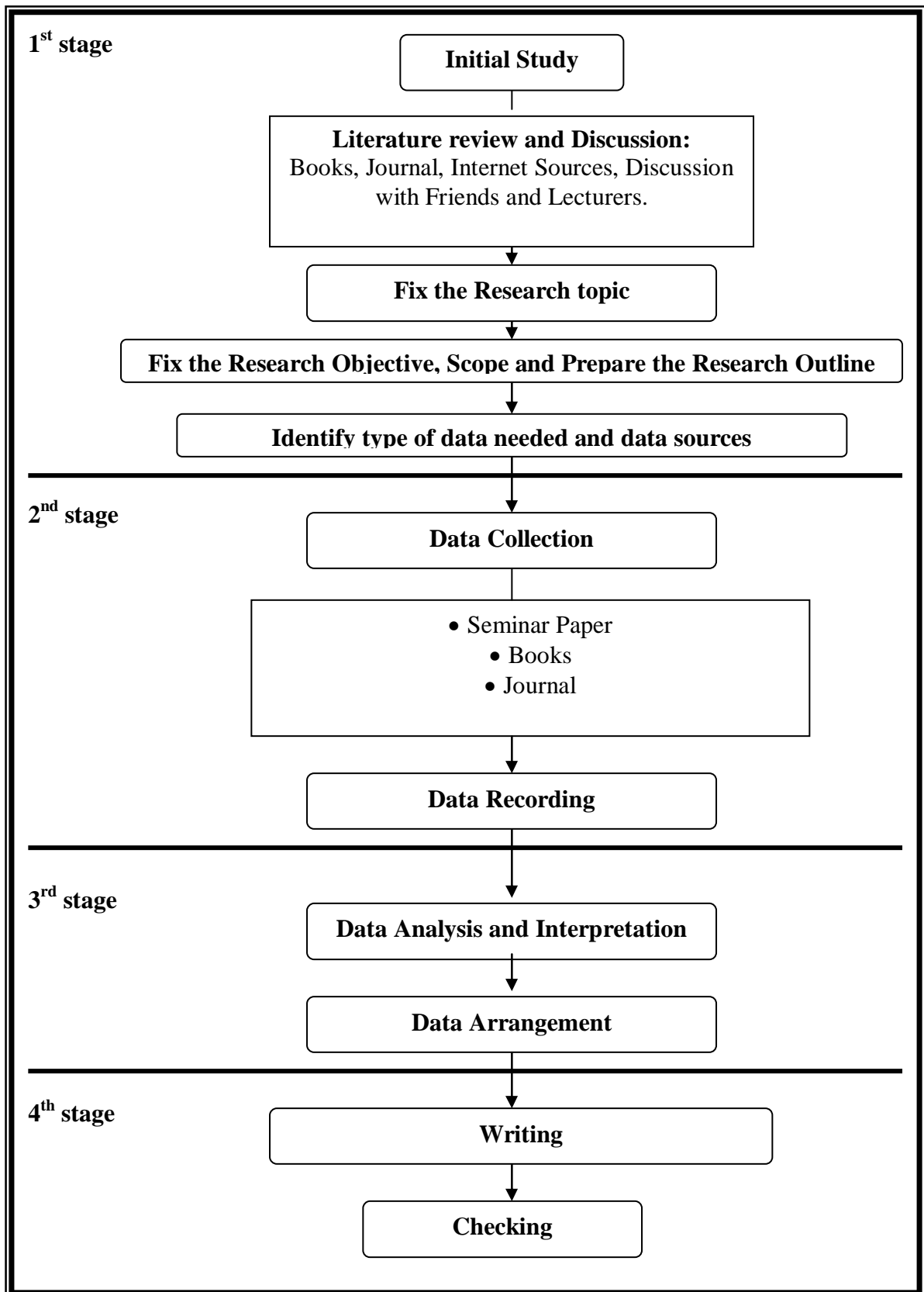


Figure 1.1: Research Process and Methods of Approach