

**TERMINATION FOR CONVENIENCE BY EMPLOYER IN CONSTRUCTION  
CONTRACT**

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TERMINATION FOR CONVENIENCE BY EMPLOYER IN CONSTRUCTION  
CONTRACT

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## ABSTRACT

Termination for convenience clauses is now present in many construction contracts. This clause essentially allows an employer to terminate the contract for his own convenience without having to specify the default that the contractor has committed. Contrary to termination for default where the power to terminate the contract rests on the contractual determination or common law termination, the invocation of the termination for convenience clause is biased towards the employer where the unilateral power to exercise the such clause rests on the employer. This may subject to clear abuse of discretion by the employer if the clause is improperly exercised and may lead to disastrous consequences if such termination results in wrongful termination. Limitations on the rights to terminate for convenience are necessary to ensure that the termination process is lawful and valid. This research study is conducted for the purpose to identify potential issues that prohibits the employer to terminate for convenience. Analysis of eleven (11) cases from Commonwealth countries are done to meet the research objective. In general, termination for convenience clause shall comply with the existing contractual terms for the entitlement of absolute right of termination exercisable by the employer. Further to that, the contract provisions shall specify the limit of the damages claimable by the contractor in any event of termination for employer's convenience. The employer shall also act in good faith when exercising his discretion to comply with the validity of termination for convenience. Lastly, termination for convenience clause should not be read together with variation clause to omit the balance of the works. Hence, condition precedents are important to be specified to further enhance the duties and obligations of the parties involved in the agreement prior to termination for employer's convenience for the fairness of contract

## ABSTRAK

Penamatan kontrak untuk kemudahan kini wujud dalam kebanyakan kontrak pembinaan yang mana majikan boleh menamatkan kontrak untuk kemudahan sendiri apabila kelalaian kontraktor tidak dinyatakan dengan jelas di dalam kontrak. Bertentangan dengan penamatan kontrak dengan ingkar yang mana kuasa untuk menamatkan kontrak bergantung kepada penentuan kontrak dan keputusan hakim, penamatan kontrak untuk kemudahan cenderung kepada majikan yang mana kuasa unilateral untuk menamatkan kontrak bergantung kepada majikan untuk berbuat demikian. Kuasa tersebut boleh mengakibatkan penyalahgunaan budi bicara oleh majikan jika kuasa tersebut tidak digunakan dengan wajar dan selanjutnya memberi akibat yang buruk jika penamatan tersebut bertentangan dengan undang-undang. Had ke atas hak untuk menamatkan kontrak untuk kemudahan majikan perlu dikenal pasti untuk memastikan proses penamatan itu adalah sah. Kajian penyelidikan dijalankan untuk mengenal pasti isu-isu yang berpotensi untuk memberi larangan kepada majikan untuk menamatkan kontrak untuk kemudahan sendiri. Sebelas (11) kes dari negara Komanwel dipilih untuk analisis bagi mencapai objektif kajian. Secara umum, sebelum majikan menjalankan hak untuk menamatkan untuk kemudahan, majikan perlu memastikan bahawa klausa penamatan tersebut dikuatkuasa oleh undang-undang. Kontrak tersebut juga perlu menjelaskan dengan teliti akan had ganti rugi yang boleh dituntut oleh kontraktor. Majikan juga perlu memastikan bahawa kewajipan untuk menamatkan kontrak adalah berasaskan niat yang baik untuk memastikan klausa penamatan kontrak untuk kemudahan adalah sah. Akhir sekali, klausa penamatan kontrak untuk kemudahan tidak boleh dibaca bersama dengan klausa variasi untuk menamatkan baki kerja. Justeru, syarat dahuluan adalah perlu untuk mempertingkatkan kewajipan pihak-pihak yang terlibat dalam perjanjian untuk meningkatkan keadilan kontrak.

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## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background Studies**

Termination provision is usually prescribed under express terms in most construction contracts which provides remedy to be exercised by both parties to the contract. Such express provisions constitute relevant causes which an employer can relate to determine the contract as well as establishes the contractor's rights to determine his own employment in the contract due to the employer's default. The duties and obligations on respective parties are imposed once a contract is formalised. Both parties are then required to execute their roles in order to fulfil their respective promises and likewise can only release themselves by the discharge of the said contract.

Local standard form of contracts contains express provisions which specify the rights and remedies of respective parties when contract determination happens. The parties are entitled to determine the contract under certain circumstances. Such determinations are categorised as termination with cause where the terminating party shall rely on the express contractual provision in order to determine the contract.

The process of terminating a party with cause in a construction contract is not an easy task due to the severity of the effect on the terminated party. The complexity nature of construction contracts shall also be taken into consideration as well as its unfavourable

effects to the terminated party. For termination “with cause” or “by default”, the condition precedents are expressly mentioned, but not for termination “without cause”.

Termination “without cause” is now present in many construction contracts, which is also known as termination “for convenience”. Compared to the termination “with cause” which sets out the condition precedence or circumstances that the terminating party shall comply prior to the application of the termination clause, the power to exercise such rights under termination “for convenience” clause rests entirely to the employer who is empowered to act at any time when he desires without any apparent default on the part of the contractor.

Termination “for convenience” in general is an arrangement whereby the employer holds the power to determine the contractor’s employment without the necessity to specify of any default on the part of the latter. In other words, the employer under the execution of the termination “for convenience” may unilaterally terminate a contract without the necessity for him to prove contractor’s default at any time and without any reason.

The exercisability of termination “for convenience” is first illustrated in United States of America as early as World War II.<sup>1</sup> Since then, such termination provisions had been applied throughout the construction world to reduce the employer’s liability by allocating the risk of an unexpected change in events to the contractor.

However, the application of termination “for convenience” clause may vary from country to country. In general, there are particular implications of the termination that are still unsettled in law, especially in bespoke contract which may create several legal issues and untested in court. Not all the contract termination provisions are drafted fairly for all circumstances. The contractor, who is desperate in securing the job which contains such

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<sup>1</sup> Torncello v. United States 681 F.2d 756, 764 (Ct.C1.1982)

termination, has limited options but to accept the amended terms and conditions. The risks are on the contractor's side because they are not familiar with the bespoke contract.

In review of the inclusion of termination of convenience clause, the following standard form of contracts stipulated that;

i. *JKR PWD Form 203A (Rev. 1/2010) and PWD Form Design & Build (Rev. 1/2010)*

*Clause 52.1 of PWD Form 203A & Clause 62.1 of PWD Form DB (Rev. 1/2010) – Termination on National Interest*

*“Notwithstanding any provision of this Contract, the Government may terminate this Contract by giving not less than thirty (30) days written notice to that effect to the Contract (without any obligation to give any reason thereof) of the Government considers that **such termination is necessary for national interest, national policy or national security.**”*

ii. *CIDB 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.”*

In the local bespoke contracts that are purposely written to suit the project nature, the following bespoke contracts stipulated that;

i. Putrajaya Conditions of Main Contract

*Clause 60.01 – 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”.*

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

*Clause 53A – Termination for Convenience*

*“.. 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..**”*

Termination for convenience clause is also included in the following international standard form of contracts;

i. Public Sector Standard Conditions of Contract for Construction Works 2014 (PSSCOC)

*Clause 31.4(1) – Termination without Default*

*“The Employer may **at any time**, give the Contractor a written Notice of Termination. This shall have the effect of immediately terminating the employment of the Contractor under the Contract and the Contractor shall immediately vacate the Site, remove all his Construction Equipment and labour force from the Site and surrender possession of the Site to the Employer.”*

ii. FIDIC 1999 Conditions of Contract for Construction of Building and Engineering Works designed by the Employer

*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. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another Contractor.”*

Based on the review on the above-mentioned clauses, the employer is entitled to end the contractor's employment without the necessity to give any reason in advance by issuing a prior notice to the contractor. JKR PWD 203A however is more restricted on the termination for convenience clause where such termination is exercisable in view national interest, policy or security. It is safe to say that the employer owns the power to terminate a particular contract unilaterally without the needs to provide reasons to support the termination cause. Even though the termination for convenience clauses are variedly drafted and may be beneficial to any party to a contract, they are generally drafted by the principal, which may have biased towards the principal's rights and obligations to the contract.

## **1.2 Problem Statement**

Building contract is a binding agreement which is entered between parties with certain expectations of enforcement. Such agreement is also known as bilateral agreement, which contains written promises by respective parties in a contract with consideration involved. In other words, both parties are required to perform an action to fulfill the obligations specified in the contract. The mutuality of both parties is essential to create an enforceable contract and legally binding. Unilateral agreement however involves only the promisor to perform the act and does not bind the promisee until when the promisee performs.

To apply into the exercisability of termination for convenience clause, the rule of thumb is that the employer may terminate for his own convenience when default of the contractor is not specified expressly in the contract. The absence of the necessity to specify reasons to support the termination may ultimately lose the profits that the contractor was counting on while entering into the contract. Such unilateral power by the employer to end the contract without any necessity to specify any valid reason for termination will expose further risks to the contractor. This is because his contract will be terminated at

any time without any reason. Without the reservation of a unilateral right of termination for convenience, it shall bring into potential disputes on the illegality and unlawful termination without reasonable causes.

Without any doubt, there shall be a list of reasonable and exercisable rules to ensure that the invocation of the termination for convenience provision is not tainted with illegality where the employer must ensure that the circumstances for the triggering of the termination with convenience clause are clearly stipulated.<sup>2</sup> It is said that to ensure that execution of the termination for convenience provision is not tarnished with illegality, the employer shall ensure that the followings are complied;<sup>3</sup>

- i. The clause is validly incorporated into contract;
- ii. The clause empowers the employer to invoke the right to determine in the first place;
- iii. The circumstances for the triggering of the clause are clearly stipulated;
- iv. All relevant pre-conditions, formalities and procedural requirements are complied with; and
- v. The clause is not invoked for an improper purpose.

However, not all form of contracts specifies in detail the precedents that the employer need to comply prior to the execution of termination for convenience clause. This may lead to clear abuse of discretion by the employer if the clause is improperly exercised based on the fact that no justification is necessary. A condition precedent which requires certain conditions to happen before any provision in contract comes into force is necessary for the benefit of doubt of all parties. Even if such condition precedents are applied by implication to the termination for convenience clause, it will effectively imply preventions of further liability from arising until certain conditions are met. In other words, the employer, in complying to the condition precedents, must has exhausted and

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<sup>3</sup> Singh, H. (2003). *Engineering and Construction Contracts Management: Post-Commencement Practice*. LexisNexis.



executed all reasonable efforts before exercising his right to end the contractor's employment at his own will.

Up to the writing of this research study, best to the author knowledge, there are no clear indication or similar researches in Malaysia that explore in details on the elements to be fulfilled before the employer can execute his right on exercising the termination for convenience clause. The employer may, in the absence of the said elements, unilaterally terminate the contract and this creates unfettered risks to the contractor. That being said, there is a necessity to highlight the essential circumstances that shall be at least, applied in implication to the existing form of contracts to impose limits on triggering the express termination with convenience clause.

### **1.3 Objective of the Study**

The objective of this research is to determine issues that prohibit the employer from successfully terminate the contractor for convenience.

### **1.4 Scope of the Study**

The scope of this research is limited to identification of case law-based research and articles in relation to the disputes between the employer and the main contractor, or the main contractor and the sub-contractor whereby the termination for convenience is exercised by the terminating party.

## **1.5 Significance of the Study**

The significances of this study are;

1. To set the jurisdiction of the employer's unilateral power in determining the contract under convenience;
2. To set the condition precedence to be complied by the employer prior to exercising the termination of a contract under convenience; and
3. To ensure that the termination for convenience provision is utilised in a way that the parties' contractual relationship comes to an end amicably.

## **1.6 Research Methodology**

A proposed methodology has been designed and illustrated in a sequential flow comprising of four (4) stages which is executed to fulfill the objective of this study, as shown in Figure 1.1.

### **1.6.1 First Stage**

Firstly, a preliminary study is conducted for the purpose of identifying the potential research topics. The study is done based on the following criteria, which are literally decided based on the following issues;

1. Issues related to termination for convenience; and
2. Issues that prohibit the employer from terminate for convenience

Based on the findings, the author finalised preliminary design on the research's aim, objective and also the problem statements upon consultation with his supervisor. Those findings are important to ensure that each section complement each other. The preliminary objective is then amended to suit the findings.

### **1.6.2 Second Stage**

The author then drafted the literature review based the collection of various resources and published materials whereby those sources are collated and critically analysed to ensure that the intended contents able to support the proposed topic. This stage shall integrate and summarise on the body of knowledge and set the credibility on the proposed study. The final drafting of the literature review shall be able to support the validity of the study and at the same time stimulate new ideas.

After identifying the topics to be discussed and included in the literature review, the layout of the preliminary proposal under Chapter 1 is revisited. This is to ensure that the topics discussed under literature review do not deviate from the research's objective.

The research methodology is then conducted by means of legal research through study of existing case laws in order to achieve the objective of this study. Typical cases that are suitable for further analysis through the combination of three (3) elements are then identified, which are study on the facts, judge's decisions and further discussions. In other words, the cases by all means shall act as important sources material in this study.

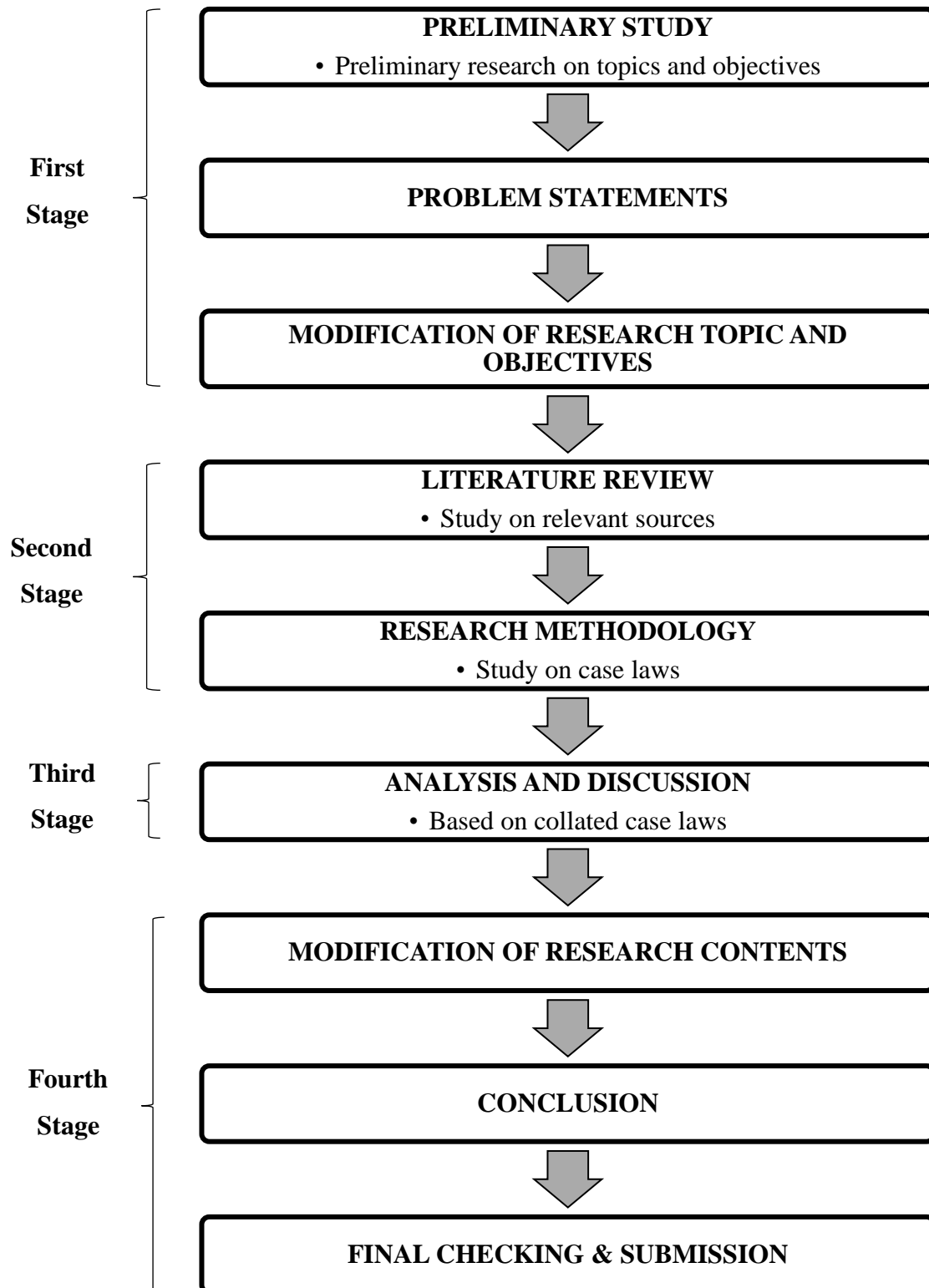
### **1.6.3 Third Stage**

Upon identifying the relevant cases, critical studies are then conducted to examine the decision made by the courts in respective cases. In this stage, the raw data collated in the cases shall be translated into meaningful information for the purpose of illustrating the points and conclusions that are able to achieve the objective of this study. The studies are primarily focused in cases in Commonwealth countries because of the similar fundamental principle of English laws practiced in those Commonwealth countries.

### **1.6.4 Fourth Stage**

Upon completion of the analysis, the content of this research layout is re-adjusted in any event the earlier content did not reflect clearly the actual aim and objectives of this study.

Lastly, a conclusion is proposed. Final checking on every section of this study for the avoidance of high plagiarism is conducted before the submission date.



*Figure 1.1: Research Methodology*

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