

TIME AT LARGE: IMPLICATION FOR LIQUIDATED DAMAGES

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*To*  
*Mak, ayah, kak asma', jihah, syafiq, and aimi sara*  
*for your endless support and love*

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## ABSTRACT

“Time at large” is a term used to indicate that the duty to complete the works by particular time is lost. In the event of late completion, the Contractor may use “time at large” to avoid paying liquidated damages. The Contractor may argue that the duration of the contract was never established or delay was caused by Employer’s default. Thus, preventing Employer from enforcing the right to liquidated damages. However, the interpretation of “time at large” is not that straightforward as there were different or various interpretations of the term. The basic principle of “time at large” suggests the Contractor, in fact, is given time to fulfil his obligations rather than a specific duration to complete the works. Therefore, the principle needs to clarify further specifically in relation to liquidated damages. This research is conducted to determine the circumstances for which “time at large” may be validly acceptable by the Courts in avoiding or mitigating the liquidated damages. The method applied for this research was legal research methodology. This research has been carried out based on cases that are related to “time at large” and liquidated damages. The law cases were reported in *Malayan Law Journal* (MLJ) which was retrieved from Online Database LexisNexis. In achieving the objective of this research, seven cases have been chosen to be analyzed. Based on the finding of the analysis, there are a few number of circumstances at which “time at large” may be validly acceptable by the Courts in avoiding or mitigating the liquidated damages. Those circumstances are additional variations or extra works, late site possession, delay and disruption of the performance of works, failure to insist on strict compliance with the deadline of the contract, waiver and failure to grant an extension of time. The results show that the Contractor may use “time at large” to avoid or mitigate the imposition of liquidated damages claims from the Employer.

## ABSTRAK

“*Time at large*” adalah istilah yang digunakan untuk menunjukkan bahawa tugas untuk menyelesaikan kerja-kerja pada masa tertentu hilang. Apabila projek pembinaan lewat siap, Kontraktor menggunakan "*time at large*" untuk mengelak daripada membayar ganti rugi jumlah tertentu dan ditetapkan. Kontraktor mungkin berhujah bahawa tempoh kontrak tidak pernah ditubuhkan atau kelewatan disebabkan oleh kelalaian Majikan. Oleh itu, Majikan terhalang daripada menguatkuasakan hak terhadap ganti rugi tersebut. Walau bagaimanapun, tafsiran bagi “*time at large*” tidak begitu jelas kerana terdapat perbezaan atau pelbagai interpretasi istilah. Prinsip asas "*time at large*" mencadangkan Kontraktor mempunyai banyak masa untuk menyiapkan kerja-kerja yang ditetapkan. Dengan itu, prinsip ini perlu dijelaskan dengan lebih lanjut khususnya berkaitan dengan ganti rugi jumlah tertentu dan ditetapkan. Penyelidikan ini dijalankan untuk menentukan keadaan di mana "*time at large*" boleh diterima dengan sah oleh Mahkamah dalam menghindari atau mengurangkan kerugian ganti rugi tertentu dan ditetapkan. Kaedah yang digunakan bagi penyelidikan ini adalah metodologi penyelidikan undang-undang berdasarkan kes-kes yang berkaitan dengan "*time at large*" dan ganti rugi tertentu dan ditetapkan. Kes-kes yang dilaporkan dalam *Malayan Law Journal* (MLJ) diperolehi dari Online Database LexisNexis. Dalam mencapai matlamat penyelidikan ini, tujuh kes telah dipilih untuk dianalisis. Berdasarkan dapatan analisis, keadaan di mana "*time at large*" boleh diterima dengan sah oleh Mahkamah dalam menghindari atau mengurangkan kerugian ganti rugi adalah perubahan atau tambahan kerja, lewat pemilikan tapak, gangguan dan kelewatan terhadap prestasi kerja, kegagalan untuk menuntut pematuhan yang ketat pada tarikh akhir kontrak, pengecualian untuk memenuhi keperluan untuk menuntut ganti rugi dan kegagalan yang telah dibubarkan untuk memberikan lanjutan masa. Hasil menunjukkan bahawa Kontraktor boleh menggunakan "*time at large*" untuk mengelakkan atau mengurangkan penenaan tuntutan ganti rugi tertentu dan ditetapkan daripada Majikan.

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**LIST OF ABBREVIATIONS**

<b>ABBREVIATION</b>	<b>DESCRIPTION</b>
LAD	<i>Liquidated and Ascertained Damages</i>
LRT	<i>Light Rail Transit</i>
MLJ	<i>Malay Law Journal</i>
PAM	<i>Pertubuhan Arkitek Malaysia</i>
PWD	<i>Public Work Department</i>
S.O	<i>Superitending Officer</i>
TNB	<i>Tenaga Nasional berhad</i>

## LIST OF CASES

- ABB Transmission and Distributions v Sri Antan* [2009] 7 MLJ 644
- Aruna Mills Ltd. v. Dhanrajmal Gobindram* [1968] 1 Q.B 655
- Balfour Beatty Building Ltd v Chestermount Properties Ltd* [1993] 62 BLR 1
- Bluewater Energy Services BV v Mercon Steel Structures BV and others* [2014] EWHC2132 (TCC)
- Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* [1997] 82 BLR 39
- British Steel Corporation v Cleveland Bridge & Eng Co* [1981] 24 BLR 100
- Bruno Zornow v Bcroft Development* [1990] 51 B.L.R. 16
- Bunge Corp. v. Tradax Export S.A* [1981] 1 W.L.R 711,725
- Contract Millichamp v. Jones* {1983} 1 All E.R 267
- Foo Yee Construction Sdn Bhd v Vijayan a/l Sinnapan* [2014] 5 MLJ 660
- Gaymark Investment v Walter Construction Group Limited* [1999] 16 BCL 449
- Guthrie Landscaping v Hasrat Usaha* [2011] 4 MLJ 121
- Hartley v. Hymans* [1920] 3 K.B 475,484
- Hick v Raymond and Reid* [1893] AC 22
- Hock Huat Iron Foundry v Naga Tembaga* [1999] 1 MLJ 65
- Holme v Guppy* [1838] 3 M&W 387
- HW Nevil (Sunblest) v William Press & Sons* [1982] 20 BLR 78
- J and J Fee Ltd v The Express Lift Company Ltd* [1993] 34 ConLR 147.
- Le Baupin v Crispin* [1920] 2 KB 714
- Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] SGHC 162

*Mariner International Hotels Ltd & Anor v Atlas Ltd & Anor* [2007] HKCU 209

*Maclean v. Dunn* [1828] 4 Bing.722,728

*Neodex Limited v The Borough of Swinton and Pendlebury* [1958] 5 BLR 38

*Peak Construction (Liverpool) v Mckinney Foundation* [1976] 1 BLR 111

*Penang Development Corporation v. Teoh Eng Huat* [1992] 1 MLJ 749

*Rapid Building Group v. Ealing Family Housing Association* [1984] 29 BLR 5

*RDP Royal Palm Motel, L.P. ex rel. PADC Hospitality Corp. I v. Clark Const. Group, Inc.*, [2006]168 Fed. Appx. 348

*Ryan v Ridley & Co .*[1902] 8 Com.Cas 105

*R.V. Ward Ltd v. Bignall* [1967] 1 Q.B 534,550

*Selene G* [1981] 2 Lloyd's Rep.180, 185.

*Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151

*Simplex Concrete Piles v Metropolitan Borough of St Pancras* [1985] 14 BLR 80

*Tan Ah Kian v Haji Hasnan* (1962) MLJ 400

*Thamesa Designs v Kuching Hotels* [1993] 3 MLJ 25

*Teo Hock Guan & Anor v Johore Builders & Investments* [1996] 2 MLJ 596

*Toepfer v. Lenerson Poortman N.V.*[1980] 1 Lloyd's Rep. 143

*Tool Metal Manufacturing v Tungsten Electric* [1955] 2 All ER 657

*Westminster Corporation v J Jarvis & Sons Ltd* [1970] 1 WLR 637 at p 646

*Walter Lawrence v Commercial Union Properties* [1984] 4 ConLR 37

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of Study

A contract is an agreement that gives rise to obligations of the parties which are enforced by law (Haidar and Barnes, 2011). The parties must perform his or her obligations strictly according to the contract (Chow, 1998). When a party without a valid reason fails or refuses to execute the obligations, he has committed a breach of the contract. Breach of contract is when the party fails to perform contractual obligations provided under conditions (Haidar and Barnes, 2011). A breach of contract may be a partial or complete failure to perform, delayed performance, faulty or inadequate performance (Oon, 2003).

According to Fawzy *et al.* (2014), the construction industry has been facing a lot of negative impacts due to delays and time overruns especially with the increasing number of complex large scale-construction projects. The requirement to complete the



construction work on time is important as it may affect the cost of the project. Thus, time becomes an extremely important element towards the performance of the project.

As time is important in a construction project, the Employer may use time is of the essence of the contract. The failure of the Contractor to finish the works by the deadline is a breach of the contract. According to Furst and Ramsey (2001), when time is of the essence, the breach of condition related to time discharges the other party from the liability in performing the contract. The Employer can terminate the contract if the Contractor fails to meet the deadline in a contract in which time is of the essence (Keating, 1978).

The legal requirement and effect for the work to be completed within stipulated time can be referred to the provision of section 56 (1) of Contract Act 1950:

“When a party to a contract promises to do a certain thing at or before a specified time, ..., and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.”

In the case of *Sim Chio Huat v Wong Ted Fui* [1983], 1 MLJ 151 the Federal Court held:

“If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently, he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time.”

A new revised date for completion can only be done if the contract permits it (Murdoch and Hughes, 2008). As to this, most construction contracts contain machinery which fixes an initial deadline to complete the works and for extensions of time to the original date of completion for specific delay events (Smith, 2012). In the event of late completion, the Contractor will be chargeable for liquidated damages either through action, deduction or set-off (Co, 2017).

Liquidated damages are represented in a fixed sum in a contract, payable in certain circumstances where there is a breach. Liquidated damages have been used as a mechanism for the Employer to encourage the Contractor to comply with the work programme in completing the project (Davis, 2014). Moreover, the liquidated damages are considered as compensation due to a breach of contract. Furthermore, it is used as an initial agreement of the Contractor before entering the contract, to pay the damages without having the Employer to prove the loss (Lee, 2006).

Construction contracts often had a “liquidated damages” clause in favour of the Employer. This clause provides that if the Contractor fails to complete the work by the deadline, he is required to pay Employer the agreed amount of damages from the initial date of completion until the work is fully completed.<sup>1</sup> Most standard form of contract inserts a specific clause which is called as “Liquidated Damages” or “Liquidated and Ascertained Damages” (LAD) in the event of failure to complete the works by the Contractor.<sup>2</sup> However, the clause will only be relevant once liability is proven or admitted (McNair, 2016).

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<sup>1</sup> Clause 22.2 PAM 2006

<sup>2</sup> Clause 40.2 PWD 203A (Rev. 1/2010), Clause 22.1 PAM 2006

## 1.2 Problem Statement

However, there will be circumstances where the Employer is unable to claim liquidated damages. The Contractors may use the “time at large” to refuse from paying liquidated damages. Time has become at large when the contract does not have an extension of time to be granted (Davis, 2014). Eggleston (2009) stated that time at large when the duty to finish the work particular time is lost. The Contractor may argue that the duration of the contract was never established or delay was caused by Employer’s default. In such situation, the contractual duty of Contractor is to complete within a reasonable time.

According to Varley (2014), the issues of time at large were recently reviewed in *Bluewater Energy Services BV v Mercon Steel Structures BV and others*.<sup>3</sup> Ramsey J stated that:

“The principle is of some antiquity and has a surprising effect on the contractual obligations as to the time for completion. As I have found that there is an extension of time machine for acts of prevention and I am able... to determine the appropriate adjustments to the... Key Dates, this is not the opportunity to consider the underlying basis for the principle.”

Meanwhile, in local case *Foo Yee Construction Sdn Bhd v Vijayan a/l Sinnapan*<sup>4</sup>, the issue arose on whether it was the respondent's failure to insist on strict compliance with the completion date under the contract and delay in filing an action for specific performance set time at large. It was held that any damages recoverable were limited to the amount derived from applying the expressly agreed liquidated damages formula set out in the contract. Despite the existence of a “time is of the

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<sup>3</sup> [2014] EWHC2132 (TCC)

<sup>4</sup> [2014] 5 MLJ 660

essence” clause in the building contract, the respondent by his conduct did not insist on strict compliance with the deadline for handing over of vacant possession but had waited until the project is completed to commence his action. In the circumstances, time was set at large.

In *Thamesa Designs v Kuching Hotels*<sup>5</sup> the site possession from the Employer to the Contractor was late which has caused delay by the Contractor. Therefore, the Employer should not be authorized to claim for liquidated damages due to his failure to give site possession on time which affected the time to become at large in which there was no specific date for the damages to be evaluated.

These cases summarized that when the time is at large, the Employer is disallowed to claim the liquidated damages as there is no fixed date that can be counted for liquidated damages. However, the interpretation of time at large is not straightforward. There are different or various interpretations of time at large based on the cases law above. According to Ministry of Housing and Local Government Malaysia (2013), there are rising issues on the reluctance to pay compensation for late delivery. Contractors are prone to apply the “time at large” situation to avoid from paying the liquidated damages.

The principle of “time at large” suggests the Contractor has a lot of time to fulfil the works. The principle needs to clarify further in relation to liquidated damages where Contractor may use the time at large to stop liquidated damages from being executed. Contractors regularly argue the provision for extending the time is unworkable due the contract machinery has been damaged. This issue requires extensive research as the meaning and effect are often argued incorrectly and misunderstood by the parties involved (Lip, 2010).

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<sup>5</sup> [1993] 3 MLJ 25

Hence, there is a crucial need to determine the circumstances for which time at large scenario may be validly acceptable by the court in avoiding or mitigating the liquidated damages claim.

### **1.3 Research Objective**

The objective of this study is to determine the circumstances for which “time at large” may be validly acceptable by the Courts in avoiding or mitigating the liquidated damages.

### **1.4 Scope of Research**

The scope of this research is based on case law. There are no restrictions on the case law referred in this study as long as the cases are related to the time at large and liquidated damages. The standard forms of contract that will be referred to in this research are:

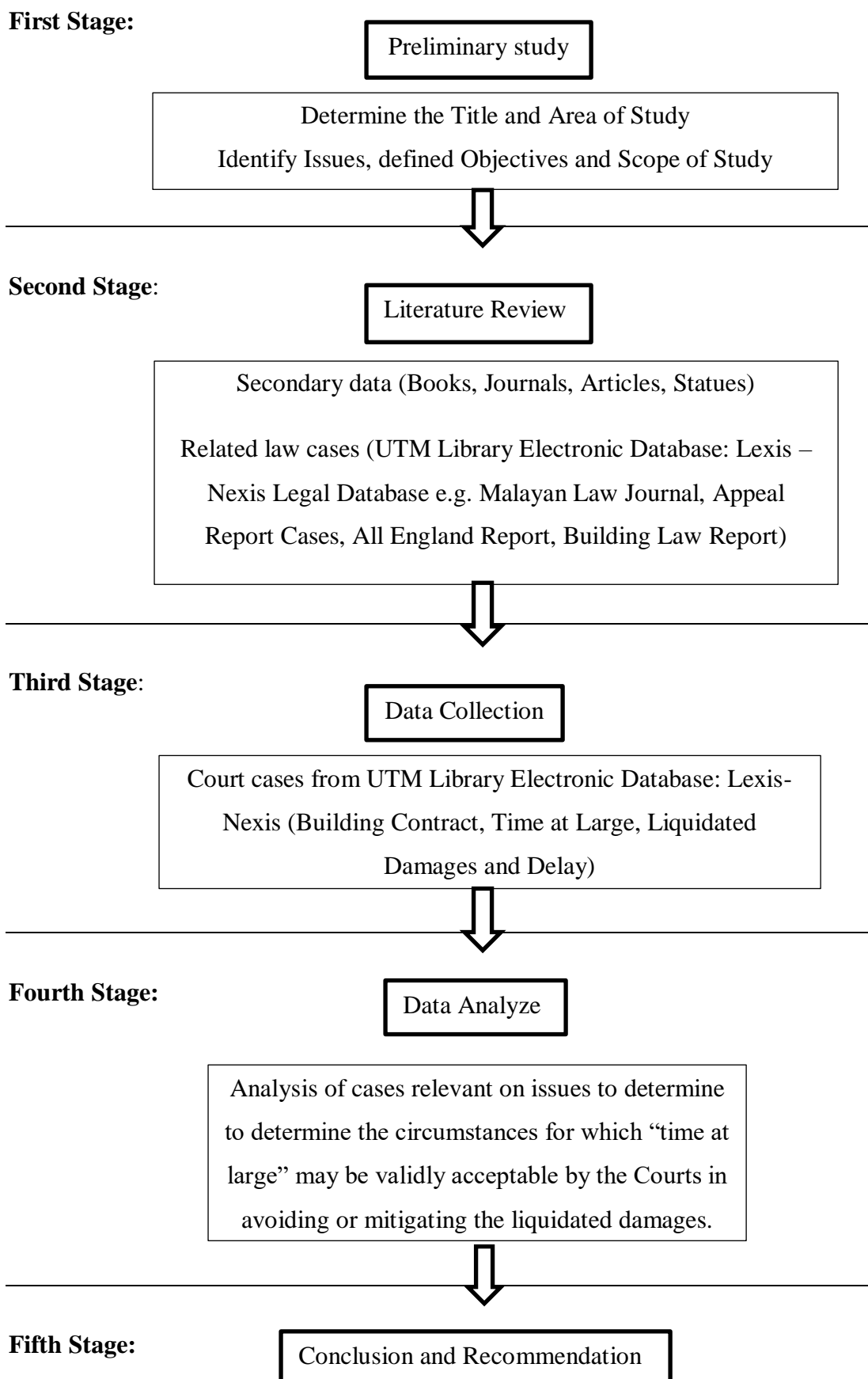
1. Pertubuhan Arkitek Malaysia (PAM) Condition of Contract 2006
2. Public Works Department (P.W.D) Form 203A (Rev. 1/2010)

### **1.5 Significance of Research**

Delays in the construction industry are not uncommon. Delays are always associated with the claim for liquidated damages by one party. When a delay occurs the parties will start to raise the argument that will lead to intense disputes. Therefore, when the industry players are provided with the sufficient understanding of time at large and the effect on liquidated damages towards the contracting parties, this situation can be avoided at an earlier stage. The fulfilment of interest for both parties can be improved if the time at large issues both from the contractual and practical perspectives are efficiently managed and controlled without having to be embroiled in time-consuming and costly legal entanglements.

## **1.6 Research Methodology**

In short, the research's process divided into five major stages, which involves preliminary study, literature review, data collection, data analysis, conclusion, and recommendation.



*Figure 1.6 Research Methodology Flowcharts*

## **1.7 Organization of Thesis Chapter**

Chapter 1 is where the idea for the research is initiated. The chapter will start with the background of the study, followed by problem statement, the objective of the research which states the aims of the study; scope of the research; significance of the study, the research methodology process and lastly the organization of thesis chapter.

Chapter 2 will cover on Standard Form Provisions in PWD and PAM Contract related to time; time as an essence in the contract; construction completion; extension of time for the purposes of provisions and grounds for extension; Prevention Principle; time at large; and reasonable time.

Chapter 3 will detail out the methods used to collect and analyse the data in order to achieve the research objective. Chapter 4 is the essential part of the research. Here, the cases law related to the time at large in the context of liquidated damages shall be analysed and the result will be discussed. The outcome will later answer the research objective.

Chapter 5 is the end part of this research. In this chapter, this chapter will summarize and conclude the findings, highlight the problem encountered during the course of the research and give a recommendation on improving the subject area.



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