

THE PROFILE OF BREACHES OF CONTRACT IN CONSTRUCTION  
INDUSTRY

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## **DEDICATION**

This thesis is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time.

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## **ABSTRACT**

The doctrine of freedom to contract, as the cornerstone of contract law in the common law countries (Malaysia inclusive) has consequently generated an extensive array of contracts of various characteristics and varieties. In Malaysia, there are two basic components in the contract documents used for the contracting of most construction work that is the Contract Conditions and technical specifications and drawings. As a general principle, once a party enters into a contract, he must perform his obligations strictly according to the terms of the contract. However, in the construction industry, breaches of contract are commonplace to the point of routine. Moreover, under the complicated provisions of many construction contracts the possible breaches of contract either by contractor or employer are numerous, and in each case the general principles must be applied to determine what, if any, damage is recoverable for the breach. Therefore, the objectives of this study is to develop a profile for breaches of contract where consists the analysis of year cases, types of parties involved, standard form of contract for the project, the types of breaches of contract and the reliefs sought due to breach of contract. Limitation of this study will be on the breaches of contract cases reported by Malayan Law Journal between 1971 – 2019, cases in Malaysia and related to Building Contract only while methodology of this study will be based on the secondary data analysis. Research finding identified that the most cases of breaches of contract is in the recent year which is between 2011 – 2019. The most party involved in breaches of contract are between the employer and the main contractor. The analysis also identified that the PWD Standard Form of Contract is the most form of contract that involved in breaches of contract. The most types of breaches of contract that occurred in construction industry is abandonment of work and delay completion work. The analysis also identified that damages is the most used as a relief sought for breaches of contract. By developing this profile, hopefully it will help the project manager in handling the disputes of breaches of contract. Besides as a tool in contract management, this profile helps to prevent or minimize the breaches of contract in Malaysian construction industry.

## ABSTRAK

Doktrin kebebasan berkontrak, kerana asas undang-undang kontrak dalam negaraneegara “common law” telah mengakibatkan penjanana satu tatasusunan yang meluas dalam pelbagai ciri and jenis-jenis kontrak. Di Malaysia, terdapat dua komponen asas dalam dokumen-dokumen kontrak yang digunakan untuk kontrak kerja pembinaan iaitu Syarat-syarat Kontrak dan penentuan-penentuan teknikal sertalukisan-lukisan. Secara prinsip umum, apabila satu pihak memasuki suatu kontrak, pihak tersebut perlu menjalankan kewajibannya semata-mata menurut syarat syarat kontrak. Bagaimanapun, dalam industri pembinaan, pelanggaran kontrak adalah biasa dan menjadi rutin. Lagipun, di bawah peruntukan-peruntukan rumit itu banyak kontrak pembinaan kemungkinan mempunyai pemungkiran kontrak sama ada oleh kontraktor atau majikan, dan dalam setiap kes, prinsip umum itu mesti digunakan dalam perintah bagi menentukan apa, jika mana-mana, kerosakan boleh dibaikpulihkan. Oleh itu, objektif kajian ini adalah untuk membangunkan profil untuk pelanggaran kontrak di mana terdiri daripada analisis kes tahun, jenis pihak yang terlibat, jenis borang kontrak yang digunakan, jenis pelanggaran kontrak dan cara mengatasi masalah pelanggaran kontrak. Skop kajian ini adalah mengenai pelanggaran kes-kes kontrak yang dilaporkan oleh Malayan Law Journal antara tahun 1971 - 2019, kes-kes di Malaysia dan berkaitan dengan kontrak binaan, manakala kaedah kajian ini melibatkan analisis data sekunder. Hasil kajian mendapati bahawa kebanyakan kes pelanggaran kontrak berlaku pada tahun kebelakangan ini iaitu antara 2011 - 2019. Sebahagian besar yang terlibat dalam pelanggaran kontrak adalah antara majikan dan kontraktor utama. Analisis ini juga mengenal pasti bahawa jenis borang kontrak PWD adalah jenis borang kontrak yang melibatkan banyak kes pelanggaran kontrak. Pelbagai jenis pelanggaran kontrak yang berlaku dalam industri pembinaan adalah pengabaian kerja dan kerja tertunda. Analisis itu juga mengenal pasti bahawa ganti rugi adalah yang paling banyak digunakan sebagai pelepasan yang dicari untuk pelanggaran kontrak. Dengan membangunkan profil ini, diharapkan ia akan membantu pengurus projek dalam menangani pertikaian pelanggaran kontrak. Selain sebagai alat dalam pengurusan kontrak, profil ini membantu untuk mencegah atau meminimumkan pelanggaran kontrak dalam industri pembinaan Malaysia.

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## **LIST OF ABBREVIATIONS**

SO	-	Superintending Officer
PWD	-	Public Work Department
PAM	-	Pertubuhan Arkitek Malaysia
UTM	-	Universiti Teknologi Mara
IEM	-	The Institution Engineers of Malaysia
CIDB	-	Construction Industry Development Board
UTM	-	Universiti Teknologi Malaysia
COA	-	Court of Appeal
MLJ	-	Malayan Law Journal

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# CHAPTER 1

## INTRODUCTION

### 1.1 Background of Problem

The doctrine of freedom to contract, as the cornerstone of contract law in the common law countries (including Malaysia) has produced a wide range of contracts of various characteristics and varieties. Coupled with an explosion of contractual dealings arising out of the globalization and liberalization process the practical implications are a multitude of contracts in all fields of human endeavour; the construction industry not being expected. It is a tall order to deal with the entire spectrum of such contracts (Harbans Singh, 2004)

Basically, a contract is an agreement enforceable by law (Section 2(h) of Contract Act 1950). In other words, a contract is an agreement which is legally binding between the parties. The agreement between two or more parties is constituted by an offer and an acceptance of it (Vohrah, B. and Wu, Min Aun, 2000).

In Malaysia, there are two basic components in the contract documents used for the contracting of most construction work. The first of these contains a list of legally crafted terms and conditions and is usually referred to as the “Contract Conditions”. The second component consists of a set of technical specifications and drawings which together define the scope, standards and other technical requirements of the project (Chow, Kok Fong, 1988).

Where the employer is a government authority, the contract conditions frequently take after a standard form of contract used by the contracting authority (for example, the Public Works Department Standard Form 203A). Alternatively, it may consist of one of the standard contract forms issued by professional and trade bodies such as the Pertubuhan Arkitek Malaysia (PAM) or the Construction Industry

Development Board (CIDB). References in this work will be made to some of the major provisions contained in the more common standard forms. In practice, these standard conditions may be modified, sometimes substantially, and legal liabilities and rights of the parties to the contract would be fashioned accordingly (Chow, Kok Fong, 1988).

Consequently, once a party enters into a contract, the party must perform his obligations exactly according to the terms of the contract (Chow, Kok Fong, 1988). The contracting parties are liable to answer for any of the obligations which they have failed to discharge and it is no defence to an action for incomplete performance that the parties have done everything that can be reasonably undertaken if the end result falls short of that required by the contract (*Paradine v. Jane* [1647]). However, breach of contract happens, when a party, without lawful reason, wrongs or fails to perform the terms and obligations of the contract as agreed (Cheong, May Fong., 2007).

## **1.2 Problem Statement**

In the construction industry, breaches of contract are normal to the point of being routine (Eggleston, 2008). In some contracts, certain breaches by the Employer, such as failure to make payment on an interim certificate, entitle the contractor to determine his employment under the contract but such remedies are few and as a general rule the contractor's remedy for employer's breach is the recovery of general or unliquidated damages. That is to say, damages which are assessed after the breach.

Unlike the equitable remedies of specific performance and injunctions, damages are awarded to the innocent party as of right, subject only to exceptions such as mitigation and remoteness of damage (Phang, Andrew Boon Leong *et al.*, 1998). Section 74 (1) of the Contracts Act 1950 sets out the provision for such compensation. The said sections read:

Compensation for loss or damage caused by the breach of contract.

*“When a contract has been broken, the party who suffers by the breach is entitled is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made like contract, to be likely to result from the breach of it.”*

Furthermore, in *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd* [2001] 5 MLJ 510, Dato’ Justice Kadir Musa stated that:

“What would be most probably justifiable for the plaintiff, if it can be so proved, is to claim compensation for damages for the defendant’s non-fulfillment of their ‘obligation’ under the contract by virtue of section 76 of the Contract Act 1950.”

However, under the complicated provisions of many construction contracts the possible breaches of contract either by contractor or employer are numerous, and in each case the general principles must be applied in order to determine what, if any damage is recoverable for the breach in question (Wallace, 1970).

In brief, whether any types of breach becoming the “trend” of the construction industry, or how can a claimant realize the legal issues of damages that arise in the industry? Therefore, it is crucial for the claimants to identify the types of breaches might occur and the legal issues associated with damages as to clear obstacles for claiming damages that are entitled to them.

### **1.3 Objective of Study**

The objective of this study is:

To develop a profile of breaches of contract in construction industry based on legal cases/case law that will help to improve the contract management practice.



## **1.4 Scope of Research**

The research is confined to the following scope and limitations:

- To breaches of contract cases reported by Malayan Law Journal between 1971 – 2019.
- Cases in Malaysia only
- Cases related to Building Contract only

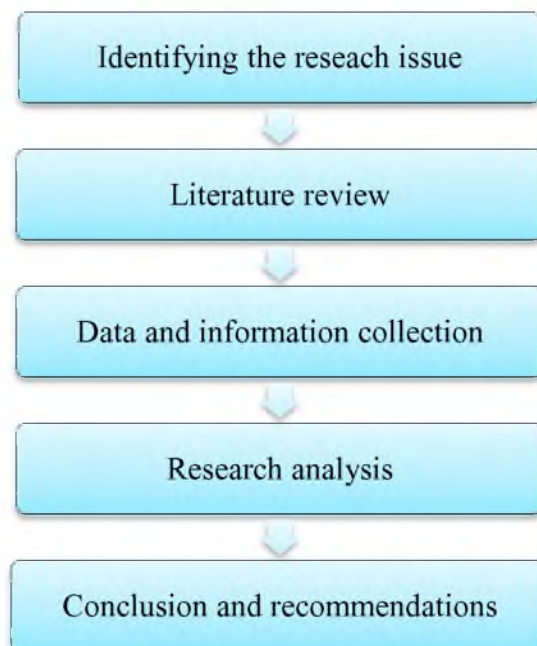
## **1.5 Significance of the Research**

This research may provide an insight of the current situation in relation to breach of contract encountered in the Malaysian construction industry and bring up to date of the legal issues in relation to breach of contract. Besides that, from this research, the key players in construction industry can observe the latest trend and pattern of the breaches of contract. This research also could be a reference to them on how they can avoid committing any breaches. With this research, it can also give academic knowledge or information about the breaches of contract in Malaysian construction industry for the researcher and student about the breaches of contract.

## 1.6 Research Methodology

Research methodology proposes an arrangement of research procedures. Therefore, research methodology is one crucial part to ensure the research can be carried out methodically to achieve the proposed objective of this research. It is a systematic technique to use in the data collection process.

Briefly, the research process will be divided into five main stages:



### 1.6.1 Stage 1: Identifying Research Issue

Identifying the research issue is the initial stage of the whole research. To identify the issue, firstly, it involves discussion with lecturer and reading on variety sources of published materials, such as journals, articles, seminar papers, previous research papers or other related research papers, newspapers, magazines and electronic resources as well through the World Wide Web and outline e-databases from University of Technology Malaysia, UTM library's website.

### **1.6.2 Stage 2: Literature Review**

Literature review is the second stage of the research. Literature review will be involved the collection of documents which from secondary data for the research, such as books, journals, newspapers. Indeed, published resources like books, journals, varies standard form of contract, and related statutory are the most helpful in this literature review stage. Besides this, reported court cases from different sources like Malaysian Law Journal and Building Law Reports will be referred.

### **1.6.3 Stage 3: Data and Information Collection**

This stage is data and information collection stage. This is an important stage towards achieving the objective of this research. In this stage, the further action is to collect the relevant information based on the secondary data from the published resources. Lexis Nexis database which provides cases of Malayan Law Journal is the main sources in getting the related cases.

### **1.6.4 Stage 4: Research Analysis**

In this stage, it is able to determine whether the stated objective have been achieved or vice versa. Different types of analysis will be carried out according to the requirement of the objective.

### **1.6.5 Stage 5: Conclusion and Recommendations**

Conclusion and recommendations is the final stage of the research. In this stage, the findings will be able to show the result of the research. A conclusion needs to be drawn in-line with the objectives of the research. At the same time, some appropriate recommendations related to the problem may be made for a better solution in relation to the said problem.

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