

PROFILING OF TERMINATION GROUNDS IN
CONSTRUCTION CONTRACT

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DEDICATION

*To my beloved mother and brother,
& those who encourage me,
Thank you for the support!!!!*

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ABSTRACT

Terminating a contract can be complex and it is very important that the correct procedures are followed. 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. 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. Hence, this research aims to identify grounds to termination contract in construction industry. This research is carried out mainly through documentary analysis of law journal. This data needed for this research is obtained via LexisNexis Malaysia and CIDB Law Report. From the cases that appear under the termination keyword, it appears that 14 cases are related with the scope of the research. The judgment of each of the cases is analysed in order to find out either the termination grounds of construction contract. The grounds are non-payments of sum due, hindrance of the contractor, abandonment or suspension of the work, defective work, delay and not comply with material specification. This research also highlighted the parties involved in the cases and level of court interfere in the case. Hence, the findings of this research will provide a profile on the grounds of termination for the construction players in the future. This research perhaps would contribute towards enhancement of knowledge of the contracting parties by shedding some information and knowledge regarding their rights.

ABSTRACT

Menamatkan kontrak boleh menjadi rumit dan sangat penting bahawa mengikut prosedur yang betul. Alasan untuk penamatan di bawah kontrak tidak akan semuanya berpunca daripada pelanggaran asas undang-undang umum. Walau bagaimanapun, penamatan kontrak tidak boleh dianggap untuk mengakhiri semua masalah yang berkaitan dengannya kerana memutuskan sama ada alasan yang tepat telah dipenuhi dapat membawa masalah sendiri tafsiran klausa dan fakta itu sendiri. Oleh itu, kajian ini bertujuan untuk mengenal pasti alasan untuk kontrak penamatan dalam industri pembinaan. Penyelidikan ini dijalankan melalui analisis dokumentari jurnal undang-undang yang diperoleh melalui LexisNexis Malaysia dan Laporan Undang-undang CIDB. Dari kes-kes yang muncul di bawah kata kunci penamatan, ternyata bahawa 14 kes berkaitan dengan skop penyelidikan. Penghakiman setiap kes dianalisis untuk mengetahui alasan untuk penamatan kontrak iaitu tidak membayar jumlah yang kena bayar, halangan kontraktor, pengabaian atau penggantungan kerja, kecacatan kerja, kelewatan dan tidak mematuhi spesifikasi bahan. Penyelidikan ini juga menekankan pihak-pihak yang terlibat dalam kes dan tahap mahkamah campur tangan dalam kes itu. Oleh itu, penemuan penyelidikan ini akan memberi profil atas alasan penamatan contract kepada para pemain pembinaan pada masa akan datang dan akan menyumbang ke arah peningkatan pengetahuan pihak-pihak yang berkontrak dengan menumpahkan beberapa maklumat dan pengetahuan mengenai hak mereka.

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LIST OF ABBREVIATIONS

AC	-	Law Reports Appeal Cases
CA	-	Court of Appeal
CB	-	Common Bench Reports
CIDB	-	Construction Industry Development Board
FC	-	Federal Court
HL	-	House of Lords
IEM	-	Institution of Engineer, Malaysia
KB	-	King Bench
LR	-	Law Reports
LT	-	Law Times Reports
MLJ	-	Malayan Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Work Department
QB	-	Queen Bench
SCR	-	Supreme Court of Canada

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Contract Act 1950 defines ‘contract’ as ‘an agreement enforceable by law’(Section 2(h) of the Contract Act 1950). A contract creates a legal obligation upon the contracting parties. A contract also defined as a promise or set of promise for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty.¹ Construction contracts are contracts entered into between the employer and contractor to carry out types and quantities of work or supply materials involving erection, refurshing, repair, maintenance or demolition of building and other structures.² According to general principle,

¹ J.Beatson. Anson’s Law of Contract (28th Edition). Oxford University Press.Pg 2.

² Sundra Rajoo. The PAM 2006 Standard Form of Building Contract. LexisNexis Malaysia Sdn Bhd.

once a party enters into a contract, he/she must perform his/her obligations strictly according to the terms of contract.³ There are only two parties to a building contract; there are the employer and the contractor but due to the customary divisions of duties within the building process, several other persons are named.⁴

In a construction project, client, contractors, engineers and architects operate in a world structured by construction contracts. Construction contracts present numerous problems; both legal problems and also technical problems. For the experienced contractor, engineer, or architect, he might have no difficulty in solving their construction contract problems. However, for those who have no experience these are beyond his sphere and can give rise to difficulties. Therefore, it is important for the parties involved in construction industry to understand well the legal aspects of construction contracts in order to solve any disputes and conflict which may arise during the construction process.

A contract does not end automatically. This must generally be bought about by some act of the parties. the action of

Pg 3.

³ Chow, Kok Fong. (1988). An Outline of the Law and Practice of Construction Contract Claims. Sin-gapore: Longman Singapore Publishers Pte. Ltd.Pg.27.

⁴ Turner, D.F. (1971). Building Contracts: A Practical Guide. London: George Godwin Ltd.Pg9

termination or determination normally always brings the contracting parties into arbitration or litigation. Although the implications are serious for the parties concerned to arrive at such a precarious state, many parties in the construction industry still lacked the understanding between determination of employment and termination of construction contract. Parties in construction industry are still confused as to the differences between the term of determination and termination of contract. It is important at the outset of the contract to understand the distinction between the two concepts of “termination” and “determination”, and the legal consequences of that distinction.

Termination of contract occurs when a valid and enforceable contract is brought to an end either by becoming impossible to perform due to unforeseeable circumstances at the time the contract was formed or by the actions of one or both parties. When a contract is terminated, it is said to be discharged and the contracting parties are free from further obligations arising from it. Some terminations of a construction contract are justified. However, a party who wrongfully terminates a contract will be found to have materially breached the contract. When a wrongful termination occurs, the non-terminating party may pursue various courses of action for a recovery.⁵ Wrongful terminations in the

⁵ 8 Lexis Nexis: Remedies for Wrongful Termination of Construction Contract.

context of employment law on the other hand means a situation in which an employee's contract of employment has been terminated by the employer in circumstances where the termination breaches one or more terms of the contract of employment, or a statute provision in employment law.

In wrongful termination of contract, the non-terminating party may rescind the contract and seek a quantum meruit recovery based on the performance rendered pursuant to the contract. Besides that, the non-terminating party may also treat the termination as an end and claim the profits that would have been realized from the terminating party for the wrongful termination of contract. Furthermore, the non-terminating party could maintain the contract and then seek damages through a breach of contract action. Generally, the choice of remedy will be based on not only who is the non-terminating party but also the stage of construction. For example, if the employer wrongful terminates the contract in planning stage, the contractor might choose to acquiesce in the termination and then seek to recover the profits he would have gained on the contract.⁶

<http://www.lexisnexis.com>.

⁶ Lexis Nexis: Remedies for Wrongful Termination of Construction Contract. Ibid.

The greatest risk face by either the employer or the contractor in terminating a contract is that the termination could be determined by a court or arbitration panel to be wrongful or not. If the termination is proved to be wrongful by court or arbitration panel, then the party terminating the contract not only fails to collect its additional funds spent to complete the project, but must also pay the wrongfully terminated party its contract payments through the date of termination and potentially the loss of profit on the work not performed.⁷

1.2 Problem Statement

Sir William Anson as in Ashworth defined contract as a legally binding agreement made between two or more parties, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. Termination of construction contracts commonly occur in construction industry and usually has serious implications on the project. Some terminations of a construction contracts are justified. However, there are also some cases which the terminations turn out to be a wrongful termination

⁷ Gregory L. Cashion. Default Termination. American Bar Association Forum

or it was not done correctly. Wrongful termination of the contract by employer or contractor, give the non-terminating parties a right to reasonable remedies from them. The employer may terminate the contractor who fails to perform accordingly to the contract; conversely, a contractor may also terminate the construction contract that has not been paid in accordance to the contract. In the contract of employment, its termination does not necessarily mean that all legal relationships between the employer and the employee come to an end.

According to Wong, termination is often considered as a taboo among the players in the construction industry owing to the severity of the consequences arising there from. Common words such as determination or forfeiture are synonymous to termination. Briefly, termination of a contract takes place at a point in time in the course of a contract period when a legally binding contract is brought to an end before it has been discharged by performance due to the acts of one or both parties.

Terminating a contract can be complex, and it is very important that the correct procedures are followed. This may involve issuing notices setting out the grounds for termination, allowing warning periods, and giving the opportunity to remedy breaches.

Contrarily, there are circumstances a party may find it necessary to terminate a construction contract where the other contracting party commits a breach so serious as to undermine the fundamental objectives of the innocent party under the contract. Section 40 of the Contract Act 1950 defines breach of contract as:

‘When a party to a contract has refused to perform, or disable himself from performing, his promise in its entirety, the promise 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 he fall due, that is he has decided to unilaterally put an end to the contract.

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 follows⁸:

⁸ Powell Smith etc. [1989], An Engineering Contract Dictionary, Legal Studies and Services Ltd, Pg. 109 – 110

“...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...”

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.

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.

In construction contracts, terminations clause is 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.

1.3 Research Question

The above problem statements lead to following research question as stated below:

1. What are the grounds that can be used to terminate a construction contract in Malaysia?

1.4 Objectives of the Study

The objective of this research is:

To identify grounds to terminate a construction contract in Malaysia.

1.5 Scope of the Study

The identified scope of this study is as follows: -

1. Malaysia law cases reported in Malayan Law Journal
2. Cases only related to Malaysian construction industry

1.6 Significance of the Study

The purpose of this research is to increase the awareness of the employers and contractors in relation to the ground of termination 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 under termination.

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.

1.7 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.

1.7.1 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 which attained from UTM library and Internet. Inputs on the current issues in termination from lecturers and industry players will be sought to provide better resolution of the issues relating to the topic. From the issue, the objective of this research has been identified.

1.7.2 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 and information for the study regarding to the research field will be collected to achieve the research objectives.

In this research, there are two types of data needed. First is primary data can be obtained from Malayan Law Journal and other law journals which can be found form UTM Online Database, e-Journals & e-Books, and mainly from LexisNexis Legal Database. The second type of data is secondary data which were gathered from journals, articles, seminar papers, books and including reports available from online database regarding the termination in construction industry. These data will help to develop the literature review.

1.7.3 Stage 3: Analysing and interpreting data

Careful and detailed study and analysis on books, journals and case laws from various jurisdiction will be conducted in this stage. All necessary information such as decision of the courts, views and comments have been analysed from the court case pertaining to circumstances and grounds have been used to

terminate the construction contract. The facts and details of the cases critically review and continued with the writing up of the findings as the research outcome. The grounds used to terminate the construction contract have been highlighted in each of the cases. The grounds is profiled to the themes provided in literature review.

1.7.4 Stage 4: Findings, conclusions and recommendations

This is the final stage where findings, conclusion and recommendations on the topic will be presented. The whole process will be reviewed and finalized to determine the objective of the study. In addition, further study and some recommendations has been suggested for the next research to be carried out.

1.8 Organisation of the Chapters

This research covers 5 chapters. The chapters are as follow:

1.8.1 Chapter 1: Introduction

This chapter is to introduce the geese of the study. The brief background of the termination of construction contract is discussed in this chapter. The objective for this research, scope of study; significance of study; as well as the methodology and the outline of this research is presented in Chapter 1.

1.8.2 Chapter 2: Construction Contract

Chapter 2 of this study would define relevant notions and terms as; Nature of Construction Contract, Parties involved in

construction contract, terminations and etc. This chapter would provide the basis for the further analysis and discussion in other chapter.

1.8.3 Chapter 3: Research methodology

Chapter 3 will explain the methodology method used by author in order to finish the research study.

1.8.4 Chapter 4: Data Analysis and Discussions

Chapter 4 is to analyse and discussion in for the material used for this topic research. The table will be constructing in order to analyse the data. At the end of this chapter by analysing, the objective of study would be achieved.

1.8.5 Chapter 5: Conclusion and Recommendations

In chapter 5, all discussions would be concluded based on analysis in chapter 4. Some recommendations would be suggested for the next further study for this topic.

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