

**VALIDITY ISSUES OF VARIATION ORDER IN CONSTRUCTION
CONTRACTS**

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DEDICATION

This thesis is dedicated to...

My wife, **Wahidanoor Bt Wahid**, daughters **Husna Farhananoor**,
Ain Firzanahnoor, **Ainnur Raudhah** and to all family members.....

Thank you for support everything.....

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ABSTRAK

Kontrak pembinaan adalah satu perjanjian yang mengikat janji antara dua pihak iaitu antara majikan dengan kontraktor atau kontraktor dengan sub kontraktor. Sekarang ini, terdapat pelbagai jenis borang kontrak yang boleh digunakan di dalam kontrak pembinaan dan ia bergantung kepada kesesuaian jenis projek. Kontrak biasa juga digunakan sebagai medium untuk melindungi kepentingan pihak yang berkontrak. Selalunya, borang kontrak akan mengandungi pelbagai klausa termasuklah klausa pembayaran, lanjutan masa, kecacatan projek dan juga perubahan kerja (VO). Perubahan kerja adalah antara elemen utama di dalam kontrak yang membenarkan untuk berlaku perubahan, penukaran, penggantian, penambahan atau pengurangan ke atas skop kerja semasa di dalam kontrak. Pelaksanaan perubahan kerja (VO) ini perlu dilaksanakan dengan penuh teliti dan mengikut tatacara seperti yang dinyatakan di dalam kontrak bagi memelihara kesahihannya. Kegagalan berbuat demikian akan menyebabkan timbul pelbagai masalah dan akan mengganggu perjalanan kontrak. Oleh itu di dalam kajian ini, akan menentukan keadaan yang membenarkan perubahan kerja (VO) itu berlaku dan juga menentukan faktor yang menyebabkan kerja perubahan menjadi tidak sah. Metodologi penyelidikan terhadap kajian ini adalah menganalisis sebanyak 9 kes yang diperolehi melalui laman Lexis Nexis. Pada dasarnya, analisis undang-undang ini telah mengenalpasti sebab-sebab yang menyebabkan kesahihan dalam proses perubahan kerja (VO) telah terganggu atau dipertikaikan dan seterusnya telah menyebabkan perubahan kerja (VO) tersebut menjadi tidak sah. Objektif pertama telah menunjukkan pelbagai keadaan boleh menyebabkan berlakunya perubahan kerja (VO) di dalam kontrak pembinaan. Manakala, di dalam objektif kedua menunjukkan, kesilapan dalam prosedur melaksanakan perubahan kerja (VO) antara faktor utama yang menyebabkan perubahan kerja itu adalah tidak sah. Daripada analisis kajian ini, dapat disimpulkan bahawa sekiranya tatacara dan proses perubahan kerja (VO) diikuti seperti dinyatakan di dalam borang kontrak, masalah pegesahan tidak akan berlaku dan akan menjamin dan memelihara kepentingan antara dua pihak yang berkontrak.

ABSTRACT

The construction contract is a set of agreement that binds the parties, either between the employer and contractor or contractor and sub contractor. Currently, there are many kinds of contract form that may be used in construction depending on the nature of construction work. Usually, the form of contract is used to protect interest of the parties and will contain various elements including variation order (VO) clause. The variation order clause will usually permit the party, normally the employer, to carry out variation, modification, alteration, addition or omission to the current scope of work as stipulated in the contract provision. The process of VO need to be made in a proper manner for validity purposes and failure to do so will cause problems to the existing contract. In light of that, the objectives of this research are to determine the circumstances for variation order issued and to determine the causes of invalid variation order. The research methodology adopted was based on legal case analysis for which nine construction cases was obtained from the Lexis Nexis data base. Case law analysis is carried out to identify the issues on the validity of variation order, which may bring about an invalid variation order. The first objective shows that there are many circumstances identified that may lead or to cause the variation order (VO) to be issued in construction contracts. Some of these circumstances may be attributed to lack of detail or planning at the pre-contract stage. The second objective confirmed that a lot of invalid variation order (VO) are caused by procedurally invalid variation order. Some of these procedures were not complied with such as written instructions, omissions were not properly carried out, cardinal changes and no provision for variation was provided in the contract. In summary, it can be concluded that if the process of variation order (VO) is conducted in good manner and follow the procedure stated in the contract, the validity issues may not arise and interest of the parties are protected.

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LIST OF ABBREVIATION

| | |
|------|---|
| SO | Superintending Officer |
| PWD | Public Work Department |
| UTM | Universiti Teknologi Malaysia |
| PAM | Pertubuhan Arkitek Malaysia |
| AIAC | Asian International Arbitration Centre |
| IEM | The Institution Engineers of Malaysia |
| CIDB | Construction Industry Development Board |
| KLIA | Kuala Lumpur International Airport |
| LPT | Lebuhraya Pantai Timur |
| VO | Variation Order |
| COA | Court Of Appeal |
| AHC | Australia High Court |

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CHAPTER 1

INTRODUCTION

CHAPTER 1

INTRODUCTION

1.0 Background of the Research

Malaysia is the country where is currently active in carrying out various construction work projects. Implementation of construction works has contributed to the rapid development in whole countries, especially in Peninsular of Malaysia area. According to Construction Industry Board Malaysia (CIDB) around RM 465 Billion recorded in expenses for the construction project by 2015, 2016 and 2017. The data collected and shows in following schedule.

Table 1.1: Values of construction project in Malaysia

| Year | Numbers of project | Values of project |
|------|--------------------|-------------------|
| 2015 | 7,013 | RM 126 Billion |
| 2016 | 6,547 | RM 176 Billion |
| 2017 | 7,548 | RM 163 Billion |

Source: CIDB Malaysia¹,

¹ CIDB Construction Law Report 2017, CIDB, page 9

The construction work interpreted as activities in constructed of building or infrastructure works. According to Asian International Arbitration Centre (AIAC)², the construction work may define as activities, which involved in the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of building, electrical, mechanical or civil engineering works. The construction work usually can performed in various procurement method such as by conventional, design and build, turnkey or privatisation. Normally, construction work will be starting from site possession and finish in defect work stage.

During the construction times, many issues found such as late payment, the extension of time (EOT), performance bond, completion work, termination, variation and others. A part of them, may include variation problem. Variation may occur whether initiated from the employer, contractor or third party. Its variation is very common in any project (The Entrusty Group, 2008). Variation in simple term may understand as addition, omission, alteration or changes related to current quality or quantity in specific contract. However, in more details according to by Prof. Vincent Powell-Smith as *any change to the works as detailed or described in the contract documents*³. Meanwhile, from Mr Harbans Singh (2003) perspective, the variation as changes, may lead to extra work or extra for in a specific project. This variation order may appear from the several factors such as:

- a) changes of employer or end user requirements,
- b) Revision due to statutory requirements
- c) Design revision by own contractor for a better work

² Construction Industry Payment And Adjudication Act 2012, page 14

³ V Powel-Smith , An Engineering Contract Dictionary, p 562

In almost of standard form of contract, usually have a provision for variation clause. By example, under PWD203A (2010) standard form contract was stated under Clause 24. Meanwhile, in PAM2006 and IEM, which spelt out under Clause 11 and Clause 51 respectively. Every clause in a standard form contract has described the meaning of variation and sequence process from beginning until the end. During the construction period, if it variation has arisen, many procedures shall be compiled by parties such as an order issued in written form, order form signed by the designated person or contract administrator, changes are done within the scope of work and in time frame permitted.

1.1 Problem Statement

The employer set up in their objective that his project should be running according to work programme and may complete in target time, achieves better quality and not incurred by any variation, which may cause to additional cost. The construction process in normal practice would start from site possession and continue to be complete whether in original period or extended time. Nevertheless, inevitable during the construction period, so many issues or problem may arise such as payment claims, the extension of time (EOT), completion, termination, defect works, variation and others. Apart of issues include variation problem where is very difficult to avoid any alteration, modification, or changes which may created by own employer, consultant, contractor or third party⁴.

Variation in the contract usually arises when there are any parties may intend to make any changes or modification to obtain a better work in the current scope of work that may help it project carried in smooth momentum. By generally, if the variation has become from an employer or consultant on behalf them, the contractor is entitled to recover the remedies under contract provision. Meanwhile, in another

⁴ N. Mohammad, A.I Che Ani, R.A.O.K Rakmat, M.A Yusof (2010), Investigation On The Causes Of Variation Orders In The Construction Of Building Project, Journal Of Building Performance

situation whereas variation request by the contractor due to internal reason, any cost incurred shall bear by the contractor.

Many reason were identify which permitted for variation order (VO) includes increase or decrease of quantity work, omit work, change character of work, change quality of work, change kind of work, change levels of work, change position of work, change dimensions of work, change timing of works activities, change sequence of work and execute additional work of any kind.

The variation order (VO) in construction contract is supposed to managed in a proper process for complying the procedure and also to be valid. The validity in variation is a very important factor because it will determined the contract remains valid for throughout duration. However, it also protects to each party in contractual administration, permit the contractor to recover their right under contract provisions such as to claim additional cost, apply the extension of time and also claims for loss and expense.

Both parties should committed by several elements to ensure the variation process meet the validity requirement such as:

- a. Authority of person or entity issuing the variation order
- b. Procedure and documentation requirement
- c. Scope of the variation clause on the contract
- d. Common law rules governing Variations

Once the order issued by the employer by either a Superintending Officer (SO) or, Employer Representatives (ER), Architect or Engineer, the contractor is obliged to perform the instruction (Harbans- 2003). However, the variation must be in written form and signed by officer empowered or contract administrator. By the end, it variation must be there in the current scope of work as stipulated in form of contract.

Although, the variation order process made according to the contractual procedure. However, unfortunately, there are some circumstances, which identify caused to the validity problem in variation. In result, the variation order is to become invalid and may open the opportunity to other parties for recovering their remedy or damages.

For example as stated in *Laporan Ketua Audit Negara by 2009*⁵, which is under categories *Aktiviti Jabatan/ Agensi Dan Pengurusan Syarikat Kerajaan Negeri Kedah* as in **Appendix A**, was found that mostly Variation Order (VO) process has been conducted by the Public Work Department (PWD) of Kedah is not valid. Because, failed to get approval from Superintending Officer (SO).

In above *Laporan Audit Negara* are clearly shows the issues in variation order. Therefore, when the variation order (VO) process is not valid. It may lead to a negative impact on contract management such as dispute arises, contract time may take longer and contract revoked. The validity issues which led the variation to be invalid, caused by some reasons such that inexperienced person and lack of understanding in variation procedure as described in condition of contract conducts contract administration.

Therefore, the question of validity needs to address in order to manage variation properly in a future transaction.

⁵ Laporan Ketua Audit Negara, Negeri Kedah 2009, Jabatan Audit Negara Malaysia

1.2 Objective of this Research

Based on the problems and issues highlighted, the objective of this study are;

- a) To determine the circumstances for variation order (VO) issued
- b) To determine the causes of invalid variation order (VO)

1.3 Scope and Limitation of Study

The scope of this study is based on the case law related to the issues of variation order in construction contract. The relevant cases collected from Lexis Nexis website. All these scope of study also based on clause which is related to variation in form of contract such as PWD 203A(2010), PWD DB(2010), PAM 2006, AIAC and IEM.

1.4 Significance of Study

The construction contract can be assume as a medium for reference to parties when the disputes was occurred during project duration. In these contract usually was described the meaning and reason of variation order (VO). Once it variation order (VO) was issued through instruction by Employer or by his representatives as stated in condition of contract. The process must be organised in a good procedure to avoid validity issues, which may causes a variation, may be to invalid.

Usually in some cases, which related to validity issues in variation order (VO), the parties may encounter it disputes referred to arbitration or litigation stage, which gives a negative impact to the current contract. Therefore, this is very useful in this research to increase the understanding of the importance in the validity of variation order (VO) to avoid any problem in the future.

1.5 Previous Research

There is a topic in previous studies, which focused on the same topic as the current study. Nevertheless, those researchers focused on different objective. The ‘Valid and In Valid Omission by Mothilal a/l Muniandy (2014)⁶ emphasised on the circumstances the omission in variation whether was conducted in valid or in valid process.

Therefore, in this study will focus on validity issues in variation order that may cause a problem to be invalid and has referred to the court.

1.6 Scope Of Study

The scope of this study established was from the case law related to dispute in variation which under various contract. The relevant cases were collected from Malaysia Law Journal (MLJ) which is available in the university database of Lexis

⁶ Universiti Teknologi Malaysia Institutional Repository [Online] Available at <http://eprints.utm.my/>

Nexis website. Besides that, there were several cases obtained from other countries, which seem relevant to this research study.

1.7 Research Methodology

An organized procedure to conduct this study is important to achieve the research objectives. The five major procedures involved in this study are identifying the research issue, literature review, data collection, data analysis, conclusion and suggestions.

1.7.1 Identifying the Research Issue

The first stage of research process is the initial stage of the whole research. This involves identifying the research issue. Firstly, it includes a discussion with the lecturer and reading on variety sources of published materials, such as journals, articles, and previous research papers to get an idea of the research issue that studied. The objectives of the study identified through the research issues that gathered from the first stage. The outline will be prepared to identify the type and sources of data related to the research.

1.7.2 Literature Review

Literature review is the second stage of the research process after the research issue and objective identified. This stage will be involved in the collection of documents which are from secondary data. Generally, secondary data were several sources such as books, journals, research papers, and newspaper. Indeed, published

reported court cases are the most helpful in this literature review stage. It is important to identify the general state of knowledge concerning the subject area of variation order (VO) such as background, definition, procedures, relevant events.

1.7.3 Data Collection

The third stage of research process is the methodology adopted in the preparation of this report which detailed out the stages of the research study from inception until completion. This research used many case law to analyse the issues. Therefore, the data was collected from the Malayan Law Journal (MLJ) which using the university's online library data base Lexis-Nexis website. Other sources such as journals, articles books and website were also used in this research to obtain the data.

1.7.4 Data Analysis

The fourth stage of research process is the data analysis. This stage involves data analysis, interpretation and data arrangement. This process is to process and convert the data collected into information that is useful for the research. The study will identify the issues are related to validity of Variation Order (VO) in construction. This chapter will include data analysis and findings that acquired from this research to achieve all the objectives.

1.7.5 Conclusion and Suggestions

Conclusion and recommendations is the final stage of the research. In this stage, the whole process of study will be reviewed with the intention to identify whether the research objective has been achieved. The findings will be able to show

the result of the research. A conclusion will be drawn in-line with the objectives of the research

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