

ENFORCEABILITY OF THE LIQUIDATED AND ASCERTAINED DAMAGES
AND EFFECT OF SECTION 75 CONTRACTS ACT 1950

SHAZLIMANSHAH BIN MOHAMAD

A project report submitted in partial fulfilment of the
requirements for the award of the degree of
Master of Science (Construction Contract Management)

Faculty of Built Environment and Surveying
Universiti Teknologi Malaysia

JUNE 2019

DEDICATION

Specially dedicated to my mother,
my grandmother,
my wife,
my daughter,
my son,
and to all family members and friends.

Thank you for your love and support.

ACKNOWLEDGEMENT

Assalamualaikum w.b.t. Firstly, I would like to express my highest gratitude to my supervisor, Sr Dr Norazam Bin Othman for his support, encouragement, guidance, advice, comments and dedication in assisting me to succeed in writing out this thesis.

Special thanks to Dr Hamizah Liyana Bt Tajul Ariffin for her concerns, comments and professional advices. I am also very thankful and grateful to all lecturers of Construction Contract Management team for their kind support, help and motivation during my studies.

My appreciation also goes to all my classmates for their great support, opinion and willingness to share their knowledge towards the completion of my research.

Finally, I would like to extend my truthful appreciation to all my family members, especially my late father, my beloved mother, and my lovely and supportive wife Norfahana Abdul Ghani for her endless love and support.

ABSTRACT

The usual redress awarded to the employer in the event of a breach of contract due to late completion will be in the form of liquidated damages. Liquidated damages, or commonly known as Liquidated and Ascertained Damages, abbreviated as 'LAD' is sought as the sequel to a non-completion of work. The main issue in liquidated damages relating to Section 75 is relates to the claimable amount by the aggrieved party should contract violation happen. As deliberated in many law cases, the Courts have the discretion to award any other amount in the case of liquidated damages sum fixed in the contracts been challenged by the contractor as unreasonable. Hence this research is aimed to determine the requirements of damages entitlement for employer in the event of late completion by the contractor in accordance to the Contracts Act 1950 and also to determine whether the LAD clause in the contract is enforceable in relation to the court decision in Malaysia. Throughout this study, legal research will be conducted by using the case law as the research sources. The case laws are used for the purposes of data analysis. This study found that most of the court decisions, required the innocent party to prove his actual loss in claim for damages until the recent landmark decision by Federal Court in *Cubic Electronics*. The position of LAD in Malaysia has changed and shifted to the burden of proof pertaining the damages clause from the innocent party to the defaulting party. In the construction context, this means the contractor, and not the employer, will have to prove that the liquidated and ascertained damages clause and the sums stated therein are unreasonable.

ABSTRAK

Pampasan yang biasa diberikan kepada majikan apabila berlaku pelanggaran kontrak terutamanya kelewatan didalam penyiapan adalah ganti rugi tertentu (*liquidated damages*). Ganti rugi tertentu sinonim dengan istilah lain seperti ganti rugi tertentu yang telah ditetapkan (*liquidated and ascertained damages*) (LAD) dan merupakan pampasan yang paling sering digunakan didalam kontrak apabila berlaku kelewatan. Isu utama ganti rugi tertentu yang telah ditetapkan terhadap seksyen 75 Akta Kontrak 1950 adalah berkaitan dengan jumlah amaun tuntutan oleh pihak yang terkilang apabila berlakunya pelanggaran kontrak. Seperti yang dibincangkan di dalam banyak kes undang-undang, Mahkamah mempunyai budi bicara untuk memberikan apa-apa jua jumlah amaun yang difikirkan munasabah apabila pihak kontraktor mencabar jumlah LAD yang telah ditetapkan didalam kontrak. Oleh itu, penyelidikan ini bertujuan untuk menentukan keperluan LAD yang perlu diambil kira oleh majikan mengikut peruntukan Akta Kontrak 1950 dan juga untuk menentukan sama ada klausa LAD di dalam kontrak boleh dikuatkuasakan berdasarkan kepada keputusan yang telah dibuat oleh mahkamah di Malaysia. Bagi memstikan objektif kajian dapat dicapai, kaedah penyelidikan menggunakan kes undang-undang akan digunakan sebagai sumber utama penyelidikan. Kes undang-undang ini akan digunakan bgi tujuan analisis data. Kajian ini mendapati bahawa kebanyakan keputusan mahkamah memerlukan pihak yang tidak bersalah untuk membuktikan kerugian sebenar apabila menuntut ganti rugi sehinggalah keputusan paling penting telah dibuat oleh Mahkamah Persekutuan baru-baru ini untuk kes *Cubic Electronics*. Kedudukan LAD di Malaysia telah berubah dan pengemukaan bukti berkaitan dengan klausa LAD telah bertukar dari pihak yang terkilang kepada pihak yang ingkar. Dalam konteks pembinaan, ini bermakna kontraktor, dan bukan majikan yang perlu membuktikan bahawa jumlah LAD didalam kontrak adalah munasabah atau sebaliknya. Perkara yang penting dan perlu dipastikan adalah klausa LAD perlu terdapat di dalam kontrak untuk pelaksanaan.

TABLE OF CONTENTS

	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF TABLES	xi
	LIST OF FIGURES	xii
	LIST OF ABBREVIATIONS	xiii
	LIST OF CASES	xiv
CHAPTER 1	INTRODUCTION	1
1.1	Background of Study	1
1.2	Problem Statement	6
1.3	Previous Research	8
1.4	Objectives of the Study	10
1.5	Scope of the Study	10
1.6	Significance of the Study	11
1.7	Research Methodology	11
1.8	Conclusion	13
	1.8.1 Chapter 1: Introduction	13
	1.8.2 Chapter 2: Liquidated and Ascertained Damages (LAD) and Section 75 of the Contracts Act 1950	13
	1.8.3 Chapter 3: Research Methodology	14
	1.8.4 Chapter 4: Legal Effects and Enforceability of LAD	14
	1.8.5 Chapter 5: Conclusion and Recommendations	14

CHAPTER 2	LIQUIDATED AND ASCERTAINED DAMAGES (LAD) AND REMEDIES AVAILABLE UNDER THE CONTRACTS ACT 1950	15
2.1	Introduction	15
2.2	Breach of Contract	17
	2.2.1 Affirm the Contract	17
	2.2.2 Accept the Repudiation	18
2.3	Consequences of Breach of Contract	19
2.4	Damages	20
	2.4.1 Remoteness of Damage	22
	2.4.2 Measure of Damage	25
	2.4.3 Mitigation of Damages	26
	2.4.4 Proof of Damage	28
	2.4.5 Type of Damages	29
	2.4.5.1 General Damages	30
	2.4.5.2 Special Damages	30
	2.4.5.3 Nominal Damages	30
	2.4.5.4 Substantial Damages	31
	2.4.5.5 Exemplary Damages	31
	2.4.5.6 Liquidated Damages	32
	2.4.5.7 Unliquidated Damages	32
2.5	Liquidated and Ascertained Damages (LAD)	33
	2.5.1 Definition of LAD	34
	2.5.2 Basic Characteristics of LAD	36
	2.5.2.1 Sum of Money Agreed	36
	2.5.2.2 Genuine Pre-Estimate of Loss	37
	2.5.2.3 Sum Stipulated in the Contract	39
	2.5.2.4 Recovery of LAD is Triggered by Breach	40
	2.5.3 Express Contractual Provision in the Standard Form of Contracts	40
	2.5.4 Advantages and Disadvantages of LAD Provision	42
2.6	Distinction Between Penalties and Liquidated and Ascertain Damages	45

2.6.1	Penalty	45
2.6.2	Distinguishing Between LAD and Penalty	47
2.7	Effect of Section 75 of The Contracts Act 1950	52
2.7.1	If the Sum So Named in the Contract and Is There Any Other Stipulation by Way of Penalty	53
2.7.2	Whether or Not Actual Damage or Loss is Proved to Have Been Caused Thereby	54
2.7.3	Reasonable Compensation Not Exceeding the Amount So Named	55
2.7.4	Effect on the LAD after Selvakumar Decision	55
2.8	Conclusion	57
CHAPTER 3	RESEARCH METHODOLOGY	59
3.1	Introduction	59
3.2	Legal Research	60
3.3	Source of The Law	60
3.4	Stage of Research Methodology	61
3.4.1	Initial Stage: Identifying Research Issue	62
3.4.2	Second Stage: Literature Review and Data and Information Collection	62
3.4.3	Third Stage: Research Analysis	66
3.4.4	Fourth Stage: Conclusion and Recommendations	66
3.5	Conclusion	67
CHAPTER 4	LEGAL EFFECTS AND ENFORCEABILITY OF LAD	69
4.1	Introduction	69
4.2	Summary of Cases	70
4.2.1	Keen Builders Sdn. Bhd. v Utara Dua (Malaysia) Sdn. Bhd. (Samudra (Malaysia) Sdn. Bhd.)(Garnishee) [1998] 2 CLJ Supp 256 (High Court)	70
4.2.2	Pembinaan Sima Sdn. Bhd. v Low Lai Seng Holdings Sdn. Bhd. [1998] 1 CLJ 159 (High Court)	73
4.2.3	Lightweight Concrete Sdn. Bhd. v Nirwana Indah Sdn. Bhd. [1999] 5 MLJ 351 (High Court)	76
4.2.4	Hock Huat Iron Foundry v Naga Tembaga Sdn. Bhd. [1999] 1 MLJ 65 (Court of Appeal)	78

4.2.5	Sakinas Sdn. Bhd. v Siew Yik Hau & Anor [2002] 5 MLJ 497 (High Court)	80
4.2.6	Metramac Corporation Sdn. Bhd. v Fawziah Holdings Sdn. Bhd. & Ors [2007] 5 MLJ 501 (Federal Court)	83
4.2.7	Johor Coastal Development Sdn. Bhd. v Constrajaya Sdn. Bhd. [2009] 4 MLJ 445 (Federal Court)	86
4.2.8	Malayan Cement Industries Sdn. Bhd. v Golden Island Shipping (L) Bhd. [2018] 1 CLJ 228 (Court of Appeal)	88
4.2.9	Saycon Construction Sdn. Bhd. v Rosado Tradeline Sdn. Bhd. [2018] 4 MLJ 652 (Court of Appeal)	91
4.2.10	Tekun Nasional v Plenitude Drive (M) Sdn. Bhd and 2 Others Appeal [2018] 8 CLJ 693 (Court of Appeal)	94
4.2.11	Cubic Electronics Sdn. Bhd. (In Liquidation) v Mars Telecommunications Sdn. Bhd. [2018] MLJU 1935 (Federal Court)	97
4.3	Summary of Discussion	100
4.4	Enforceability Requirements by the Court	102
4.5	New Position of Liquidated and Ascertained Damages	103
4.6	Conclusion	105
CHAPTER 5	CONCLUSION AND RECOMMENDATION	107
5.1	Introduction	107
5.2	Summary of Research Findings	107
5.2.1	Objective I : To determine the requirements of damages entitlement for employer in the event of late completion by the contractor in accordance to the Contracts Act 1950	108
5.3	Objective II: To determine whether the LAD clause in the contract is enforceable in relation to the court decision in Malaysia	110
5.4	Problems and Constraints	111
5.5	Suggestions for Further Research	111
5.6	Conclusion	112
REFERENCES		115

LIST OF TABLES

TABLE NO.	TITLE	PAGE
Table 3.1	Search terms used to retrieve the relevant cases	64
Table 3.2	List of relevant cases	65
Table 4.1	Enforceability of Liquidated and Ascertained Damages and Effect of the Contracts Act 1950	100

LIST OF FIGURES

FIGURE NO.	TITLE	PAGE
Figure 1.1	Research Flow Chart	12

LIST OF ABBREVIATIONS

PWD	-	Public Work Department
PAM	-	Pertubuhan Arkitek Malaysia
AIAC	-	Asian International Arbitration Centre
IEM	-	The Institution Engineers of Malaysia
CIDB	-	Construction Industry Development Board
LD	-	Liquidated Damages
LAD	-	Liquidated and Ascertained Damages

LIST OF CASES

CASES NAME	PAGES
Arkitek Tenggara Sdn. Bhd. v Mid Valley City Sdn. Bhd. [2007] 5 MLJ 697	21
Associated Metal Smelters Ltd. v Tham Cheow Toh, [1971] 1 MLJ 271	24
Bhai Panna Singh v Bhai Arjun Singh [AIR 1929 PC 179	53, 54, 58,108
British Westinghosue Electric and Manufacturing Co. Ltd v. Underground Electric Railways Co. of London Ltd. [1912] AC 673	26
Cavendish Square Holding BV v Talal El Makdessi [2016] AC 1172	49, 50, 98, 104
Ching Yik Development Sdn Bhd v Setapak Development Sdn. Bhd. [1996] 3 MLJ 675	18
Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] AC 6, 74 LJPC 1, [1904-7] All ER Rep 251	37
Cubic Electronics Sdn. Bhd. (In Liquidation) v Mars Telecommunications Sdn. Bhd. [2018] MLJU 1935	97, 101
Dennis v Sennyah [1963] MLJ 95	101

Dunlop Pneumatic Tyre Co. v New Garage & Motor Co. Ltd [1915] AC 79	4, 16
Elsey v JG Collins (1978) 83 DLR 1	34
Govindaraju v Ganesan [1994] 3 SLR 85	34
Frank & Collingwood Ltd v. Gates. [1983] 1 Con LR 21	30
Hadley v Baxendale (1854) 9 Ex 341	1
Hock Huat Iron Foundry v Naga Tembaga Sdn. Bhd. [1999] 1 MLJ 65	78, 100, 102
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd. [2009] 4 MLJ 445	6,86,96, 102
Joo Leong Timber Merchant v. Dr Jaswant Singh a/l Jagat Singh [2003] 5 MLJ 116	28
<i>Kabatasan Timber Extraction Co v Chong Fah Shing</i> [1969] 2 MLJ 6	90
Keen Builders Sdn. Bhd. v Utara Dua (Malaysia) Sdn. Bhd. (Samudra (Malaysia) Sdn. Bhd.)(Garnishee) [1998] 2 CLJ Supp 256	70, 100, 102
Law v Redditch Local Board [1982] 1 QB 127	85
Lightweight Concrete Sdn. Bhd. v Nirwana Indah Sdn. Bhd. [1999] 5 MLJ 351	7, 6 100, 102
Lubenham Fidelities and Investments Company Ltd. v South Pembrokeshire District Council (1986) 33 BLR 39	40

Mahamad Mozaharal Ahmad v Mahamed Azimaddin Bhuinya AIR 1923 Cal 507	21
Malayan Cement Industries Sdn. Bhd. v Golden Island Shipping (L) Bhd. [2018] 1 CLJ 228	88, 100, 102
Metramac Corporation Sdn. Bhd. v Fawziah Holdings Sdn. Bhd. & Ors [2007] 5 MLJ 501	83, 101, 102
Peak Construction (Liverpool) Ltd. v McKinney Foundations Ltd. (1970) 1 BLR 111	39
Pembinaan Sima Sdn. Bhd. v Low Lai Seng Holdings Sdn. Bhd. [1998] 1 CLJ 159	39
Philips Hong Kong Ltd. v Attorney General of Hong Kong (1993) 61 BLR 41	42
Popular Industries Ltd. v Eastern Garment Manufacturing Sdn. Bhd. [1983] 3 MLJ 360	22
Raja Lope & Anor v. Malayan Flour Mills Bhd. [2000] 6 CLJ Supp 194	28
Realvest Properties Sdn. Bhd. v The Co-operative Central Bank Ltd. [1996] 2 MLJ 461	85
Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543	74
Robophone Facilities Ltd. v Blank [1966] 1 WLR 1428 (CA)	33, 44
Sakinas Sdn Bhd v Sie Yik Hau & Anor [2002] 5 MLJ 497	80, 82, 102

Saycon Construction Sdn. Bhd. v Rosado Tradeline Sdn. Bhd. [2018] 4 MLJ 652	91,101,102
Scandinavian Trading Tanker Co. AB v Flota Petrolera Ecuatoriana [1983] 2 AC 694	46
SEA Housing Corporation Sdn. Bhd. v Lee Poh Choo [1982] 1 MLJ 324	28
Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 2 MLJ 817	3, 5, 7, 54, 55 ,87, 89, 96, 98
Setegap Bhd v Ranhill Engineers and Constructors Sdn Bhd [2011] 6 MLJ 684	6
Sime Engineering Sdn. Bhd. v Public Bank Bhd. [2004] 5 CLJ 561	31
Syed Jaafar bin Syed Ibrahim v Maju Mehar Singh Travel & Tours Sdn. Bhd. [1999] 4 MLJ 413	29
Teh Wan Sang & Sons Sdn Bhd v See Teow Chuan [1984] 1 MLJ 130	17
Tekun Nasional v Plenitude Drive (M) Sdn. Bhd and 2 Others Appeal [2018] 8 CLJ 693	94, 101, 102
<i>Temloc Ltd. v Erill Properties Ltd.</i> (1987) 39 BLR 30	39, 44
Toeh Kee Keong v Tambun Mining Co. Ltd. [1968] 1 MLJ 39, FC	24
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B 528	23
Wallis v Smith (1882) 21 Ch D 243	34
Wearne Brothers (M) Ltd v Jackson [1966] 2 MLJ 155	53

CHAPTER 1

INTRODUCTION

1.1 Background of Study

According to Rajoo, S. and Singh, KS. H. (2012), the agreement or understanding between two or more parties which is enforceable by the law is known as contract. It is the instruments which fixes the rights and obligations of the contracting parties. Fundamentally, when one agrees to contract, he is obliged to carry out the tasks strictly as per contractual terms (Fong, C.K., 1998). Mustaffar, N.I. (2017) explained that failure to perform tasks as per contractual terms or execution refusal, he has committed a breach of the contract. Upon the breach or non-fulfilment of an obligation by the defaulting party the innocent party has always the remedy of damages.

Entitlement in claim financially is the common means to treat a breach of contract, whereby, the faultless party is compensated for the loss and damages sustained consequently through the breach committed by the other party. This is further concurred by Molloy, J.B. (2001) where he stated that damages are normally assessed when breach occurs and are designed to be compensatory in nature. In the landmark case of *Hadley v Baxendale (1854) 9 Ex 341*, Alderson B. said:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"

Fong, C.K. (1998) elucidate that in the example of late completion, the employer is usually awarded with liquidated damages that is determined through calculation with reference to the contract. In some exclusion, under the common law when contractual aspects are affected by a breach of contract, the contract then can be brought to an end by the innocent party. Hence, Singh, KS. H. (2004) suggests that liquidated damages, synonymous with the term Liquidated and Ascertained Damages and the abbreviation 'LAD' remain a remedy most commonly encountered consequence of non-completion.

Liquidated damages clause was being introduced to enhance the efficiency of the performance of the contract as well as the settlement of legal disputes arising from such contracts. It is often described as a contractual term agreed upon by both the contracting parties which stipulates the amount of damages payable upon a breach of contract (Meng, T.P. and Fook O.S., 2016). According to Rajoo, S. and Singh, KS. H. (2012), the general rule is to the effect that the financial contractual remedy can be recovered only if there is an express clause in the contract permitting the same. Instances of such provisions include clause 22.0 of the PAM Contract 2006 (With Quantities), clause 40.0 of the JKR Forms 203 and 203A (Rev. 1/2010), clause 45.0 of the PWD Form DB (Rev. 1/2010), clause 46 of the IEM.CE 2011 Form and clause 26 of the CIDB Form (2000 edn).

Meng, T.P. and Fook O.S., (2016) explains that the existence of a liquidated damages clause assists the contracting parties to compare cost/risk and benefits of the performance of the contract to determine whether the contract is worth pursued with. In the dispute resolution of a breach of contract where it excludes the need for the courts to determine the amount of damages payable to the party and also would be useful in relation to situations where it might be difficult for the aggrieved party to prove the amount of losses suffered, it saves time and cost (Singh, KS. H., 2004).

In Malaysia, the recovery of liquidated damages is governed by Section 75 Contracts Act 1950 (Act 136) which state the following:

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for”.

The main issue in relation to the interpretation of Section 75 as stated by Singh, KS. H., (2004) is on determining the meaning intended for the phrase ‘*whether or not actual damage or loss is proved to have been caused thereby*’. In *Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 2 MLJ 817* the Federal Court held that the loss incurred by the employer has to be proven by him accordingly with reference to the general principle of damages. The party who seeks to enforce a liquidated damages clause has to reasonably prove the compensation or the damages parallelly to Section 74 Contracts Act 1950 which provides the scope of the types and amount of damages recovered from a legal action for breach of contract. Elucidating Section 75, the Federal Court held that the breach of contract damages claimant is obliged to prove the incurred reasonable compensation of the actual damages in accordance with the settled principles in the English landmark case of *Hadley v Baxendale [1854] 9 Ex 341*. Thus, any failure to prove such damages will result in the refusal of the court to award such damages (Rajoo, S. and Singh, KS. H., 2012).

In most common law countries, in order to justify liquidated damages deduction, the employer will only have to prove that the clause of liquidated damages is an authentic delay damages pre-estimation. In the case of *Dunlop Pneumatic Tyre Co. v New Garage & Motor Co. Ltd* [1915] AC 79, Lord Dunedin said that:

“The essence of liquidated damages is a genuine covenanted pre-estimate of damage”

The meaning of term ‘genuine pre-estimate’ was further explained in *WT Malouf Pty Ltd v Brinds Ltd* [1981] 52 FLR 442 as:

“A genuine pre-estimate means a pre-estimate which is objectively of that character: that is to say, a figure which may properly be called so in the light of the contract and the inherent circumstances. It will not be enough merely that the parties honestly believed it to be so.”

Albeit, under English law, Abu Hasan N., (2016) explains that there may be a difference between a penalty clause and a liquidated damages provision with distinct effects, there is no such distinction between liquidated damages and penalty as liquidated damages in Malaysia as it is deemed as penalty and invalid by virtue of Section 75 of the Contracts Act 1950. In *SS Maniam v State of Perak* [1957] MLJ 75 Judge Thompson said:

“...in this country there is no distinction between penalty and liquidated damages. This section boldly cuts the more troublesome knot in the common law doctrine of damages ...In brief, in our law, in every case if a sum is named in a contract as the amount to be paid in case of breach; it is to be treated as a penalty.”

Hence, Malaysia stands differently away from the English Law, as the Malaysian court close out the differentiation between liquidated and ascertained damages and penalties does not come in force, as it was controlled by the Contracts Act, section 75 had eradicated this distinction. Therefore, the liquidated damages clause and penalty clause are predominantly looked into just the same way as the penalty clauses under English Law in Malaysia. Pursuant to Contracts Act 1950, Section 75, should the employer able to prove, the employer may then be only entitled to damages suffered as a consequence of the delay by the contractor up to a limit of the sums mentioned and stated in the contracts.

The requirements to prove the actual loss in claiming compensation under a liquidated damages clause were further affirmed in the case of *Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 2 MLJ 817 where the injured party was required by the Federal Court to evince his actual loss, notwithstanding there was a proviso of liquidated damages clause in his contract. The literal interpretation of Section 75 of the Contracts Act provides that:

“...the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named...”.

However, Fong, C.M., (2016) suggests that the Federal Court in this case noted that the phrase *“whether or not actual damage or loss is proved to have been caused thereby”* covers intentionally contracts of two kinds with the first being with such reasonable compensation, the assessment of it would be on a difficult for the court while the second could easily be assessed with settled rules for a compensation that is reasonable.

The actual loss proven by the principle was further reaffirmed in the case of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd*. [2009] 4 MLJ 445. Judge Ariffin Zakaria held that *Section 75* of the Contract Act shall stay governed and the Court must deduce what the equitable amount of compensation. In another case of *Setegap Bhd v Ranhill Engineers and Constructors Sdn Bhd* [2011] 6 MLJ 684, liquidated damages amount claimed by defendant was refused by the Court to be granted as the amount was failed to be proved. Nonetheless, it is worth to note that in the case of *Sakinas Sdn Bhd v Sie Yik Hau & Anor* [2002] 2 AMR 1957, a different approach was made by Judge Abdul Aziz Mohammed when he decided that it is not required to proof the actual damage or loss in claiming the liquidated damages as no known measure of damages could be employed to.

As such, it is apt to note that based on the law cases of laws in Malaysia, the failure to adduce evidence to prove such loss and damages incurred by the employer would result him from disentitled to recover simpliciter the liquidated damages as per the contractual sum fixed, only to differ in sum if there is a genuity in the pre-estimation of loss and damages.

1.2 Problem Statement

A contract in a standard form carry a pivotal legal structure identifying the rights, duties and obligations of the parties, establish the ambit of the powers and duties of the contract administrator and additionally put the administrative procedures necessary for operation of the contract in place (Abu Hasan, N., 2016). Allen, P.E. (1995) described that the construction contracting is extremely duration sensitive and scheduled completion of a project is frequently used to measure the success of the project. He further stated that in waiting for completion of late projects, owners lose opportunity and profits. Thus, the introduction of liquidated damages clause was to intensify the efficiency of the performance of the contract besides overlooking settlements that rises over any legal disputes from the contracts. In the event of late completion, the liquidated damages clause provides a straight forward method of calculating damages recoverable by an employer.

The main issue in liquidated damages relating to Section 75 is relates to the claimable amount by the aggrieved party should contract violation happen. As deliberated in the law cases above, the Courts have the discretion to award any other amount in the case of liquidated damages sum fixed in the contracts been challenged by the contractor as unreasonable. Hence, no guarantee is given for a party that claims the liquidated damages would be granted the same exact amount stated in the contract nor will it be a simpliciter sum deducted from the contract.

Consequence, it is deemed for the aggrieved party to determine how one can claim the total amount in the liquidated damages clause although the guidance for doing so has been provided in the case of *Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 2 MLJ 817*, where according to Meng T.P. and Fok O.S. (2016) it is submitted that there remains a number of uncertainties faced by the aggrieved party in ensuring that he can recover the full amount. There are also arguments whether the contracting parties can contract out Section 75 and substitute their own calculation of liquidated damages. The parties to a contract are free to determine their intentions are to be bound by the terms as expressly agreed.

Since 1995, the common law position in Malaysia has followed the Federal Court judgement in *Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 2 MLJ 817*. It had undermined the importance and effectiveness of liquidated damages clauses through which parties to a contract often seek to allocate risks in their contractual commitments and made effort to avoid expensive and lengthy litigation in the event of breach. Notwithstanding to any liquidated damages clause in the contract, the innocent party seeking to rely on a liquidated damages clause would still have to prove the actual damage that was suffered unless the case falls within limited category of cases where actual damage or loss is difficult to assess.

Hence, there are two issues arising from the recovery of liquidated damages in construction contracts, i.e. whether the liquidated damages clause is enforceable in relation to Section 75 of the Contracts Act 1950 and if so, what is the amount which can be recovered as a genuine pre-estimate of loss and damages.

1.3 Previous Research

There are several research conducted pertaining to the liquidated and ascertained damages topic. Lee, Y. M. (2006) had researched on the “Liquidated and Ascertained Damages (LAD) and Requirement of Mitigation”. The objectives were to determine the requirement of mitigation and the extent of the employer’s duty to mitigate his losses when enforcing his right under the liquidated damages clause. It was concluded in his research that the employer’s requirements to mitigate the losses is silent in most of the standard forms of contract. However, the employer is bound to comply with the requirements of mitigation in enforcing LAD by taking all reasonable steps or action in accordance with principles of mitigation laid in the Contracts Act 1950.

Mohamad Noor (2008) conducted a study on the legal status of the practice of provisional liquidated damaged (PLD) and further identified the reasons and also the effect of imposing the PLD to the contractors. Based on his finding, it was found that the contractual provisions must be strictly adhered by the aggrieved party in order to secure their right to claim for the liquidated damages. It was also concluded that the position in Malaysia governed the provisions under the statutory provisions under the Contracts Act 1950.

Chia, M. L. (2009) further conducted research to identify the enforceability of the liquidated damages provision in the construction contract. It was found from the research that the to ensure a liquidated damages provision to be enforced successfully in a building contract, there are requirements needed to be fulfilled by the party i.e.. requirements to mitigate damages as well as prove of actual losses suffered. Further, to success in the recovery of damages claimed, the aggrieved party must also submitted the notice of intention to invoke the LAD clause. But in the case related to the contract of sale and purchase under the Housing Developers Regulation 1989 there is an exceptions to the requirements mentioned.

Nur Syaimasyaza (2011) conducted a research on “Notice condition precedent to claim liquidated ascertained damages (LAD)”. Her research focused whether notice is a condition precedent to claim the liquidated damages and the legal impact of notice provision for liquidated damages claim. It was found in her research that when the provision did not expressly state that notice is a condition precedent, it can be condition precedent by implication. The argument that section 56(3) is an implied term to the contract was wrong because section 56(3) is only applicable when the contract becomes voidable.

Nurul Iman Mustaffar (2017) conducted her study to determine the circumstances for which “time at large” may be validly acceptable by the Courts in avoiding or mitigating the liquidated damages. In her research finding, it was found that the results shows that the Contractor may use “time at large” to avoid or mitigate the imposition of liquidated damages claims from the Employer.

Based on the previous research studies done pertaining to the liquidated and ascertained damages, none of the researchers are discussing on the enforceability of the liquidated damages in relation to the Section 75 of the Contracts Act 1950. Therefore this research will look into the legal stance of the employer in recovering the liquidated and ascertained damages and effect of the Section 75 of the Contracts Act 1950 based on the law cases decided in Malaysia.

1.4 Objectives of the Study

Objectives in this study are stated below with respect to the mentioned problem statement from above:-

- a) To determine the requirements of damages entitlement for employer in the event of late completion by the contractor in accordance to the Contracts Act 1950.
- b) To determine whether the LAD clause in the contract is enforceable in relation to the court decision in Malaysia.

1.5 Scope of the Study

The study approach used in this is based on case law. The Court cases related to the “liquidated ascertained damages” and “enforceability of liquidated damages clauses”. Reference is also will be made to cases in other countries such as United Kingdom. The related provisions in the standard forms of contract used in Malaysia, including clause 22.0 of the PAM Contract 2006 (With Quantities), clause 40.0 of the JKR Forms 203 and 203A (Rev. 1/2010), clause 45.0 of the PWD Form DB (Rev. 1/2010), clause 46 of the IEM.CE 2011 Form and clause 26 of the CIDB Form (2000 edn).

1.6 Significance of the Study

The purpose of this research is to consider the various aspects of a liquidated and ascertained damages (LAD) in contracts, from the perspective of recent case laws in Malaysia. Pursuant to Section 75 of the Contracts Act 1950, the employer is only entitled to damages if it can prove to have actually suffered as a consequence of the delay by the contractor, but up to a limit of the sums set out in the LAD clause. It is hope that this research will aid to better understanding of the legal implications of such clauses and would place the employer in a better position to negotiate and ensure that the LAD sum set out in the contract are in order according to the law which eventually protect their interest in the future should there is any dispute.

1.7 Research Methodology

Research process and method of approach is important as guidelines in preparing the research so that the research could be done in an organized way to achieve the research objective. In short, there are four (4) stages to the research:-

1. Research issue identification.
2. Reviewing literature and collection of information and date.
3. Analysis of the research.
4. Recommendation from conclusion.

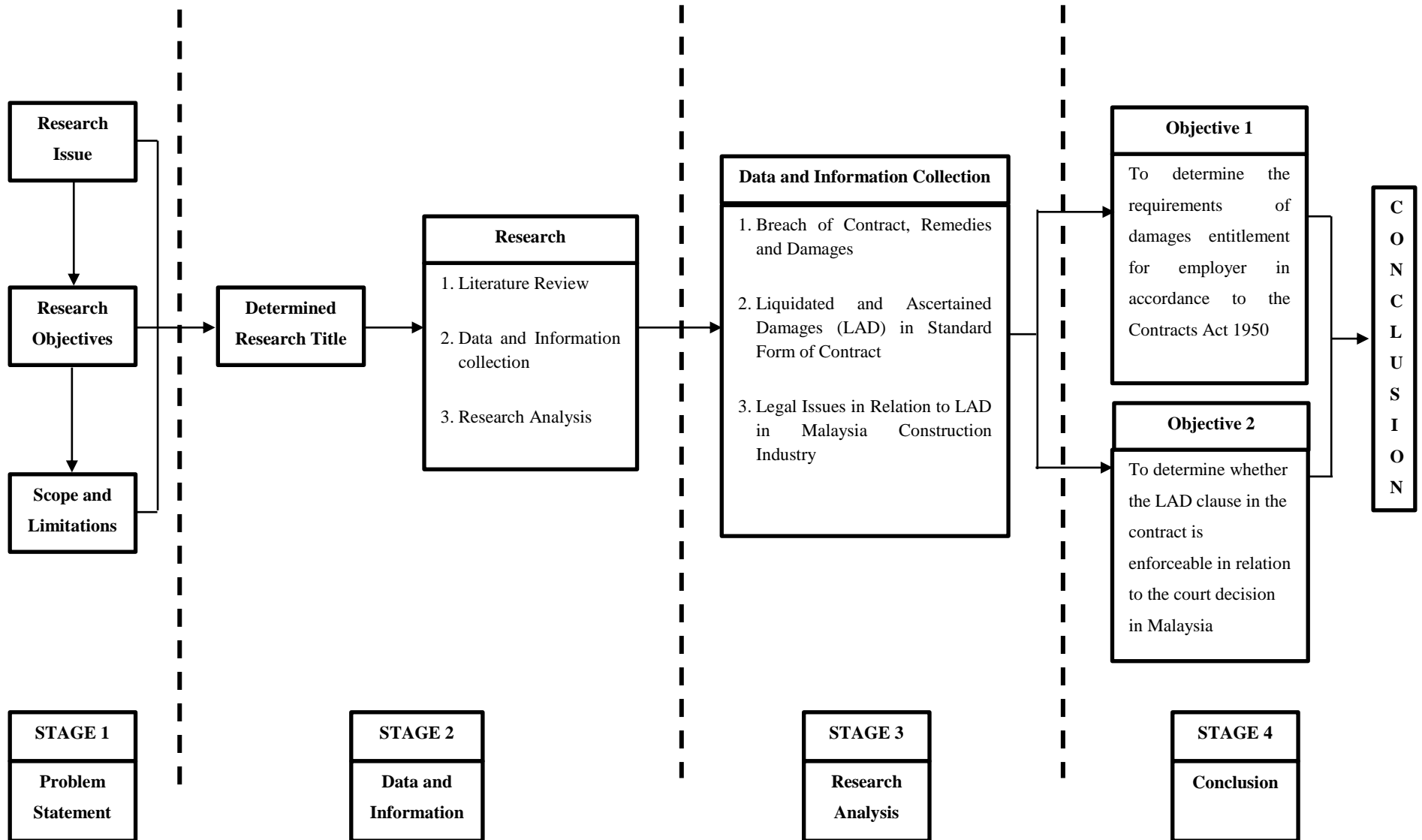


Figure 1.1: Research Flow Chart

1.8 Conclusion

In short, the reach done is closely linked to matters pertaining the enforceability of the liquidated and ascertained damages clause in its standard form of building contract with relevance to Section 75 of the Contracts Act 1950. A study in this is scaled down into five (5) chapters altogether.

1.8.1 Chapter 1: Introduction

Introduction towards the research is noted in the first chapter whereby the chapter also further branches into few sub-topics with the first sub-topic highlighting the study background and subsequently the statement of problem which influences the fundamental on which the research will be done on. Subsequently, objectives of the research that states the aims of the study follows; the significance of the study on how it is to surmount certain industrial problems; the study's boundary or limit and scope, the methodology that will be utilized in this research while conducting the research.

1.8.2 Chapter 2: Liquidated and Ascertained Damages (LAD) and Section 75 of the Contracts Act 1950

Concisely, there will be a few subtopics that will be covered in this chapter such as breach of contract, introduction, damages, LAD and LD term definition and principles, position of LAD in Malaysia and cases and issues pertaining the workability of LAD when a breach of contract happens. Also, this chapter discusses the major issues in relation to the interpretation of Section 75 of the Contracts Act and the law cases in Malaysia and other countries related to the damages in the event of a breach of contract.

1.8.3 Chapter 3: Research Methodology

This chapter details out what are the methods used to collect and analyse the data in order to achieve the objectives of the research.

1.8.4 Chapter 4: Legal Effects and Enforceability of LAD

This chapter is a vital part of the research done. This chapter here discusses the various cases in law that is related to the enforceability of liquidated and ascertained damages. The further outcome will be crucial in responding and concluding towards the research objectives.

1.8.5 Chapter 5: Conclusion and Recommendations

This resides as the last lap of the total report and serves as the conclusion chapter. In short, it comprises of conclusion and recommendation, the summary of the research findings and suggestions on future further research.

REFERENCES

- Adriaanse, J. (2016). *Construction Contract Law*. London; Macmillan Publishers Ltd.
- Allen, P.E. (1995). *The Estimation of Construction Contract Liquidated Damages*.
URL:<http://www.library.findlaw.com/civil/remedies/damages/liquidated.damages/html>
- Ashworth, A. (2001). *Contractual Procedures in the Construction Industry*. 4th ed. England: Pearson Education Limited
- Aubin, J. S. and Sebastiano, R. (2017). *Liquidated Damages: Canadian Adoption, Divergence and the Necessity for Restatement*. Journal of the Canadian College of Construction Lawyers. Canada: Thomson Reuters
- Bello, W. A., (2010). *An Assessment of Liquidated and Ascertained Damages in Contract Delivery*. Accra, Ghana, West Africa Built Environment Research (WABER) Conference, University of Reading
- Burrows, A. (2004). *Remedies for Torts and Breach of Contract*. Third Edition. New York: Oxford University Press Inc.
- Chappell, D., Powell-Smith, V., Marshall, D. and Cavender, S. (2001). *The Building Contract Dictionary*. 3rd ed. U.K.: Wiley-Blackwell.
- Cheong, May Fong. (2007). *Civil Remedies in Malaysia*. Malaysia: Sweet & Maxwell Asia.
- Cheong May Fong (2016). *Contract Law in Malaysia (Student Edition)*. Selangor. Sweet & Maxwell Asia

Chow, Kok Fong (1998). *An Outline and Practice of Construction Contract Claims*. Singapore: Longman Singapore Publishers Pte. Ltd.

CIDB Form (2000 Edition)

Contracts Act 1950 (Act 136)

Cornell University Law School, "Legal Research", Retrieved from http://www.law.cornell.edu/wex/legal_research

Eggleston, B. (2009). *Liquidated Damages and Extensions of Time*. 3rd ed. London: Blackwell Science Ltd., p.2

Fenwick, E. (2012). *Dictionary of Construction Terms*. London: Informa Maritime & Transport

Form CIDB.B (NSC)/2002

Fong, C.K., (2014). *Construction Contracts Dictionary*. Subang Jaya: Thomson Sweet & Maxwell Asia

Gajria, K. (2000). G T Gajria's Law Relating to Building and Engineering Contracts in India. Fourth Edition. New Delhi: Butterworths India

Government of Malaysia (2010). *JKR Sarawak Form of Contract (2006)*. Malaysia : Government of Malaysia.

Government of Malaysia (2010). *Public Works Department Form 203A (Rev 1/2010)*. Malaysia : Government of Malaysia.

Government of Malaysia (2010). *Public Works Department Form 203 (Rev 1/2010)*. Malaysia : Government of Malaysia

Government of Malaysia (2010). *Public Works Department Form 203N (Rev 1/2010)*.
Malaysia : Government of Malaysia

Government of Malaysia (2010). *PWD Form DB (Rev 1/2010)*. Malaysia :
Government of Malaysia.

Harbans Singh KS (2004). *Engineering and Construction Contracts Management:
Commencement and Administration*. Selangor: Malayan Law Journal Sdn. Bhd.

Harbans Singh KS. (2014). *Engineering and Construction Contracts Management:
Commencement and Administration*. 2nd ed. Petaling Jaya: Lexis Nexis Malaysia
Sdn. Bhd.

IEM.CE 2011 & IEM.ME 2012 Forms

Keating, D. (1978). *Building Contracts: Including A Commentary On The JCT
Standard Form Of Building Contract*. London: Sweet & Maxwell.

Lim, C.F. (1993). Enforcement of Liquidated Damages. *The Malayan Law Journal
Articles*. Vol 1, 1-9. Lexis Nexis Business Solutions

Molloy J. B., (2001). Liquidated Damages – Some General Principles. HKIS
Newsletter

Murray,M.D & DeSanctis,C.H (2005). *Legal Research and Writing*. United States of
America: Foundation Press

Nurul Iman Mustaffar (2017). *Time at Large: Implication for Liquidated Damages*.
Malaysia; Universiti Teknologi Malaysia

Naoum, D. S. G., (2007). “*Dissertation Research and Writing for Construction
Students*.” 2nd ed. United State of America: Elsevier Ltd

- Norila Abu Hasan (2016). *The Relevance of Liquidated Damages Clause in Construction Contracts*. Malaysia; Universiti Teknologi MARA
- Pertubuhan Arkitek Malaysia (2006). *Agreement and Conditions of PAM Contract 2006 (With Quantities)*. Malaysia : Pertubuhan Arkitek Malaysia.
- Pertubuhan Arkitek Malaysia (2006). *Agreement and Conditions of PAM Contract 2006 (Without Quantities)*. Malaysia : Pertubuhan Arkitek Malaysia.
- Pertubuhan Arkitek Malaysia (2006). *Agreement and Conditions of PAM Sub-Contract 2006*. Malaysia : Pertubuhan Arkitek Malaysia.
- Paterson, J. *et.al.* (2005). *Principles of Contract Law*, 2nd Edition. Sydney: Lawbook Co.
- Powell-Smith, V., (1989). *Engineering Contract Dictionary*. U.K.: Legal Studies and Services Ltd.
- Rufus, B. R., (2002) “*Legal Research*”, Manila, Rex Publishing
- Steve, Chan. (2004). Lecture 4: Duty to Mitigate, Constructive Acceleration, Challenges to Liquidated Damages. Bullet-Proof EOTs-with Particular reference to PWD/JKR standard Forms of Contract. 27 July, 2004. Kuala Lumpur: James R Knowles (M) Sdn. Bhd
- Sundra Rajoo. (1999). *The Malaysian Standard Form of Building Contract (The PAM 1998 FORM)*. 2nd ed. Kuala Lumpur; Malayan Law Journal Sdn. Bhd.
- Sundra Rajoo and Harbans Singh KS (2012). *Construction Law in Malaysia*. Malaysia; Swee & Maxwell Asia.
- Syed Ahmad Alsagoff. (2003). *The Principles of the Law of Contract in Malaysia*. 2nd ed. Kuala Lumpur, Malaysia: Malayan Law Journal Sdn. Bhd.

Tan Pei Meng and Ong Seng Fook (2016). *Recovery of Liquidated Damages in Malaysia – Legal Pitfalls and the Way Forward*. Malaysia; Universiti Tunku Abdul Rahman

The Society of Construction Law Delay and Disruption Protocol; (Oct. 2004 reprint)
Appendix A.

Usharani Balasingam (2006). *A Legal Commentary on the Position of Liquidated Ascertained Damages in the United Kingdom*. Malaysia; INTI Journal, Vol. 2, No. 1 2006

Vohrah, B. and Wu, Min Aun. (2003). *The Commercial Law of Malaysia*. Malaysia: Pearson Malaysia Sdn. Bhd.

Yaqin, A. (2007). *Legal Research and Writing*. Kelana Jaya: LexisNexis
s: 9in x 6in, 10(1–2), p. 545.