

PROFILING OF THE CONSTRUCTION LAW CASES
IN THE MALAYSIAN CONSTRUCTION COURT

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ABSTRACT

Construction Law is part of the broader body of general law of contract. The general rules of the elements, performance and discharge of contract apply even though construction contracts can be complicated and multifaceted. In Malaysia, both technical and legal disputes arising out of a construction contract are resolved through arbitration or litigation at the specialist construction court. A total of 2,050 construction law cases were registered in the High Court of Kuala Lumpur and Shah Alam since its commencement. The range of issues litigated involved adjudication, payment, claims, breach of contract, breach of natural justice, extension of time, etc. Hence, this research seeks to create a profile on construction law cases at the Malaysian Construction Court in 2018. This research is carried out and presented via the profiling method. A range of profiling elements such as the year of the judgment/decision, the types of disputes, parties and projects, are recorded and arranged systematically. Only construction law cases reported in the CIDB Construction Law Report will be included. CIDB Construction Law Report is the special and dedicated law publication of the Malaysian Construction Court. Ultimately, this research's findings will provide invaluable and practical input to all the construction industry stakeholders in determining their day-to-day affairs relating to the construction.

ABSTRAK

Undang-Undang Pembinaan adalah sebahagian daripada undang-undang kontrak yang lebih luas. Peraturan umum elemen, prestasi dan pelepasan kontrak berlaku walaupun kontrak pembinaan boleh menjadi rumit dan pelbagai aspek. Di Malaysia, kedua-dua perselisihan teknikal dan undang-undang yang timbul dari kontrak pembinaan diselesaikan melalui timbang tara atau litigasi di mahkamah pembinaan. Sebanyak 2,050 kes undang-undang pembinaan telah didaftarkan di Mahkamah Tinggi Kuala Lumpur dan Shah Alam sejak ia dimulakan. Rangkaian masalah yang diadili melibatkan pengadilan, pembayaran, tuntutan, pelanggaran kontrak, pelanggaran keadilan semula jadi, perpanjangan waktu, dan lain-lain. Oleh itu, penyelidikan ini bertujuan untuk membuat profil mengenai kes undang-undang pembinaan di Mahkamah Tinggi, Mahkamah Pembinaan, Mahkamah Sesyen dan Mahkamah Majistret pada tahun 2018. Penyelidikan ini dijalankan dan dikemukakan melalui kaedah profil. Pelbagai elemen profil seperti tahun keputusan, jenis pertikaian, pihak dan projek, direkodkan dan disusun secara sistematik. Hanya kes undang-undang pembinaan yang dilaporkan dalam Laporan Undang-Undang Pembinaan CIDB yang akan disertakan. Laporan Undang-Undang Pembinaan CIDB adalah penerbitan undang-undang khusus untuk Mahkamah Pembinaan Malaysia. Pada akhirnya, penemuan penyelidikan ini akan memberikan input yang sangat berharga dan praktikal kepada semua pihak berkepentingan industri pembinaan dalam menentukan urusan seharian mereka yang berkaitan dengan pembinaan.

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LIST OF ABBREVIATIONS

ADR	-	Alternative Dispute Resolution
CIDB	-	Construction Industry Development Board
CIPAA	-	Construction Industry Payment and Adjudication Act
JKR	-	Jabatan Kerja Raya
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Works Department

CHAPTER 1

INTRODUCTION

1.1 Problem Background

The construction industry is one of the main catalysts that contribute dynamically to the Malaysian economy via the implementation of mega infrastructure projects initiated by the Government as well as the commercial ventures by the private sector. In the case of challenging times and global competition, the industry must step up their game in terms of quality, safety, environmental sustainability, and productivity, in order to be globally competitive. It is the fundamental motive for the launching of the Construction Industry Transformation Programme (CITP) in 2015, where commitments from industry stakeholders were crucial to ensure its goals were met.¹

In 2019, the global economy was projected to expand moderately, following slower growth in both advanced and major emerging market economies. Against the backdrop of a challenging global environment, the Malaysian economy is expected to sustain its growth, momentum, expanding by 4.3% to 4.8% in 2019 (2018: 4.7%). Domestic demand will remain the anchor of growth, underpinned by continued expansion in private sector activity.²

Developments and buildings in West Malaysia are primarily governed by the Town and Country Planning Act 1974 and the Street, Drainage and Building Act 1974 respectively, along with other subsidiary legislation issued thereunder i.e., the Uniform Building By-Laws 1984 (“UBBL”). This legislation provides the minimum standards for the control and construction of street, drainage, and building. It also

¹ CIDB Annual Report 2018.

² Ibid.

sets out the procedures regulating applications for, amongst others, building plan approvals and the requirements for fire-fighting services.

Depending on the complexity, size, and nature of the project, there may be other applicable legislation:³

- a) The Federal Roads Act 1959;
- b) The Quantity Surveyors Act 1967;
- c) The Registration of Engineers Act 1967;
- d) The Architects Act 1967;
- e) The Malaysian Highway Authority Act 1980;
- f) The Construction Industry Development Board Act 1994;
- g) The Federal Roads (Private Management) Act 1984;
- h) The Road Transport Act 1987; and
- i) The Town Planners Act 1995.

Specific legislation exists in relation to payment within the construction industry, which is provided for in the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). There are also different legislative requirements for projects in East Malaysia (Sabah and Sarawak) and the Federal Territories.

The Judiciary is entrusted with the role of interpreting and enforcing all the laws enacted by the legislature. In *PP v. Kok Wah Kuan*,⁴ Richard Malanjum CJ (Sabah and Sarawak) stated: “the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system.” In *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals*,⁵ Gopal Sri Ram JCA stated: “The power to interpret all written law and to declare the law upon a particular subject that is raised as a dispute requiring

³ Lee Hishammuddin Allen & Gledhil, *The Legal 500 & The In-House Lawyer, Comparative Legal Guide* (Malaysia: Construction).

⁴ [2007] 6 CLJ 341, FC.

⁵ [1997] 4 CLJ 253, CA.

curial determination has been entrusted by the framers of the Federal Constitution to the courts.”

In Malaysia, construction disputes are traditionally resolved in arbitration⁶, otherwise in the regular courts of law.⁷ These construction disputes are often technically complex involving mixed issues of fact and law. The modes of dispute resolution available in recent years have been increasingly perceived as inadequate and unsatisfactory by the users, especially regarding cost and time taken to dispose of the dispute. By the initiative of the Construction Industry Development Board (CIDB) to transform the Malaysian construction industry dispute resolution landscape in line with the vision of the Construction Industry Master Plan, the Construction Industry Payment and Adjudication Act 2012⁸ (CIPAA) is finally enacted in June 2012 after several years of debate. The specialist construction court is also established by the Malaysian Judiciary on 1st April 2012 in the High Courts in Kuala Lumpur and Shah Alam at the joint request of the CIDB and the Bar Council Malaysia. There are only two specialist construction courts in Malaysia. However, these courts commenced operation on 1st April 2013 and heard disputes based on or connected to construction-related matters.

1.2 Problem Statement

Court specialization helps improve the processing of court cases that are more complex or require exceptional expertise beyond the law, such as construction, architecture, engineering, environment, or cases that must be handled differently better to reflect the needs of a particular court user group.

⁶ PAM form of building contract, PWD forms of construction contracts.

⁷ Subordinate Courts At 1948 (Act 92) and Courts Judicature Act 1964 (Act 91).

⁸ Act 746.

Specialization in the court system promotes more significant efficiency. Specialized procedures and staff and judges who have well versed in these cases lead to streamlined operations and more efficient processing. By diverting a class of cases to specialist courts, the burden of growing caseloads in the regular courts will be reduced, also positively impacting on their operations. A judiciary of specialists also leads to higher-quality decisions, especially in complex areas of law. Their greater expertise and experience will lead to better decisions, better outcomes for the litigants, and greater user satisfaction. The creation of specialist courts with exclusive jurisdiction over particular areas of the law would enhance uniformity of decisions in those areas, thereby contributing to greater predictability and confidence in the courts possibly reduced appeal rates.

In some instances, special courts have been created when the caseload did not actually justify the additional investment, raising questions as to whether the resources could have been better spent on overall court operations. In other cases, judges who work on only one type of case may develop deep but narrow expertise that may limit their focus and lead to a restricted view of the law which may, in turn, lead to a reduced ability to consider new legal and societal trends that are reflected in other areas of the law. Judges may also develop too close a relationship with a particular group of lawyers and interest groups involved in particular case types.

Judicial specialization can take a variety of forms. The model chosen should reflect the weight of the underlying problem that it aims to address and the local circumstances, especially the number of cases of the type that is targeted for specialization and the external demand for special treatment. The higher the number of cases that require special treatment, be it in the form of judicial expertise, processes, or services, the greater the need for more comprehensive specialization and the higher the justification for investing in it.

In the 1980s, the U.S. Congress created a Federal Courts Study Committee to examine various issues, including an overall evaluation of specialized courts.⁹ The Committee's 1990 report set out criteria for determining when to create a specialized court, including whether:

- 1) The subject is a focused area of decision making that can be segregated from other claims;
- 2) The subject area has a high volume of cases, which might alleviate the burdens on general courts if diverted to a specialized court;
- 3) There is a predominance of scientific or other technical issues affecting a proposed area of specialization that might require particular expertise on the part of decision-makers;
- 4) There is uniformity in the administration of a particular matter.

From the statistics provided by the CIDB Construction Law Report, it is established that the Construction Court of Wilayah Persekutuan Kuala Lumpur and Selangor represent a clear lead with highest number of registered cases in High Court, representing 83% of the national volume of registered construction cases for the same year.¹⁰ This means, the specialist court is becoming the main resolution dispute avenue for the construction industry stakeholders. Nonetheless, the availability of the information in this profiling which can be accessed by the construction stakeholders is crucial in determining the appropriate resolution and outcome of any construction disputes.

1.3 Research Aims & Objectives

This aim of this research is to profile the construction law cases in the Malaysian Construction Court.

⁹ Federal Reports Study Committee, "Report of the Federal Courts Study Committee," *Connecticut Law Review* 22, no. 4 (1990).

¹⁰ CIDB Law Reports 2018.

The objectives of the research are as follows:

- a) To determine the current status and cases development of the Construction Court of Kuala Lumpur and Shah Alam.
- b) To determine the types of disputes, the parties involved in the construction disputes, and the types of construction projects of the construction law cases in the Construction Court. The parameters relating to the types and parties of the disputes are selected to gather information which is accessible not just to a particular group of professional or personnel, but to identify the application of the law to the construction industry as a whole. The parameter relating to the types of construction projects *i.e. building construction, residential construction, engineering construction, and industrial construction* are selected because of the different regulations and/or bylaws applicable to the project.

1.4 Scope of Research

This research will focus on the statistics of the court cases in the Construction Court (of Kuala Lumpur and Shah Alam). This research is limited to the following:

- a) Construction disputes reported in the Malayan Law Journal and CIDB Law Reports in year 2018.
- b) Cases in Malaysia only.
- c) Cases related to construction law.

1.5 Significance of the Research

The findings may equip the industry stakeholders, legal counsels and the court users to make professional and informed decisions and references in their day-to-day affairs based on the research data. To provide a useful framework for establishing the specialist Construction Court in other States when there is legal and economic importance to constitute such court.

1.6 Research Methodology

The research will be conducted and divided into six stages:

- 1) *Identify the Research Issue* - Identifying the research issue is the initial stage of the whole research. This involves discussing with the research supervisor and identifying a research problem by reading recent research, theory and debates on the topic of interest to find a gap in what is currently known.
- 2) *Literature Review* - Literature review focuses on a specific topic of interest and includes a critical analysis of the relationship among different works, and relating this research to work. It provides a theoretical framework and rationale for a research study.¹¹ It also provides insight into the profiling and the relevant attributes with the construction industries by subject index. Reported court cases from different sources like Malaysian Law Journal and Building Law Reports will be referred.
- 3) *Legal Research* - Legal research is the process of identifying and retrieving information necessary to support legal decision making. It includes each step of the course of action that begins with analysing the facts of a problem and concludes with the application and communication of the investigation

¹¹ Galvan, J. (2006). Writing literature reviews: a guide for students of the behavioral sciences (3rd ed.). Glendale, CA: Pyczak Publishing.

results.¹² . Sources of legal information range from printed books, to legal research websites and databases subscriptions.

- 4) *Data and Information Collection* - The data and information collection stage is essential for achieving the research objectives. A formal data collection process is necessary to ensure that the data gathered are both defined and accurate. This way, the subsequent decisions based on arguments embodied in the findings are made using valid data.¹³
- 5) *Research Analysis and Profiling* - During the research analysis stage, all the collected cases, information, data, ideas, opinions and comments are arranged, analyzed, and interpreted. The information on a specific subject could be captured via 'profiling'. Profiling refers to algorithms or other mathematical techniques that allow the discovery of patterns or correlations in large quantities of data, aggregated in databases.
- 6) *Conclusion and Recommendation* - The final stage of the research process involved the writing up and presenting the research findings. The findings will indicate the extent to which the aims have been achieved and summarise the research's key findings and outcomes. At this stage, recommendations may be made for future work and highlight the work's significance or usefulness.

¹² Barkan, Steven M.; Bintliff, Barbara; Whisner, Mary. *Fundamentals of Legal Research* (10 ed.). Foundation Press. p. 1.

¹³ *Data Collection and Analysis* By Dr. Roger Sapsford, Victor Jupp , SAGE Publications, Limited, 1996.

1.7 Research Organization

This research covers five chapters, as follows:

a) Chapter 1 - Introduction

This chapter provides an overview of the research. It contains the background of the research problem, problem statement, objectives of the study, scope of the study, the study's significance, and the research approach.

b) Chapter 2 - Literature Review

This chapter reviews related literature and works in the construction industry. Reviews are done about the general framework of Malaysia's construction law, legislation on a particular subject or legal issue, court cases, law reports, legal commentary, and articles.

c) Chapter 3 - Research Methodology

This chapter discusses the concept and theoretical background of legal research and the step-by-step model of the research undertaking. It also discusses the concept of profiling and its importance to the construction industry and elements of profiling such as year of cases, court cases by subject index, the number of cases registered, disposed and outstanding.

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2. AMT Engineering Services v AH Design Communications Sdn Bhd & Another Case [2019] 1 CIDB-CLR 233.
3. Aston Villa Sdn Bhd v Infra Segi Sdn Bhd & Another Case [2019] 1 CIDB-CLR 238.
4. Bauer (Malaysia) Sdn Bhd v Jack-In-Pile (M) Sdn Bhd (CA) [2019] 1 CIDB-CLR 39.
5. Brampton Holdings Sdn Bhd v GAE Technical Services Sdn Bhd & Anor and Other Appeals [2019] 1 CIDB-CLR 247.
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11. Damansara Uptown Retail Centre Sdn Bhd v MEG Consult Sdn Bhd [2019] 1 CIDB-CLR 108.
12. Dr YG Tan Jurutera Perunding Sdn Bhd v Projek Lebuhraya Usahasama Bhd [2019] 1 CIDB-CLR 199.
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14. Façade Treatment Engineering Sdn Bhd v Ken Grouting Sdn Bhd [2019] 1 CIDB-CLR 267.
15. Gaya Analisa Sdn Bhd v Oceanergy Gases Sdn Bhd [2019] 1 CIDB-CLR 269.
16. Geopancar Sdn Bhd v M101 Entity Sdn Bhd [2019] 1 CIDB-CLR 117.

17. Green Prospect Sdn Bhd v King Ong Development Sdn Bhd (CA) [2019] 1 CIDB-CLR 43.
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19. Hartajaya-Benteng Timur-AMR Jelo JV Sdn Bhd v Kerajaan Malaysia & Another Case [2019] 1 CIDB-CLR 274.
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21. Ideal City Development Sdn Bhd v PWC Bina Sdn Bhd & Other Appeals [2019] 1 CIDB-CLR 203.
22. Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd (CA) [2019] 1 CIDB-CLR 205.
23. Kelibat Megah (M) Sdn Bhd v Smart Reliance Sdn Bhd [2019] 1 CIDB-CLR 283.
24. Kerajaan Malaysia (Jabatan Kerja Raya) v Global Globe (M) Sdn Bhd (CA) [2019] 1 CIDB-CLR48.
25. Kerajaan Malaysia v Shimuzu Corporation & Others [2019] 1 CIDB-CLR 126.
26. Kuasatek (M) Sdn Bhd v HCM Engineering Sdn Bhd & Other Cases [2019] 1 CIDB-CLR 285.
27. Lebas Technologies Sdn Bhd v Malaysian Bio-Excell Sdn Bhd [2019] 1 CIDB-CLR 288.
28. Mammoth Empire Construction Sdn Bhd v Stam Engineering Sdn Bhd & Another Case [2019] 1 CIDB-CLR 292.
29. Master Prestige Sdn Bhd v Pertubuhan Kebajikan Islam Malaysia (PERKIM) (Bahagian Selangor) & Anor [2019] 1 CIDB-CLR 295.
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46. Rentak Segar Sdn Bhd v Transmission Technology Sdn Bhd & Another Case [2019] 1 CIDB-CLR 318.
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53. Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd [2019] 1 CIDB-CLR 337.
54. Tasja Sdn Bhd v Kementerian Kesihatan Malaysia [2019] 1 CIDB-CLR 339.
55. Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd & Another Appeal (FC) [2019] 1 CIDB-CLR 29.
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