

PAYMENT FOR OFF-SITE UNFIXED MATERIALS AND GOODS

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*..... To my beloved family and friends.....*

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## **ABSTRACT**

Construction industry in Malaysia will usually involve the execution of a building contract between the owner (employer) and the contractor using the Standard Form of Contract. The contracts normally contain clauses stipulating the rights, duties, obligations and responsibilities of the employer and the contractor as well as remedies for the breach of any of the duties. One of the important elements in the construction contract is “payment” by employer to the contractor. Based on the Standard Form of Contract in Malaysia, the employer will pay the contractor according to the percentage value of work done including the percentage of unfixed materials and goods which are delivered to the site or adjacent to the site. But in practice, the Superintending Officer (S.O.) or employer did pay the contractor for materials and goods which are not delivered “on” or “adjacent” to the construction site. Thus, the objectives of the study are to determine whether employer may include value of the off-site unfixed materials and goods in the interim payment and to identify the circumstances that allow for the payment for unfixed materials and goods off-site. The analysis done is through analysis of documents such as Standard Form of Building Contract, Treasury Instruction, and Treasury Circular, Preliminaries item in Bills of Quantities, books, journals and articles. Based on the analysis of the documents, it is identified that the employer cannot pay the contractor for off-site unfixed materials and goods and cannot include the value of the stated items in the interim payment. The employer only can pay the contractor for the work he had properly executed and for the unfixed materials and goods which are delivered to or adjacent to the construction site. There are no circumstances that allowing the employer to pay for off-site unfixed materials and goods to the contractor. The finding of the study is hopefully can be reference to the employer and to the contractor especially on the issue of payment for off-site unfixed materials and goods and also to help the construction professional to understand the legal aspect of their work in the area of payment for unfixed materials and goods.

## ABSTRAK

Industri pembinaan di Malaysia biasanya akan melibatkan pelaksanaan kontrak bangunan di antara pemilik (majikan) dan kontraktor dengan menggunakan Borang Kontrak Standard. Kontrak biasanya mengandungi klausa- klausa yang telah menetapkan hak-hak, kewajipan, obligasi dan tanggungjawab majikan dan kontraktor serta remedi bagi pelanggaran mana-mana tugas. Salah satu elemen penting dalam kontrak pembinaan adalah "bayaran" oleh majikan kepada kontraktor. Berdasarkan kepada Borang Kontrak Standard di Malaysia, majikan akan membayar kontraktor mengikut nilai peratusan kerja yang telah dilakukan termasuk peratusan bahan- bahan dan barang-barang binaan yang tak dipasang, yang dihantar ke tapak pembinaan atau bersebelahan dengan tapak pembinaan. Tetapi, Pegawai Penguasa (P.P.) atau majikan tetap membayar kontraktor untuk bahan-bahan dan barang-barang binaan tak dipasang yang tidak dihantar ke tapak pembinaan atau bersebelahan dengan tapak pembinaan. Keadaan ini selalu berlaku terutamanya apabila tapak pembinaan tersebut terletak di kawasan bandar atau di dalam kawasan tapak pembinaan yang terhad. Oleh itu, objektif kajian ini adalah untuk menentukan sama ada majikan boleh memasukkan nilai bahan-bahan dan barang- barang binaan tak dipasang yang berada dihantar ke luar tapak ke dalam pembayaran interim dan untuk mengenal pasti keadaan yang membenarkan pembayaran bagi bahan-bahan dan barang- barang binaan tak di pasang yang dihantar ke luar tapak. Analisis yang dilakukan adalah melalui analisis dokumen seperti Borang Kontrak Bangunan Standard, Arahan Perbendaharaan dan Pekeliling Perbendaharaan, Item Permulaan dalam Bil Kuantiti, buku, jurnal dan artikel. Berdasarkan analisis terhadap dokumen-dokumen, ianya telah dikenal pasti bahawa majikan tidak boleh membayar kontraktor untuk bahan-bahan dan barang- barang binaan tak di pasang yang dihantar ke luar tapak dan tidak boleh memasukkan nilai barang-barang yang dinyatakan dalam pembayaran interim. Majikan hanya boleh membayar kontraktor untuk kerja-kerja telah disempurnakan dan juga untuk bahan-bahan dan barang-barang binaan yang dihantar ke tapak pembinaan atau bersebelahan dengan tapak pembinaan. Tiada keadaan yang membenarkan bayaran untuk bahan-bahan dan barang- barang binaan tak di pasang luar tapak kepada kontraktor. Hasil kajian ini diharap dapat dijadikan panduan oleh majikan dan juga kepada kontraktor terutamanya di dalam isu pembayaran untuk bahan- bahan dan barang- barang binaan tak dipasang yang berada di luar tapak pembinaan, selain dapat membantu pihak profesional dalam sektor pembinaan untuk memahami aspek undang- undang tentang kerja mereka yang berkaitan dengan bayaran untuk bahan- bahan dan barang- barang binaan tak dipasang.

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## LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
BLR	Building Law Reports
Ch.	Cases in Chancery
CIDB	Construction Industry Development Board
GDP	Gross Domestic Product
IEM	The Institution of Engineers Malaysia
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PD	Project Director
P.P.	<i>Pegawai Penguatkuasa</i>
PWD	Public Work Department (Malaysia)
S.O.	Superintending Officer
SBBB	<i>“Peraturan Baru Sekim Bekalan Bahan- Bahan Binaan untuk Projek- Projek Kerajaan”</i>
SLR	Singapore Law Report
TLR	Times Law Reports
UTM	Universiti Teknologi Malaysia

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of the Study

Construction industry is that sector of an economy which construct, alters, repairs and demolishes buildings, civil engineering works and other similar structures. The construction industry also includes the assembly and installation on site or prefabricated components and building engineering services<sup>1</sup>. In a statistic made by Construction Industry Development Board (CIDB) on construction economic indicator, the graph shows that, for the year 2008, construction industry had contribute 2.9 percent to Gross Domestic Product (GDP) and had contribute three percent to GDP at first quarter of year 2009.

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<sup>1</sup> Fadhlin Abdullah (2004). *Construction Industry & Economic Development: The Malaysian Scene*. Johor Darul Ta'zim: Penerbit Universiti Teknologi Malaysia.

Construction is the process of combining people, materials, money, plants and many more in an environment. It include group of professional peoples, firms and companies which consist of the Architect, Quantity Surveyor, Contractors who design, build, manage and supervise the construction works. There are many parties involved in construction industry, such as, developer, client, consultant team, local authority and contractor. Consultant team consists of the Architect, Civil and Structure engineer, Mechanical and Electrical engineer, and Quantity Surveyor.

Construction projects can best be understood in the context of the whole industry. Technological complexity ranges from the familiar, well-known materials and trades through to highly complex facilities involving multiple interacting sub-systems. Regardless of its technological complexity, any reasonably sized project involves a high level of organizational complexity. This arises because there are many specialized skills and professions with a useful contribution to the process.

The term ‘construction’ can include the erection, repair and demolition of things as diverse as houses, offices, shops, dams, bridges, motorways, home extensions, chimneys, factories and airports<sup>2</sup>.

Construction projects are complex and multifaceted. Likewise, the law governing construction is complex and multifaceted. For practical purposes, the law applicable to construction projects falls into three major categories which are contract, tort and statutory/ regulatory. Contracts and contract law dominate construction. A contract has traditionally defined as:

*“a promise or set of promises, for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”.*

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<sup>2</sup> Murdoch, J. and Hughes, W. (2008). *Construction Contracts Law and Management Fourth Edition*. Oxon: Taylor & Francis Group.

Thus, a contract is basically a set of promises made by one party to another party, and vice versa. Parties with capacity to contract may generally agree to whatever they wish, as long as their agreements do not run afoul of some legal authority or public policy. Consequently, an owner and a contractor generally are free to agree to an allocation of risks in the context of a construction project, but they may not agree to gamble on the project's outcome<sup>3</sup>.

## 1.2 Problem Statement

Construction industry in Malaysia usually involve the execution of a building contract between the owner (employer) and the contractor using the Standard Form of Contract much as PWD 203A (Revised 2007), PAM Contract 2006, and CIDB Standard Form of Building Contract 2000.

The contracts normally contain clauses stipulating the rights, duties, obligations and responsibilities of the employer and the contractor as well as remedies for the breach of any of the duties. One of the important elements in the construction contract is “payment” by employer to the contractor. In clause 28.1 of PWD 203A (Revised 2007) stated that:

*When the Contractor has executed work including delivery to or adjacent to the Works of any unfixed materials or goods intended for incorporation into the Works in accordance with the terms of this Contract and their total value of work thereof has reached the sum referred to in Appendix, the S.O. shall at that time make the first valuation of the same.*

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<sup>3</sup> Kelleher, T.J., Jr. and Walters, G. S. (2009). *Smith, Currie & Hancocks's Common Sense Construction Law: A Practical Guide for the Construction Professional Fourth Edition*. New Jersey: John Wiley & Sons, Inc.



In clause 30.1 of PAM Contract 2006 stated that:

*Upon receipt the Contractor's details and particulars, the Architect after having received the payment valuation from the Quantity Surveyor shall within (21) days from the date of receipt of the Contractor's application, issue an Interim Certificate to the Employer with a copy to the Contractor, and the employer shall thereafter pay the amount certified to the Contractor within the Period of Honouring Certificates.*

This clause deals with the time for the employer to pay the contractor the amount he entitled. The PWD 203A and CIDB 2000 standard forms of building contract stipulate that the contractor will be "entitled to payment therefore within the Period for Honouring Certificates named in the appendix or if not stated 30 days for PWD 203A and 21 days for CIDB 2000 standard form of building contract.

While in clause 30.2 of PAM Contract 2006 stated that:

*The amount stated as due in the Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and include the percentage of the value of materials and goods stated in the Appendix up to date of the Contractor's payment application less any amount which may be retained by the employer under Clauses 30.5 and 30.6 and, less the amounts previously certified under Clause 30.1. The materials and goods must be for incorporation into the permanent works and have been delivered to and properly stored at the Site and be protected against loss, damage or deterioration, and be accordance with the Contract. The certificate shall only include the value of materials and goods which are reasonably, properly and not prematurely brought to the Site.*

By referring to the clauses mentioned above, the contractor is entitled to receive payment from the employer once he had executed his work within the period as stated in the contract. The employer will pay the contractor according to the percentage value of work done including the percentage of unfixed materials and goods which are delivered to the site or adjacent to the site.

It is provided in clause 28.4 of PWD 203A (Revised 2007) Standard Form of Contract that:

*The amount stated as due in an Interim Certificate shall, subject to any agreement between the Parties as to payment by stages, be the estimated total value of the work properly executed and up to ninety percent (90%) of the value of the unfixed materials and goods delivered to or adjacent to the Site intended for incorporation into the permanent Works up to and including the date the valuation was made, less any payment (including advance payment) previously made paid under this Contract. PROVIDED THAT such certificate shall only include the value of the said unfixed materials and goods as and from such time as they are reasonably and properly and not prematurely delivered to or adjacent to the Site and adequately protected against weather, damage or deterioration.*

In clause 30.2 of PAM Contract 2006, it is provided that:

*The amount stated as due in an Interim Certificates shall, subject to any agreement between the parties as to stage payment, be total value of the work properly executed and include the percentage of the value of materials and goods stated in the Appendix up to the date of the Contractor's payment application less any amount which may be retained by the Employer under Clauses 30.5 and 30.6 and, less the amounts previously certified under Clause 30.1. The materials and goods must be for incorporation into the*

*permanent works and have been delivered to and properly stored at the Site and be protected against loss, damage or deterioration, and be in accordance with the Contract. The certificate shall only include the value of materials and goods which are reasonably, properly and not prematurely brought to the Site.*

In clause 42.1 of CIDB 2000 Standard Form of Contract for Building Works 2000, it is provided that:

*The Contractor shall submit to the Superintending Officer, at such intervals as may be specified in the Appendix, a statement (hereinafter referred to as the "Statement of Work Done") in such form as the Superintending Officer may from time to time prescribe. The Statement of Work Done shall show the amounts to which the Contractor considers himself to be entitled up to the last Day of the interval in respect of:*

- (a) The value of the works properly executed (including work executed pursuant to Superintending Officer's instructions under clause 28) subject to any agreement between the parties as to stage payments for the Works or any part of the Works stipulated in the Appendix;*
- (b) Any other items shown and separately priced in the Contract including those for Construction Plant, Temporary Works and the like;*
- (c) The percentage (as stated in the Appendix) in respect of the value of any Equipment, materials or goods delivered by the Contractor on the Site for incorporation in the Works;*

- (d) *Any other sums to which the Contractor may consider himself to be entitled under the Contract with itemisation of such sums with reference to relevant provisions of the Contract; and*
- (e) *Any amount due to the Contractor under an Option Module.*

So it is clearly stated in the Standard Form of Building Contract in Malaysia that all unfixed materials and goods must be delivered to the site or adjacent to the site, so that the employer can pay the contractor as required in the contract between the employer and the contractor.

But in practice, the Superintending Officer (S.O.) or employer did pay the contractor for materials and goods which are not delivered “on” or “adjacent” to the construction site. This situation always occurred especially when the construction site is located at the town area or confined construction site. This will make the supplier deliver the unfixed materials and goods at the place not adjacent to the site, and the employer still pay for it. The materials and goods might be delivered to places such as:

- To the factory
- The supplier store room
- or in the nursery

Can this be done when it is clearly stated that payment is only to include value of work done and value of materials and goods delivered to or adjacent to the site. There are no provisions for payment for off-site unfixed materials and goods in any Standard Form of Contract in Malaysia.

### **1.3 Objectives of The Study**

The objectives of the study are:

1. to determine whether employer may include value of the off-site unfixed materials and goods in the interim payment.
2. to identify the circumstances that allow for the payment for unfixed materials and goods off-site.

### **1.4 Scope of The Study**

The following are the scope of study:

1. The approach adopted in this study is document analysis based. The documents such the treasury instruction, treasury circular and many more which will be referred are only those that having connection to the study which is on payment for off-site unfixed materials and goods.
2. The standard forms of contract used in Malaysia, PAM 2006, PWD203A and CIDB 2000 will be compared and discussed. The court cases referred in this study include Malaysia, Singapore, Australia, and English cases. There is no limit to the cases chosen in terms of time frame, as long as it has not been overruled by higher court and establishes a good law.

## **1.5 Significance of the Study**

Basically, this study is expected to determine whether the employer can pay the contractor for unfixed materials and goods which are delivered off-site or not in the construction site. This is because, it had been a practice in Malaysia construction industry that the payment to the contractor is still been done by the employer even though the materials and good are not delivered to the site or adjacent to the site as stated in the contract and by referring the Standard Form of Building Contract in Malaysia. Therefore, the result of this study can be the basic reference for the employer in making the payment to the contractor, especially for the materials and goods which will be delivered off-site.

In short, the finding of the study could be used as guidance to the employer and also to the contractor when dealing with the issue of payment for unfixed materials and goods and also to educate them on what are the legal implications that they will probably face when the issue arise from the discussion which will be made in this study. Finally, it is believed that the result will also be capable to resolve the dispute in relation to the payment for unfixed materials and goods off-site in the construction industry.

## **1.6 Research Methodology**

In order to achieve the objective of the study, a systematic process of conducting this study had been organized. Basically, this study processes comprised of four major stages as the following:

- i. Develop research proposal and identifying issues and problems
- ii. Data collection
- iii. Data analysis
- iv. Conclusion and recommendations.

## **Stage 1: Develop Research Proposal and Identifying Issues and Problems**

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

By reviewing literature such as the Standard Form of Contract in Malaysia, law cases, books, and relevant journals and articles, it is to find out the discussion made by the writers on the issue of payment for off-site materials and goods to the contractor. These are done to articulate the aims, objectives and scope of the study. Other than, some past-research works had been reviewed to find out what have been done previously on similar topic. The law cases from different sources like Malaysian Law Journal and Building Law Report and Construction Law Report through the Lexis Nexis obtained are those that are related on the issue of payment for materials and goods. It had been done to see what are the decisions given by the judge on the particular cases to review the underlying principles or theory of the subject matter.



## **Stage 2: Data and Information Collection**

The second stage is Data Collection. The cases are obtained from the primary source through the Lexis-Nexis web server. Data is also collected from the secondary source which is obtained from the on-line research journals to look for previous research done by other researchers in related field. Other sources of secondary data are books, act, articles, research paper and seminar papers. These sources are important to enable researcher to come up with a comprehensive complete the literature.

## **Stage 3: Research Analysis**

Once all the related material for this study has been collected, an analysis will be conducted to answer the objectives of the study. In this stage, it is able to determine whether the stated objectives have been achieved or vice versa. Different types of analysis will be carried out according to the requirements of the objective of the study. The analysis will involve interpreting all the facts of the documents gained such as the treasury circular, standard form of building contract in Malaysia, preliminaries items in the Bills of Quantities, legal principles and statutory provisions. Arrangement of data is carried out to streamline the process of writing of the paper after the data is being collected, interpreted, analyzed and arranged. This writing-up part is the written presentation of the findings of the study. The conclusion is made based on the findings during the analysis stage.

## **Stage 4: Conclusion and Recommendations**

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

### **1.7 Organization of Thesis Chapter**

This study will be divided into 5 chapters as the following:

Chapter 1: Introduction

Chapter 2: Interim Payment to the Contractor

Chapter 3: Unfixed Materials and Goods

Chapter 4: Analysis of Documents on Payment for Off-Site Unfixed Materials and Goods

Chapter 5: Conclusion and Recommendation

### **1.7.1 Chapter 1: Introduction**

This chapter is the proposal for the study. It contains the background of the study, problem statement, objectives of the study, scope of study, significance of the study, methodology and the organization of thesis chapter.

### **1.7.2 Chapter 2: Interim Payment to the Contractor**

This chapter explained an overview on the interim certificate such as condition precedent to Interim Payment, right and obligation on both parties and also overview on the provisions based on PAM 2006, PWD 203A (Revised 2007), CIDB 2000 and concept payment under principle of Common Law.

### **1.7.3 Chapter 3: Unfixed Materials and Goods**

This chapter discusses on the definition of materials and good as well as the definition of place to deliver the materials and goods. Other than that, this chapter also discusses on the issue on ownership of the materials and goods based on the Sales of Goods Act 1957.

#### **1.7.4 Chapter 4: Analysis of Documents on Payment for Off-Site Unfixed Materials and Goods**

This chapter will present the data and analysis to address the objectives which have been formulated. Here, analysis will determine whether or not the employer can pay the contractor for the materials and goods which are delivered off-site. The analysis will be done on the documents such as Standard Form of Building Contract in Malaysia, Treasury Circular and Treasury Instruction, Preliminaries items in the Bills of Quantities, Books, Journals and relevant Articles.

#### **1.7.5 Chapter 5: Conclusion and Recommendation**

This chapter presents the recommendations and conclusions and suggestions further research that is needed in the issue of payment for unfixed materials and goods off-site. It also addresses some implications of the research recommendations to the construction industry.

## 1.8 Flow Chart of the Study

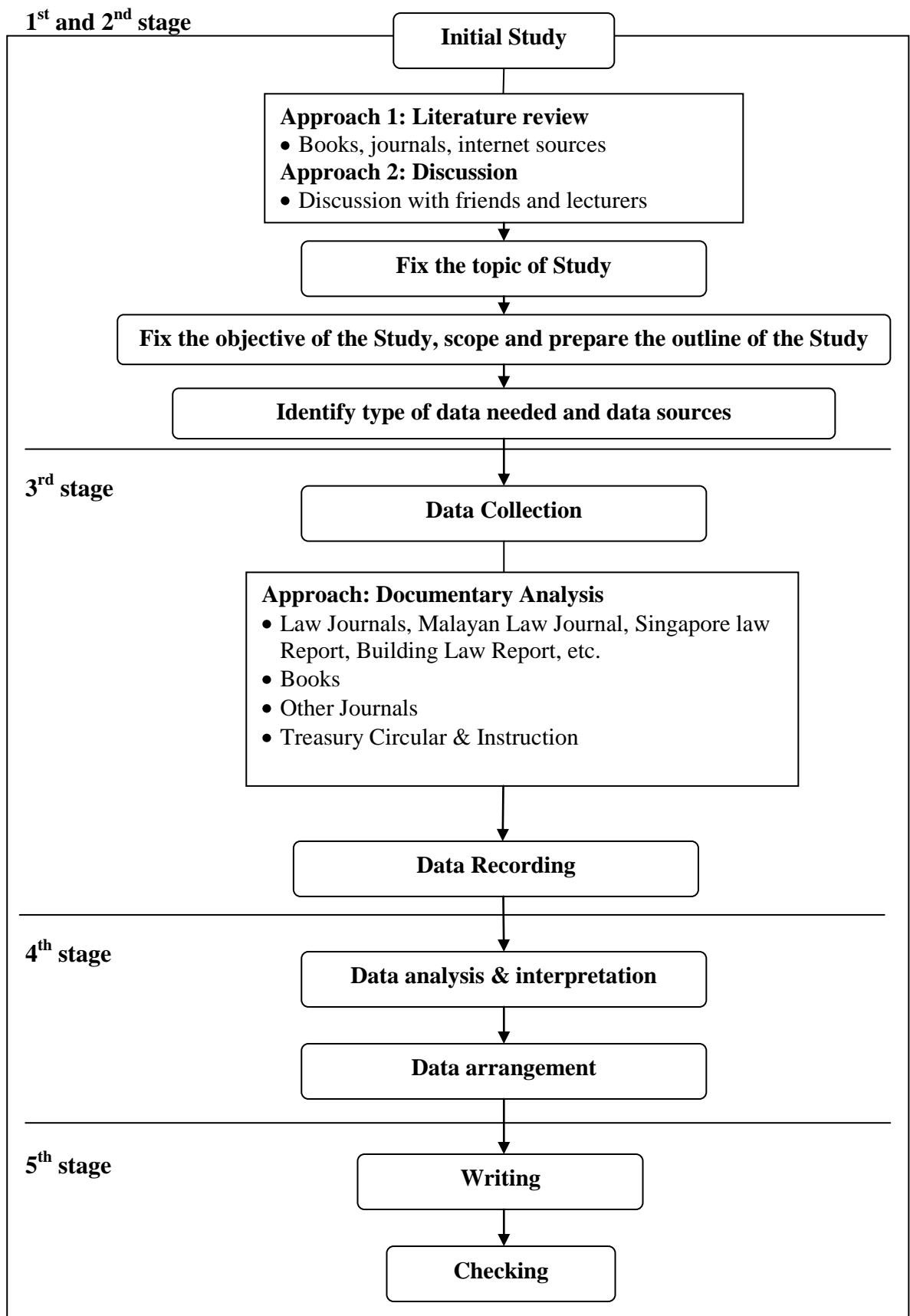


Figure 1.1: Flowchart of the Study and Methods of Approach

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