VARIATION ORDER IN LUMP SUM CONTRACT

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Specially dedicated to Mama and Papa

Thank You For Your Constant

Du’a
ACKNOWLEDGEMENT

In the Name of Allah the Most Gracious, the Most Merciful

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ABSTRACT

In this complicated industry, variation orders are part and parcel in construction contract. It is likely impossible not to have changes in completing the project either to the plans or the construction process itself. Due to its complexity in nature, these changes are inevitable in any construction project. Most construction contracts commonly include variations clauses to enable the employer’s design team to vary the design and specification, including in the Lump Sum type of contract. The main criticism of the traditional Lump Sum Contract has been that, it invites a confrontational approach over disputes arising out of contract variations. Furthermore, changes in Lump Sum Contract are difficult to quantify and the owner might reject the change order request. Thus, variation issues often give rise to argument, debate and litigation. Hence, the objective of this study is to identify the issues regarding variation order in Lump Sum Contract. The scope of the study is from the legal cases reported in Lexis Malaysia in relation to variations and Lump Sum Contract. The cases were analysed in order to achieve the objective of this project report. From the cases, few legal issues of ‘variation orders in Lump Sum Contract’ were found. The cases then be categorized under the issues discovered earlier in the literature review. From the analysis, it can be summarized that, the most common issue contended in court is on the validity of variation claims. The second is on the establishment of the very fact of a variation itself, while the third are, on the status of “cardinal” changes, and, “the contractual” and “common law position”. Last but not least, the issues on the measurement of varied work and valuation of variation orders, have also been identified in one case each respectively. Therefore, by conducting this research, the judgment made by the court on issues pertaining to variation order can be used as a reference to establish a guideline for the people in the industry so that the same problem will not be repeated in future project in Lump Sum Contract. The issues highlighted and the judgment delivered can become a lesson learned rather than opt for bringing the matter to court.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>BoQ</td>
<td>Bill of Quantities</td>
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<tr>
<td>CIDB</td>
<td>Construction Industry Development Board</td>
</tr>
<tr>
<td>ICE</td>
<td>The Institution of Civil Engineers, UK</td>
</tr>
<tr>
<td>IEM</td>
<td>The Institution of Engineers, Malaysia</td>
</tr>
<tr>
<td>JCT</td>
<td>Joint Contract Tribunal</td>
</tr>
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<td>JKR</td>
<td>Jabatan Kerja Raya</td>
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<tr>
<td>PAM</td>
<td>Persatuan Arkitek Malaysia</td>
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<tr>
<td>PWD</td>
<td>Public Work Department</td>
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<td>SO</td>
<td>Superintending Officer</td>
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<td>VO</td>
<td>Variation Order</td>
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CHAPTER 1

INTRODUCTION

1.1 Introduction

Variation orders in construction contract are part and parcel in this complicated industry. It is likely impossible not to have changes in completing the project either to the plans or the construction process itself (Nachatar et al., 2010). Due to its complicated in nature, these changes are inevitable in any construction project (Mohammad et al., 2010).

Variation orders somehow can be the savior to the project or otherwise. On the employer’s side, variation order may be one of the ways to cut cost. However, in this competitive environment of construction industry, the contractors sometimes rely on the employer’s variations to make a reasonable return for their contracts (Ren, 2001).

The standard forms of contract normally provide the variation clauses which facilitate the employer’s design team to change the design and specification. Under the clause, the employer or his representative is able to issue an instruction to the contractor to vary the works which are described in the contract, also provide as a mechanism for evaluating the financial effect of the variation and there is normally provision for adjusting the completion (Nachatar et al., 2010).
Even though it is practically impossible to achieve zero variations in a project, minor variations can often be accommodated without distracting the work programme provided that; a very good coordination between the team members has been applied. Some variations can even speed up the construction process. Hence, more often most cases of variations may result in increase of costs, failure to complete the project in time, increase in contractor’s claim and rise in the number of disputes among the parties involved (Murdoch & Will, 1996).

The main reason why variations have been requested by the client is due to inadequate project objectives for the designer to develop complete design (Nachatar et al., 2010). Depending on the nature of the variation, it may turn out to be higher or lower or it can be in the form of addition or omission to the work. Thus, where a contractor has secured a project on prices and terms which are profitable, he will have a strong interest to argue that any additional work should be construed as a variation and valued according to the prices and rates contained in the contract (Stockport Metropolitan Borough Council v OReilly, 1978).

There are three ways in which a variation might occur. Firstly, clients may change their minds about what they asked for before the work is complete. Secondly, designers may not have finished all of the design and specification work before the contract was consent to. Thirdly, changes in legislation and other external factors may force changes upon the project. Although these three origins are very different, construction contracts tend to ignore these differences and deal with all variations in the same way (Murdoch & Will, 2000).

In addition, most of the normally used standard forms of contract comprise a broad interpretation of variations clause. The normal variations clause will provide power for the employer to call for varied or additional work including additions, omissions, substitutions and alterations, changes in the quality, form, character, kind, position, dimension, level or line. Some of the contracts go even further (Knowles, 2008).
The standard form used for a project is basically based on the nature of the project and most likely, it is approved by the owner. In traditional approach, the employer accepts that design work will generally be separated from construction, and consultants are appointed for design and cost control, and the contractor is responsible for carrying out the works. This responsibility extends to all workmanship and materials, and includes all work by subcontractors and suppliers (Davis et al., 2004). In Malaysia, for Traditional Lump Sum contract, the standard form used is PWD 203 (Rev 2010) for public works.

According to Duminda (2010), it is always the perception of the people in the industry that the variation orders often happen and in most cases, they are not properly administered. It is further added by the author that, for most of the contract, which include the Bill of Quantities and Specification form part of the contract, the changes might be easier to be administered. However, for Lump Sum Contract, it might face some issues regarding variations due to the contract which is based on drawings and specifications only (Duminda, 2010). It means contractor will totally depends on the designers’ drawings. Furthermore, Elliot (1981) stated that, the Lump Sum Contract is very simple by principle but not in practice because there are many factors that can make the contract complicated, as cited in (Yusuf, 2012).

1.2 Problem Statement

The variations works has long been recognized as one of the commonest sources of disputes in the construction industry. The complexity of the construction industry due to different stakeholders’ involvement makes it differ from other industry. This complexity gives rise mostly to unwanted situation like variations with their attached effects, and the more variation orders on a project, the greater the likelihood that they become time consuming and costly in construction projects (Mohamed, 2001).
According to Knowles (2008), it has been argued that if the work is necessary to complete what is described in the Lump Sum type of contract, then the contractor will be obliged to undertake the work even though it may not have been referred to the specifications or shown on the drawings. For example, door frame may not have been specifically referred to in the contract documents (drawings) but where a contractor enters into a lump sum contract for the construction of say a house it would be implied that the price includes for door furniture (Knowles, 2008). Moreover, this kind of contract needs the contractors to prepare their own measurement, as for them, interpreting the specification can be a difficult job and they might be interpret the drawings differently, therefore it does not easily allow for a fair comparison of the tender sum received by the employer (Ashworth, 2012).

Furthermore, unlike contract with Bill of Quantities and Specifications, Lump Sum Contract is based on drawings and specifications. The variations clause which appears in most standard forms of contract is tremendously important from the employer’s point of view where the contract grants the contractor to deliver the works described in the contract for a lump sum. According to Walker & Hampson (2003), the main criticism of the traditional Lump Sum Contract has been that, it invites a confrontational approach over disputes arising out of contract variations. In addition, Rodriguez (2011) purported that, changes in Lump Sum Contract are difficult to quantify and the owner might reject the change order request. Singh & Kandan (2005) also agreed that, confusion also rise in this type of contract in terms of valuation of the works.

In the absence of a variation clause the contractor’s obligation will be restricted to completing the work described in the contract and there will be no obligation to undertake any variations or additional work (Nachatar et al., 2010). For example, as cited in the case of CM Indah against UB Ushabina Sdn Bhd (2006), the issue is whether the extra payment can be claimed by the plaintiff from the defendant in the lump sum contract entered into by both parties for variation works in the event
of no provisions of variation works stated in the contract, the Judge has decided that, in such absence, the claimant must provide proofs and evidence for such claims.

Furthermore, according to Sim (2007) various forms of construction contract defined the variation differently and different standard forms of contract have different wordings for it. He further added that, the variation clauses are usually drafted in very wide terms. Although the descriptions are clear but it is difficult to determine the point whether it is ‘variation’ or ‘new work’, and it is not clear from the ambit of these clauses as to how extensive a variation may be (Singh & Kandan, 2005). Therefore, from the issues stated above, this study is to identify what are the circumstances that brings the parties to litigation regarding Variation Orders in Lump Sum Contract. By identifying the issues from the cases, the judgment made by the court can be made as a reference to establish a guideline for the people in the industry so that the same problem will not be repeated in future project in Lump Sum Contract. The issues highlighted and the judgment delivered can be used as a lesson learned rather than opt for bringing the matter to court.

1.3 Objective of the Study

The objective of this study is to identify the issues regarding variation order in lump sum contract.

1.4 The Significant of the Research

Basically, this study is to identify what are the issues that bring the parties to litigation procedure in regards to variations under the Lump Sum Contract. The findings of the research will be presented through the selected cases which will illustrate the issues between the contracting parties in litigation and the judgment made by the judge of the court. By knowing the issues and the situations, this will be
the lesson learnt to the key players in the industries whenever they want to adopt this type of construction contract in their project.

1.5 **Research Methodology**

This study is carried out in two parts. The first part is focused on the review of literature on the Traditional Lump Sum Contract and Variation Orders.

It is followed by an extensive synthesis of case laws. The law reports and cases identified for this research were mainly gathered via Lexis Nexis. Analysis will be made on the issues on variation arose in the Lump Sum Contract as well as judgment made by the courts.

1.5.1 **Stage 1: Initial Study and Finding the Research Topic, Objective, Scope and Outline**

Stage 1 of the research involves initial study which there are two approaches used i.e. discussion with friends and lecturers regarding what research topic can be done. Initial literature review is also done to help get the idea of the research topic. After the initial study, the rough idea of the research topic is formed. The objective and scope of the research are fixed right after. Then, a research outline will be prepared in order to identify what kind of data will be needed in this research as well as on the data resources.

1.5.2 **Stage 2: Collecting Data and Research Design**

Collection of all relevant data and information is done during this stage. Data will be collected mainly through documentary analysis. All collected data and information are recorded systematically. Data collected are mainly from the Malayan
Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis online database. All the cases relating to the research topic will be sorted out from the database. Important and related to the subject matters cases will be collected and used for the analysis at the later stage.

1.5.3 Stage 3: Analyzing and Interpreting Data

This stage of research involves data analysis, interpretation and data arrangement. This process is to convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process writing of the paper.

1.5.4 Stage 4: Writing-up

This stage is the final stage of the research process. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis.
Stage 1

Initial Study

Approach 1: Literature review
- Books, journals, internet sources

Approach 2: Discussion

Fix the research topic

Fix the research objective, scope and prepare the research outline

Identify type of data needed and data sources

Stage 2

Data Collection

Research Design

Approach: Documentary Analysis

Stage 3

Data analysis & interpretation

Stage 4

Writing-up

Figure 1.1 Research Methodology
1.6 Organisation of the Report

The Master Project consists of five chapters. The brief descriptions of each chapter are as follows:

Chapter 1: Introduction

This chapter presents the overall content of the whole project writing. It introduces the subject matter, the problems that are purported to solve. The objective is specified with an appropriate research method to achieve them.

Chapter 2: Lump Sum Contract

This chapter will explain comprehensively on the Lump Sum contract. Basically, it will explain on the definitions, the overall process or delivery of Lump Sum contract, and the advantages and disadvantages of this kind of contract which help to understand more in further chapters.

Chapter 3: Variation Orders in Construction Contract

Chapter 3 discussed the definition of variation, the nature of variation order provisions and effects of variations within the scope of construction contract. The explanation will be based on opinion of other researchers in various journals and textbooks, as well as law reports on this issue.

Chapter 4: Variations in Lump Sum Contract - Analysis of Law Cases

This chapter explained the analysis on what the law cases say about variation order in Lump Sum Contract. The analysis will be made based on all the law cases
gathered within the subject matter. It also analyses the results from the judicial decisions as reported in law reports and further explore related cases regarding the variation order in Lump Sum Contract.

Chapter 5: Conclusions

This chapter presents the conclusions for the overall dissertation and some recommendation and suggestion for the industry of further research.

1.7 Conclusion

In conclusion, the main criticism of the traditional Lump Sum Contract has been that, it invites a confrontational approach over disputes arising out of contract variations. Therefore, this study is to identify what are the issues that bring the parties to litigation regarding Variation Orders in this type of contract. The research has been conducted by analysing the law cases gathered from the Lexis Malaysia. The cases then were analysed via a documentary analysis. From the analysis, the issues regarding variation order in Lump Sum Contract has been identified and categorized under several issues discovered during the literature review. From that, a critical analysis is done on the judgment made by the court for the issues in contention as the findings of the study.
LIST OF REFERENCES


