

VOIDABLE AND VOID CONSTRUCTION CONTRACTS

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DEDICATION

To my father, mother,
brother and Yuen Hwa

Thank you!

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ABSTRACT

Like other ordinary contracts, construction contracts are created when two parties, either between employers and contractors, contractor and supplier, or other combinations, mutually agree to a transaction. A contract may outwardly appear to satisfy all the requirements of a valid contract, but on closer examination the minds of the contracting parties are poles apart in respect of the terms of the contract. Such lack of genuineness may lead a construction contract to become void or voidable. According to Sweet (2000), it is difficult to determine the validity and voidability of a contract in the construction industry. There are circumstances which can cause a construction contract to become void or voidable, and those circumstances may not be easy to be determined. Hence, this dissertation intends to identify on what circumstances a construction contract will be rendered void or voidable. This dissertation was carried out mainly through documentary analysis of law journals. Meanwhile, due to time constraint, questionnaire survey and interviews were not carried out. There are six (6) circumstances have been identified which may render a construction contract voidable; and at the same time, another six (6) circumstances have been identified which may render a construction contract void. This dissertation perhaps is not comprehensive, it is, however, hoped that it may provides some rough ideas or guidelines for the parties in the construction industry when determining whether or not a construction contract is void, or voidable.

ABSTRAK

Seperti kontrak biasa yang lain, kontrak-kontrak pembinaan dibentuk apabila dua pihak, sama ada di antara majikan dengan kontraktor, kontraktor dengan pembekal, atau kombinasi-kombinasi yang lain, bersetuju bersama-sama dalam satu transaksi. Satu perjanjian mungkin pada mukanya telah mencapai semua keperluan untuk menjadi kontrak yang sah, tetapi kalau diperiksa dengan lebih mendalam, pemikiran pihak-pihak yang berkontrak mungkin berlainan berkenaan dengan terma-terma kontrak. Kekurangan pada kejatian ini mungkin akan menyebabkan sesuatu kontrak pembinaan menjadi batal atau boleh batal. Menurut Sweet (2000), adalah memang susah untuk menentukan kesahihan dan kebolehbatalan sesuatu kontrak dalam industri pembinaan. Terdapat keadaan-keadaan yang mungkin menyebabkan sesuatu kontrak pembinaan menjadi batal atau boleh batal, and keadaan-keadaan itu adalah tidak mudah ditentukan. Maka, disertasi ini bertujuan untuk mengenalpasti keadaan-keadaan di mana satu kontrak pembinaan dijadikan batal atau boleh batal. Disertasi ini dilaksanakan melalui analisis laporan undang-undang, manakala memandangkan masa yang terhad diperuntukkan, kajian borang selidik dan temuramah tidak dijalankan. Dalam kajian ini, enam (6) keadaan, yang dapat menjadikan suatu kontrak pembinaan boleh batal, telah dikenal pasti. Dan, pada masa yang sama, enam (6) keadaan pula, yang dapat menjadikan suatu kontrak pembinaan batal, telah dikenal pasti. Mungkin disertasi ini tidak menyeluruh, tetapi ia diharapkan dapat memberi sedikit idea dan paduan kepada pihak-pihak yang terlibat dalam industri pembinaan apabila mereka ingin menentukan sama ada sesuatu kontrak pembinaan batal atau boleh batal.

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LIST OF ABBREVIATIONS

AC	Appeal Cases, House of Lords
All ER	All England Law Reports
AMR	All Malaysia Reports
BLR	Building Law Reports
Cal	California Law Reports
Ch	Law Reports: Chancery Division 1991-
Ch D	Law Reports: Chancery Division 1875-90
CLJ	Current Law Journal (Malaysia)
Con LR	Construction Law Reports
CP	Law Reports: Common Pleas 1875-80
EG	Estate Gazette
ER	Equity Reports
FMSLR	Federated Malay States Law Reports
HL	House of Lords
HLC	House of Lords' Cases
Hudson	Hudson Law Reports
ICR	Industrial Cases Reports
ILR	International Law Reports
IR	Irish Reports
JP	Justice of the Peace / Justice of the Peace Reports
KB	Law Reports: King's Bench Division
LIL Rep	Lloyd's List Reports
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports

MLJ	Malayan Law Journal
NLJ	New Law Journal
PAM	Pertubuhan Arkitek Malaysia
QB	Law Reports: Queen's Bench Division
SC	Session Cases
SCR	Supreme Court Reporter
TOL	Temporary Occupation Licence
TLR	Times Law Report
WLR	Weekly Law Report

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Chapter 1

Introduction



CHAPTER 1

INTRODUCTION

1.1 Background Studies

The contract is normally a massive and complex document.¹ The word ‘contract’ in a legal sense refers to an agreement between two or more parties that is legally binding between them: in the words of section 2(h) of the Contracts Act 1950 (Act 136) (hereinafter called the Contracts Act), it is an agreement enforceable by law’. The nucleus of all contracts is an agreement, that is to say, all contracts must be built upon an agreement although not all agreements are automatically contracts. Some agreements are not contracts (i.e. the contracts are void) because they lack certain essential elements, e.g. certainty, free consent, etc.²

Like other ordinary contracts, construction contracts are created when two parties, either between employers and contractors, contractors and suppliers, or other

¹ Simon, M.S., “Construction Contracts And Claims.” (London: McGraw-Hill Book Company, 1979), pp. 61

² Vohrah, B. & Wu, Min Aun, “The Commercial Law of Malaysia.” (Malaysia: Longman, 2004), pp. 6.

combinations, mutually agree to a transaction. This mutual agreement must apply to all significant, or “material”, aspects of the arrangement. For instance, if an employer and a contractor agree that the contractor will perform certain construction work and be paid by the employer, but they fail to establish a price, a contract has not yet been created. But once the basic ingredients of the transaction have been agreed upon, a “contract” exists.³

When two parties create a contract that is to be completely binding, they must have agreed freely, such that a condition known as *consensus ad idem*⁴, exist between them. An agreement may outwardly appear to satisfy all the requirements of a valid contract, but on closer examination the minds of the contracting parties are poles apart in respect of the terms of the contract. Such lack of genuineness can be due to mistake, misrepresentation, duress or undue influence.⁵

The lack of genuineness may lead a construction contract to become void or voidable. The commonest categories of void contracts are contracts affected by mistake and illegality, and the majority of voidable contracts arise as a consequence of misrepresentation. Meanwhile, illegality as well may affect a contract in being as well as its formation.⁶ In accordance with Ashworth (1986), a void contract creates no legal rights and cannot therefore be sued upon; while a contract is said to be voidable when only one of the parties may take advantage.⁷

³ Jervis B. M. & Levin P., “Construction Law Principles And Practice.” (New York: McGraw-Hill, 1988), pp. 1.

⁴ A maxim that means the agreement by contracting parties to identical terms that is necessary for the formation of a legally binding contract. [As per Martin E. A., “Oxford Dictionary of Law.” 5th Edition. (UK: Oxford University Press, 2003), pp. 105].

⁵ Seel, C., “Contractual Procedures For Building Students.” (London: Holt, Rinehart & Winston, 1984), pp. 19.

⁶ Wallace, D., “Hudson’s Building and Engineering Contract.” 10th Edition. (London: Sweet & Maxwell, 1970), pp. 25.

⁷ Ashworth, A. “Contractual Procedures In The Construction Industry.” (London: Longman, 1986), pp. 13.

1.2 Problem Statement

Notwithstanding the fact that an agreement may have been reached which satisfies the legal requirements as to the form and manner of its conclusion, in certain circumstances such an agreement will be unenforceable as a contract because it is either void or voidable.⁸

As defined by Seel (1984), void contract is a type of contract which, even though it is not prohibited by law, is devoid of legal effect. No contract exists at all due to a lack of essential requirements. It cannot be enforced and no person can take any rights under it.⁹ Meanwhile, if a contract is voidable, there is a contract valid until such time as one of the parties takes steps to have it set aside. However, the right to have it set aside may be lost by delay, or by conduct affirming the contract, or by some innocent stranger to the contract acquiring rights or title to property under it.¹⁰

Thus, in construction industry, for instance, where there is a contract for the sale of materials between a contractor and a supplier, which is void, no title to the materials passes from the supplier to the contractor and accordingly the contractor cannot, in general, pass any title in the materials to a third party, say an employer, from whom they can be recovered. If, however, such a contract is only voidable, then title to the materials does pass and only reverts when the contract is avoided. If, before steps are taken to avoid the contract, the contractor resells the materials, he passes a good title to a purchaser without notice of the defect of title, and it is then too late to avoid the original contract.¹¹

⁸ Wallace, D., "Hudson's Building and Engineering Contract." 10th Edition. (London: Sweet & Maxwell, 1970), pp. 24.

⁹ Seel, C., "Contractual Procedures For Building Students." (London: Holt, Rinehart & Winston, 1984), pp. 212.

¹⁰ Wallace, D., "Hudson's Building and Engineering Contract." 10th Edition. (London: Sweet & Maxwell, 1970), pp. 24.

¹¹ *Ibid.*

According to Sweet (2000), it is difficult to determine the validity and voidability of a contract in the construction industry. There are circumstances which can cause a construction contract to become void or voidable, and those circumstances may not be easy to be determined. For example, as raised by Seel (1984), an employer perhaps may face a situation where in a project for foundation work, in the mistaken belief that the subsoil of the site had insufficient bearing capacity for the building he desires to erect, he signs a contract for piles to be driven. After the work has begun, can he avoid the contract for mistake when he discovers his error? Will the employer's position be changed if he discovers his error before the work has begun? Is this contract void, voidable or valid?

In view of the above, it is necessary for the parties to the contracts in this industry, especially the employers and the contractors, to have a complete understanding to the concept of void and voidable contracts in order for them to know clearly what circumstances may render a construction contract void or voidable.

1.3 Objective of Research

From the problem statement above, the following is the objective of the study: -

1. To identify the **circumstances** which cause a construction contract to become void or voidable.

1.4 Scope of Research

The following are the scope for this study: -

1. Only construction cases will be discussed in the study.
2. The study only examines the contracts between employers and contractors, contractors and sub-contractors, and contractors and suppliers.

1.5 Importance of Research

The importance of this study is to give an approach of the circumstances that lead construction contracts to become void or voidable. Through this study, the parties to the contracts in construction industry may able to have a more complete understanding to the concept and their legal positions in a void or voidable contract.

1.6 Research Process And Methods Of Approach

This research was carried out through the following process and method (see Figure 1.1): -

1.6.1 Initial Study

Firstly, during the initial study stage, initial literature review was done in order to obtain the overview of the concept of this topic. At the same time, discussions with supervisors, lecturers, as well as course mates, were held so that more ideas and knowledge relating to the topic could be collected. Afterward, the objective and scope of the research was fixed. Also a research outline was prepared based on the objective and scope.

1.6.2 Data And Information Collection

Collection of relevant data and information was started in this stage. The sources are mainly consisting of books, journals, Malayan Law Journal, seminar papers, etc. All collected data and information were recorded systematically.

1.6.2.1 Primary Data

Primary data collected was mainly from Malayan Law Journal, Building Law Report and other law journals. It was collected through the LexisNexis law database. All the cases relating to the research were then collected. Next, those cases were sorted according to different fields such as construction contract cases, cases relating to land matters, etc. Important cases were used for analysis at the later stage.

1.6.2.2 Secondary Data

Sources of secondary data consist of books, act, articles and seminar papers. These sources are important to complete the literature review chapter.

(a) Books

Books relating to construction laws and contract laws were read to know in depth the theories relating to the research field.

(b) Seminar Papers And Articles

Seminar papers and articles were the sources to strengthen the theories found in books.

(c) Act

Act is an important source to support the analysis done. Act used is the Contracts Act.

1.6.3 Analysis

In this stage, all the collected data, information, ideas, opinions and comments were arranged, analysed and also interpreted. This stage has streamlined the process of writing of the paper.

1.6.4 Completion

The last stage of the research process mainly involved the writing up and checking of the writing. Conclusion and recommendations were made based on the findings during the stage of analysis.

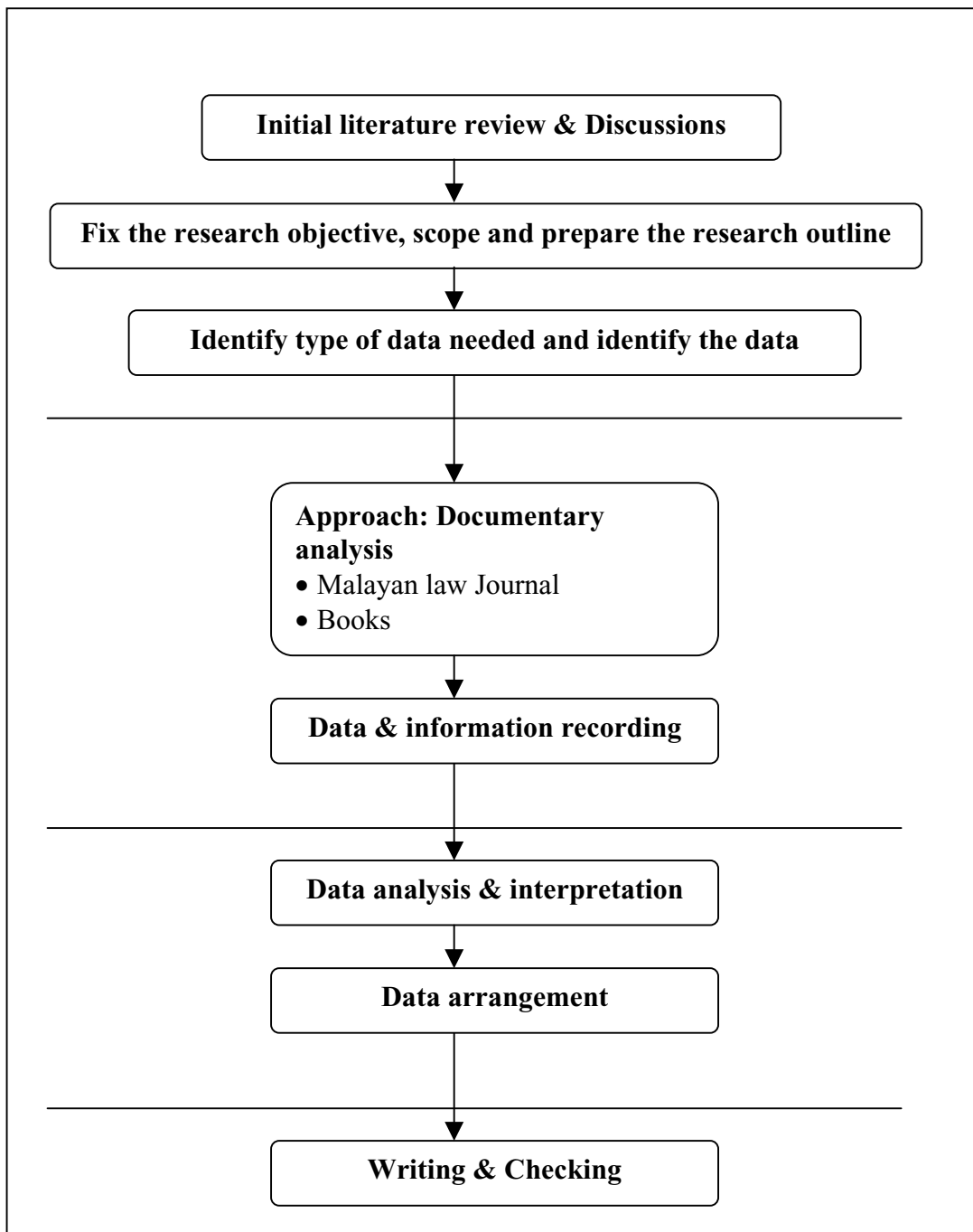


Figure 1.1: Research Process and Methods of Approach

Chapter 2

Voidable Contracts

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