MUTUAL TERMINATION OF CONTRACT IN CONSTRUCTION PROJECTS

AWANG MUHAMAD BIN HJ. JAMBOL

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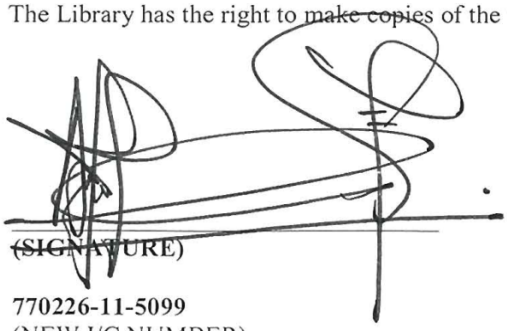

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MUTUAL TERMINATION OF CONTRACT IN CONSTRUCTION PROJECTS

AWANG MUHAMAD BIN HJ. JAMBOL

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

Faculty of Built Environment
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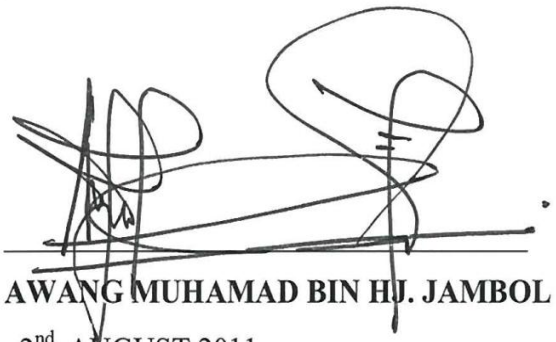
Signature : 

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To my beloved Wife, Sons and Mother,

Sister and Brother,

and Family.

Thank you for your support, guidance and everything.

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Awang Muhamad bin Hj. Jambol
August, 2011

ABSTRACT

In the present climate where the construction industry is facing an unprecedented rise in the cost of construction materials, the issue of termination is sometimes foremost on the minds of the contracting parties, especially contractors who have not properly estimated the costs during a project lifecycle. Introduction of the mutual termination clause is intended for use by the parties to an existing contract who may wish to terminate the contract and release each other from the contract. Under this form, the original contract is terminated and the parties enter into a mutual release of the contract as well as of any claims that may be pending by one party against the other. Under the Contract Act 1950, the contract may be discharged by mutual consent of contracting parties according to clause 63 and 64 of the Act. A contract may be discharged by an agreement that it shall no longer bind either party. As it is their agreement which binds the parties, so by their agreement they may be loosed from the contractual tie. Mutual termination agreement unequivocally stated that the parties agreed to a mutual termination subject to the terms and conditions set out therein. The effect of this is that the principle contract is thereby rescinded and the parties thereon are bound by the terms and conditions of the mutual termination agreement. Henceforth, if any claim should arise between the parties it is governed by the mutual termination agreement and not by the principle contract which had expressly been rescinded by mutual consent. A termination by mutual consent is an agreement between employer and the contractor to cease work under the contract. Even though in the mutual termination agreement it is clearly stated that the contractor is not entitled or shall not make any claim or demand for any payment, loss, damages, compensation or whatsoever against the client, however in certain circumstances, the disputes still arise and need to be brought to the court for final judgement.

ABSTRAK

Dalam situasi masa kini, dimana industri pembinaan mengalami kenaikan terhadap harga bahan binaan utama, isu penamatan menjadi keutamaan di dalam pemikiran pihak-pihak yang berkontrak terutamanya kepada kontraktor yang telah tidak membuat anggaran kos yang terperinci dan tepat semasa pelaksanaan projek. Pengenalan kepada fasal penamatan secara bersama adalah bertujuan untuk kegunaan oleh pihak-pihak berkontrak yang berhasrat untuk menamatkan dan melepaskan mereka daripada ikatan kontrak. Dibawah fasal ini, kontrak induk akan ditamatkan dan pihak yang berkontrak tersebut perlu secara bersama melepaskan mereka disamping itu segala tuntutan yang mungkin timbul ditangguhkan oleh pihak yang berkenaan. Di bawah Akta Kontrak 1950, suatu kontrak boleh ditamatkan secara persetujuan bersama oleh pihak yang berkontrak selaras dengan fasal 63 dan 64 Akta tersebut. Kontrak boleh ditamatkan secara perjanjian dan ianya tidak lagi mengikat diantara satu pihak dengan pihak yang lain. Sebagaimana dengan perjanjian yang telah mengikat pihak berkenaan, maka dengan perjanjian juga mereka boleh melepaskan daripada ikatan kontrak. Perjanjian penamatan bersama dengan jelas menyatakan bahawa pihak-pihak adalah bersetuju kepada perjanjian penamatan bersama tertakluk kepada terma dan syarat-syarat yang dinyatakan di dalamnya. Kesan daripada itu, ialah kontrak induk akan terbatal dan pihak-pihak adalah terikat dengan terma dan syarat-syarat yang dinyatakan di dalam perjanjian penamatan bersama tersebut. Maka, jika terdapat sebarang tuntutan diantara pihak berkenaan ianya hendaklah selaras dengan perjanjian penamatan bersama dan bukannya di bawah kontrak induk yang mana ianya telahpun dibatalkan secara bersama. Penamatan secara persetujuan bersama ialah perjanjian diantara majikan dan kontraktor untuk memberhentikan kerja di bawah kontrak. Walaupun, di dalam perjanjian penamatan secara bersama dinyatakan dengan jelas bahawa kontraktor tidak layak atau tidak boleh mengemukakan sebarang tuntutan atau permohonan bagi bayaran, kehilangan, kerosakan, pampasan atau yang seumpama denganya terhadap majikan, bagaimanapun dalam keadaaan tertentu pertelingkahan masih lagi timbul dan ianya perlu dibawa kepada mahkamah untuk mendapatkan pengadilan.

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LIST OF ABBREVIATIONS

AC	-	Appeal Cases
AIR	-	All India Reports
Bing	-	Bingham Reports
BLR	-	British Law Reports
CIDB	-	Construction Development Industry Board
Con LR	-	Construction Law Reports
ISM	-	Institute of Surveyor Malaysia
MBAM	-	Master Builders Association Malaysia
MC	-	Malayan Cases
MLJ	-	Malaysia Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Work Department
UTM	-	Universiti Teknologi Malaysia
JKR	-	Jabatan Kerja Raya
LPT2	-	Lebuhraya Pantai Timur Fasa 2
PKJ	-	Package
RM	-	Ringgit Malaysia
SPP	-	Surat Pekeliling Perbendaharaan
KM	-	Kilometre
S.O	-	Superintending Officer
BQ	-	Bill of Quantities
CH	-	Chainage
LLM	-	Lembaga Lebuhraya Malaysia
Resp	-	Respondent
VOP	-	Variation in Price
LAD	-	Liquidated Ascertain Damages

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Chapter 1
INTRODUCTION

CHAPTER 1

INTRODUCTION

1.1 Background of Study

In the current economic climate, many construction projects face unforeseen challenges to completion. Participants in such projects would be well advised to consider the legal and economic implications of termination of the project and the related contracts[1]

The construction industry may experience a slowdown for the rest of the year given the recent increase in fuel and building material prices since the government raised the price of fuel by 41 per cent on June 5, 2008. Construction costs have gone up at all levels of the value chain from building materials such as sand, cement, concrete and roofing materials to logistics (Tan Sri Jamilus Hussein, 2008)[2].

[1] CA (Joe) Davis, Daniel R. Smith (2010) *Legal Issues in Construction Contract Termination*, University of Texas
[2] *Fuel price rise likely to hit building sector*, News Strait Times, June 25, 2008

During the month of November 2009, a total of 254 projects contributing to a combined value of RM2.1 billion were recorded as at 31 December 2009. This was an improvement of 26.4% in terms of number of projects awarded, and 4.1% in terms of project value, compared with those recorded during the same period in 2008.[3]

Since the fuel price hike, the sector has seen an average increase of 30 per cent per sq inch of space, house prices may also increase between 25 per cent and 30 per cent and projects under the Ninth Malaysia Plan may not reach their targets. Some of the contractors had rejected letters of award for construction jobs because there was no profit to be made due to the high price of building materials (Datuk Osman Abu Bakar, 2008)[4].

Among the solutions, the government can compensate the contractors on the cost difference, especially on steel and cement costs. Projects can also be staggered and lengthened periodically such as awarding 30 projects a year instead of 50 a year so that demand for building materials can stabilise and prices can soften. Helping contractors will also benefit the government in the long run because the infrastructure and amenities are for the people (Datuk Osman Abu Bakar, 2008).[5]

The government has introduced Treasury's Instruction namely "*Surat Pekeliling Perbendaharaan (SPP) Bilangan 3 Tahun 2008*" by the Ministry Of Finance Malaysia in August 2008. One of the contents in the instruction is about "Mutual Termination" stated that "*if the contractors unable to continue the project due to increasing of construction material price, the contractor is given option to apply for mutual termination of contract*."[6].

[3] *Fuel price rise likely to hit building sector*, News Strait Times, June 25, 2008, Ibid.
[4] News Strait Times, June 25, 2008, Ibid.
[5] News Strait Times, June 25, 2008, Ibid.
[6] SPP Bil.3/2008, *Pelaksanaan Syarat Perubahan Harga Di Dalam Kontrak Kerja*, August 6, 2008

In April 2005, the RM2.6 billion Double Track Railway project from Rawang to Ipoh with length of 180KM had been terminated based on mutual agreement between contractor DRB-Hicom and the government.[7]

According to Works Minister, the RM3.7 billion Second Phase East Coast Highway project linking Jabor in Pahang and Kampung Gemuroh in Kuala Terengganu had been terminated for six (6) packages based on mutual agreement for the benefit of all the parties involved and the continuation of the project.[8]

Even though standard forms of construction contract have several reasons listed under the provided clauses which allow the employer or the contractor to terminate the contract but, the mutual termination of contract is not included in the condition of contract to the standard forms of construction contract. However, under the Contract Act 1950, the contract may be discharged by mutual consent of contracting parties according to clause 63 and 64 of the Contract Act 1950.[9]

A contract may be discharged by an agreement that it shall no longer bind either party. As it is their agreement which binds the parties, so by their agreement they may be loosed from the contractual tie. To render an agreement effective as a discharge it must be a valid agreement. Such an agreement must be accompanied by all the elements such as mutual intention, consent by parties, and parties having capacity.[10]

In the English case of ***Foster v Dawber [1851]6 Exch.839***, it was held that '*it is competent for both parties to an executor contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed*

[7]Johardy Ibrahim (2005), *DRB-Hicom : Landasan Berkembar Diserahkan Sukarela*, Utusan Malaysia, May 16, 2005
[8] (2010), *Cost of highway go up by 15%*, New Straits Times, August 3, 2010
[9] Contract Act 1950 (Act 136), International Law Book Services, 2010
[10] Handbook Of The Law Of Contracts, WM L. Clark. Jr.

contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment'. The agreement to discharge must therefore be under seal, or be supported by some other consideration on the part of the person seeking to be released.[11]

Meanwhile, in the case of ***Morris v Barron & Co. (1918) AC.1***, it was held that *'after signed the mutual termination agreement, parties are no longer bound by the sub-contract'*.[12]

Introduction of the mutual termination clause is intended for use by the parties to an existing contract who may wish to terminate the contract and release each other from the contract. It is designed for use either by individual parties or by a corporation or other entity. Under this form, the original contract is terminated and the parties enter into a mutual release of the contract as well as of any claims that may be pending by one party against the other.[13]

1.2 Problem Statement

The construction industry is a complex industry with many parties involved in its process and operations, often brought together to work for a particular project. Due to its multi-faceted nature and involvement of numerous parties, disputes are often inevitable. One common dispute in the construction industry is the issue of 'determination' of the Contractor's employment or termination of the contract by the Employer or the Contractor itself.[14]

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[11] J.Beatson, *Anson's Law Of Contract, 28th Edition*, Oxford University Press, April 2, 2002, Page 516.
[12] http://www.lawofcontract.co.uk
[13] http://www.lawofcontract.co.uk/termination and release
[14] MBAM Article : *Construction Contract & Management Issues*, Master Builder Journal, Vol.3, 2010

One of the common problems in the construction industry which often has serious implication on the project and the parties concerned is the determination of the Contractor's employment under the contract or termination of the construction contract. The Contractor's employment can be determined or a construction contract can be terminated by an express term in the contract such as determination/termination clauses, or termination at common law.[15]

The general contract law relating to the release of the parties from being bound by their contractual duties is called *'discharge of contract'.* Standard forms of construction contract have several clauses that relate to termination of the contracts. However they normally use the term 'determination of the contractor's employment under the contract'. A normal determination clause sets out the reasons, the procedure and the effects of the exercise of right of determination by both parties.

Most construction contracts whether in bespoke forms or standard forms of contract, would normally incorporate an express provision and/or clause, setting out the parties' rights and remedies in the event of determination of the Contractor's employment or termination of the contract. Clauses 25 and 26 of PAM 2006 Standard Form of Building Contract provide for the determination of the Contractor's employment by the Employer and the determination of its own employment by the Contractor, respectively. Similarly, Clauses 44 and 45 of CIDB 2000 Standard Form of Contract for Building Works provide for determination by the Employer and determination by the Contractor, respectively. In PWD Form 203 (Rev.2007), Clauses 51, 52 and 53 respectively provide for termination by the Employer, as follows;

- based upon events and consequences of default by the Contractor;
- on national interest; and
- on corruption, respectively.

[15] MBAM Article, Vol.3, 2010, Ibid

It is to be noted that although PWD Forms only provide for termination of contract, they envisage the procedures, mechanisms and forms of recovery and remedies to be within the contract, and not outside the contract. There is no express provision for termination by the Contractor hence any termination by the Contractor can only be done at law, unless the disputing parties agree to a mutual termination.

The right to terminate is both important and practical as it helps to ensure the contract is performed as agreed. It also helps to form the basis upon which parties may renegotiate with each other if their contractual relationship encounters difficulties.[16]

The decision to terminate, either by the contractor or employer, should not be taken in circumstances where there is a minor breach or no breach at all (convenience). The decision to terminate should only be exercised in the event of a major breach or an incident occurring which is the fault of neither party e.g. events constituting *force majeure*.

In the present climate where the construction industry is facing an unprecedented rise in the cost of construction materials, the issue of termination is sometimes foremost on the minds of the contracting parties, especially contractors who have not properly estimated the costs during a project lifecycle.[17]

In recent experience, it is suggested that notwithstanding contractual agreement on the price of materials, contractors sometimes threaten termination based on some other pretext and given the current scarcity of available contractors with capacity to resource projects.

[16] Omar Al Saadoon & Eric Teo, *Coping with termination*, Master Builder Article, 4th quarter 2008
[17] Master Builder Article, 4th quarter 2008, Ibid.

A contractor may sometimes, due to certain reasons such as increase of wages, material price, etc., requests an employer to increase payment or to renegotiate, which is higher than the price agreed in the contract between them. This contractor is asking the employer to enter into a new contract with him with a new consideration for him (i.e. the increased payment). However, the employer has a right not to accept such offer. If the employer is forced to enter into the new contract under the contractor's threat to terminate the original contract, the new contract will be voidable at the option of the employers. This is provided in section 15 of the Contracts Act 1950, which covers economic duress. Mocatta J. in the case of ***North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd & Anor***[18] held, *inter alia*, that the defendant's threat to break the contract without any legal justification unless the plaintiffs increased their payments by 10% did amount to duress in the form of economic pressure and, accordingly, the agreement of June 1973 was a voidable contract which the plaintiffs could either affirm or avoid.[19]

Also, in an earlier and well-known American case of ***Watkins v. Carrick***,[20] the contractor contracted to carry out excavation work but unexpectedly struck solid rock. He refused to proceed unless he was paid extra. It was held that the contractor was not entitled for the additional payment. Furthermore, the court also held that the contractor had given no consideration for the employer's promise of additional payment. Consideration for the employer might exist if the contractor provides the employer with a genuine practical benefit, or there is uncertainty whether or not an item of work falls within the original contract.[21]

The contractor in this circumstance is committing an economic duress upon the employer and subsequently inducing a new contract. Hence, if a contractor refuses to proceed with work unless he is paid at a higher rate than that previously agreed, the employer is entitled to refuse payment except at the originally agreed

[18] [1979] 1 QB 705; [1979] 3 WLR. 419 Queens Bench Division
[19] Yow Kah Lun, (2006). *Voidable And Void Construction Contracts*, Master Thesis, Universiti Teknologi Malaysia, Skudai, Pg.71
[20] Watkins v. Carrig, 91 N.H. 459 (N.H. 1941)
[21] Yow Kah Lun (2006). Ibid. Pg. 72

rate, and even avoid the contract. Moreover, if no consideration is given by the contractor to the employer in such situation, the new contract is void, as provided in section 26 of the Contracts Act.[22]

According to John Wong, termination that is often termed to be a taboo among the players in the construction industry owing to the severity of the consequences arising from it. Common words such as determination or forfeiture are termed as synonymous to termination. Briefly, termination of contract takes place at a point in time in the course of a contract period when a legally binding contract is brought to an end before it has been discharged by performance due to the acts of one or both parties.[23]

Mutual termination agreement unequivocally stated that the parties agreed to a mutual termination subject to the terms and conditions set out therein. The effect of this is that the principle contract is thereby rescinded and the parties thereon are bound by the terms and conditions of the mutual termination agreement. Henceforth, if any claim should arise between the parties it is governed by the mutual termination agreement and not by the principle contract which had expressly been rescinded by mutual consent.

In other words, after having signed the mutual termination agreement the parties are no longer bound by the principle contract and hence no action can be brought on the principle contract. With reference to the case of ***Morris v Barron & Co. (1918) AC.1***, it was held that *'after signed the mutual termination agreement, parties are no longer bound by the sub-contract'*.[24]

[22] Yow Kah Lun (2006). Ibid. Pg. 73
[23] John Wong. (2005), *Terminated or be Terminated*. The Malaysian Surveyor. 39.1, Pg.12
[24] http://www.lawofcontract.co.uk

A termination by mutual consent is an agreement between employer and the contractor to cease work under the contract. Such a termination would be used in a situation where mutual problems make it undesirable to continue the work, but in which assessing responsibility to either party would not be fair or reasonable under the circumstances. There usually will not be a clear indication of failure on the part of either party, and thus a payment by one party to the other to cover the costs of termination is generally not appropriate.[25]

Even though in the mutual termination agreement it is clearly stated that the contractor is not entitled or shall not make any claim or demand for any payment, loss, damages, compensation or whatsoever against the client, however in certain circumstances, the disputes still arise and need to be brought to the court for final judgement.

Payment issues are always the factor of disputes between the employer and the contractor. What are the most frequent disputes associated with the mutual termination of contract in construction project? What are the positions especially concerning the value of work done performed under the principle contract before its termination, the performance bond, the advance payment bond, material on site and also loss and expense when the contract would be mutually terminated?

Therefore, this study will focus on the process and procedure of the termination contract by mutual agreement and also to identify the most frequent disputes associated with the mutual termination of contract in construction project and its solution based on cases which have been referred to the court.

[25] Bonneville Purchasing Instructions, (2007) *Contract Termination*, Transmittal 07-2, Pg.20-2

1.3 Objective

The objectives of this study are;

1) To determine the process and procedure for termination of contract by mutual agreement in construction projects.

2) To identify the most frequent disputes associated with the mutual termination of contract in construction project and its solutions.

1.4 Limitation of Research

There are not many cases either in Malaysia and England that have dealt with the mutual termination of contract in construction contract.

1.5 Scope Of Study

The scope of this study focused on the interpretation aspects of the mutual termination of contract in construction projects. In order to achieve the objective, this study will deal with the projects that have been mutually terminated. Six (6) packages of the Second Phase East Coast Expressway Project which had been mutually terminated have been chosen as project case studies.

This study also has been conducted based on Contract Act 1950, and relevant standard form of construction contract in Malaysia, mainly PWD 203A (Rev. 2007) standard forms of contract for public project used in Malaysia together with other relevant Acts available.

1.6 Significance Of Study

This research is very important as the findings will act as a guideline to the parties in the construction project mainly to the client and the contractor which may face business difficulties due to termination.

Thus, this research perhaps would contribute towards enhancement of knowledge of the contracting parties by shedding some information and knowledge regarding their rights.

1.7 Research Methodology

In order to achieve the research objectives, a systematic process of conducting this study had been organised. Basically, the process of this research consists of five (5) major stages, which involve identifying the research issue, literature review, data collection, data analysis, conclusion and recommendation.

1.7.1 Stage 1 : Identifying The Research Issues

The first stage of research involves initial study, which is discussion with friends and lecturers regarding the research topic and initial literature review to get an idea of the research issue. The objective and scope of the research will be determined after the initial study and the outline will be prepared in order to identify the type and sources of data related to the research.

1.7.2 Stage 2 : Literature Review

After the research issue and objectives have been identified, various documentation and literature review regarding to the research field will be collected to achieve the research objectives. Generally, secondary data is collected from the latest reading materials in printing form such as books, journals, research papers, reports, newspapers as well as from the internet. It is important to identify trends and developments over time in construction industry, as well as the general state of knowledge concerning the subject area of termination of contract such as background, definition, procedures, relevant events and etc.

1.7.3 Stage 3 : Data Collection

The 3rd stage of research process is data collection which is consists of primary data and secondary data.

1.7.3.1 Primary Data

Primary data have been collected mainly through documentary analysis from Malayan Law Journal, Construction Law Report and other law journals through the LexisNexis law database via UTM library electronic database and current law journal online database. The cases relating to the research matter have been collected and only important cases have been used for the analysis at the final stage.

In order to achieve research objective, primary data also will be collected through the process of interviews. This technique hopefully will help in obtaining information in actual basis. The respondent will come from professional in the construction industry such as government officers who involved in the construction project, consultants, contractors and others construction professionals.

1.7.3.2 Secondary Data

Secondary data is data obtain from research done by third parties other than the author. Sources secondary data consists of books, articles, journal, and seminar papers. These sources are important to complete the literature review. The data also will be collected from the relevant Acts, Treasury Instruction, and Standard forms of contract.

In summary, the methodology of this research adopts from literature review together with the conduction of the semi-structured interviews with various construction professional involved in the construction project.

1.7.4 Stage 4 : Research Analysis

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

1.7.5 Stage 5 : Conclusion and Recommendations

In the last stage, the author will review the whole process of the study with the intention to identify whether the research objectives have been achieved. After presenting the research findings, further research will be suggested.

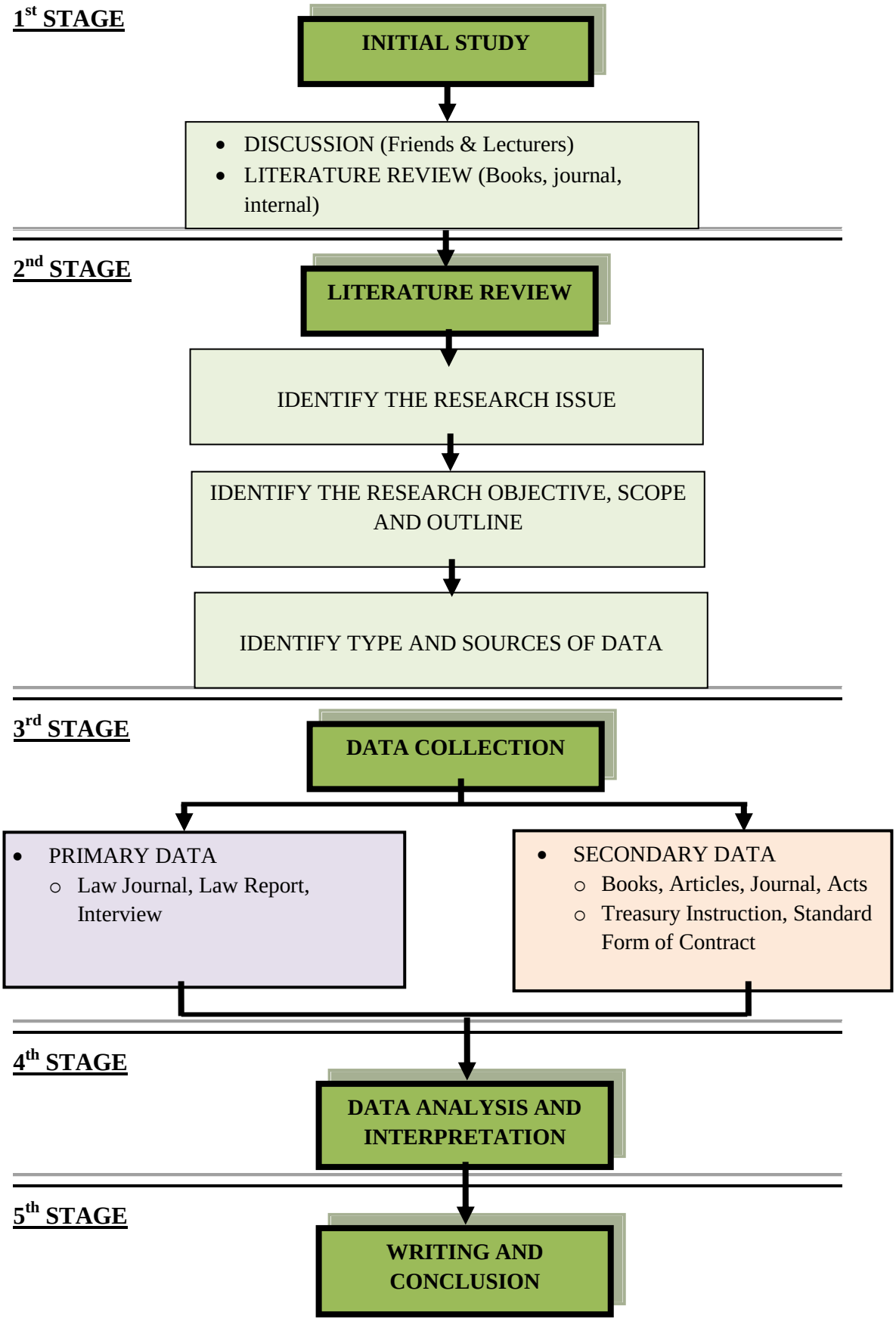

Figure 1.1 – Research Methodology Flowchart

1.8 Conclusion

As a conclusion, in order to achieve the research objectives, a systematic process and methodology of study shall be determine and identified in early stage. A researcher need to focus and conducted the study based on an appropriate method.

Thus, a study on mutual termination of contract in construction projects hopefully will benefit to the contracting parties in the construction industry as a guideline and references in the future.

Chapter 2
DISCHARGE OF CONTRACT

CHAPTER 2

DISCHARGE OF CONTRACT

2.1 Introduction

A "contract" is any agreement between two or more parties which creates an obligation to perform or refrain from performing some act. Acceptance of a purchase order constitutes a contract.[26]

An agreement is an act in the law, whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them.[27] Such declaration may consist of;

(a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or

(b) a proposal made by some or one of them, and accepted by the others or other of them."

[26] State Procurement Manual, *Contract Cancellation And Termination Procedures*, 1997, Pg.1
[27] Anson, Cont (4th Ed.) 3

Agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons. There must be a meeting of two minds in one and the same intention. From the very nature of agreement the first essential is the consent of the parties. There must be a meeting of two minds in one and the same intention. In the absence of this element there can be no agreement, and, therefore, no contract.[28]

"Cancellation" occurs when either party ends a contract for breach by the other. The cancelling party retains any remedy for breach of the whole contract or any unperformed balance. When one party violates the term and condition of a contract, the other party has the right to cancel. The entire contract may be rolled back, payments previously made may be refunded, and any remaining obligations are immediately ended.[29]

"Termination" occurs when either party ends a contract other than for a breach. Any parts of a contract that already have been completed will be left alone, but obligations for the future, not yet performed, will cease.[30]

In generally, what is termination or discharge of contract? Briefly, termination of contract takes place at a point in time in the course of the contract period when a legally binding contract period is brought to an end before it has been discharged by performance due to the acts of one or both parties.[31]

According to the Oxford Advanced Learner's Dictionary, the word 'termination' was explained as the act of ending something.[32]

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[28] http://chestofbooks.com/business/law/Handbook-Law-Of-Contracts/Discharge-Of-Contract-By-Agreement.html

[29] State Procurement Manual, *Contract Cancellation And Termination Procedures*, 1997, Ibid. Pg.1

[30] State Procurement Manual, Ibid. Pg.1

[31] John Wong. (2005). Terminated or be Terminated. *The Malaysian Surveyor*. 39.1. Page 12

[32] Wehmeier, S. [2000]. Oxford Advanced Learner's Dictionary of Current English. Sixth Edition. Oxford University Press. New York

2.2 Discharge of Contract

Rights and duties under contract are created by principles of contract. Parties are bound to perform their respective duties under the contract. Parties may release themselves from their duties by principles of contract as well. Those principles are collectively called 'discharge of contract' principles.[33]

Discharge of a valid contract involves the process under which the primary (performance) obligations come to an end. Discharge of a valid contract should be distinguished from termination of an invalid contract, as with *Mistake & Restraint of Trade* where the agreement is deemed to be void. In such instances no obligations can be said to have existed whereas in the case of a valid contract the primary obligations cease but the contract may remain in existence and give rise to the secondary obligations to pay damages.[34]

Essentially, there are four (4) types of discharge of contract:

1) Performance.

2) Agreement.

3) Frustration.

4) Breach of contract

[33] Jamaludin Yaakob, Lecture Notes, *Discharge of Contract*, 2010
[34] Discharge of Contract – *Performance*, *Breach*, *Frustration*, Law 231 L 08, Page.1,from http://www.chriswallis.com/uni/cnlaw231l08.pdf

2.2.1 Discharge of Contract in Malaysian Contract Act 1950

When a contract is terminated, it is said to be discharged and the contracting parties are free from further obligations arising from it. A contract may be discharged by any one of the following ways:[35]

1. By performance

2. By impossibility or frustration

3. By breach

4. By consent or agreement between the parties

2.2.2 Discharge of Contract in Common Law

The common law right to terminate or 'repudiate' a contract can arise in either of two situations. First, one party may make clear that it has no intention of performing its side of the bargain. Secondly, that party may be guilty of such a serious breach of contract that it will be treated as having no intention of performing. A breach of this kind is known as a '*repudiatory breach*'. In both cases, the innocent party has a choice; either to 'affirm' the contract and hold the other party to its obligations (while claiming damages as appropriate for the breach), or to bring the

[35] Beatrix Vohrah & Wu Min Aun. [2010]. "*The Commercial Law Of Malaysia*", 2nd Edition. Malaysia: Pearson Malaysia Sdn Bhd. pg 151.

contract to an end. If repudiation is opted for, then both parties are released from any further contractual obligation to perform.[36]

A contract may be determined before completion in common law or by the exercise of express rights set out in the contract itself. In the latter case, the determination clause often seeks to improve on the common law rights of the parties by giving grounds for determination which would not entitle one party to determine at common law. Most determination clauses also specify the rights and obligations of the parties following the exercise of the power of determination, and leave the common law rights of the parties intact.[37]

By contrast, many building contracts make provision for 'termination of the contractor's employment' in specified circumstances. Not all of these circumstances amount to sufficiently serious breaches of contract to justify termination. Indeed, some of them are not breaches at all. Such clauses normally lay down procedures (the giving notice and so on), which must be followed if the termination is to be effective. They also deal with the consequences, financial and otherwise, of the termination. Most importantly, while common law termination brings the contract to an end altogether, the contractual remedy of termination only terminates the contractor's right and obligation to carry out the contract works, but does not release the parties from any further obligation.[38]

This point is of some significance since, where the ground of determination is not one which would be treated as repudiator at common law, it has been held that the party determining is entitled only to such remedy as the contract itself specifically provides. In the case of ***Thomas Feather & Co. (Bradford) Ltd* v *Keighley Corporation (1953) 53 LGR 30*** in which a local authority contract

[36] John Murdoch, And Will Hughes. (2008). *Construction Contracts: Law And Management*. Fourth Edition. Taylor & Francis.London. Pg 332
[37] Tay Lee Yong, (2006). *Determination Of Contract By Employer In Construction Industry*, Master Thesis, Universiti Teknologi Malaysia, Skudai, Pg.14
[38] John Murdoch, And Will Hughes. (2008). Fourth Edition. Ibid. Pg 332

provided that, in the event of unauthorized sub-contracting, the authority could either terminate the contractor's employment or claim £100 liquidated damages. When the contractor breached this provision, the local authority gave notice of termination, engaged another contractor to complete the works and then claimed against the original contractor for the extra cost incurred (a total of some £21,000). However, it was held that, since the contractor's breach would not have justified termination of the contract at common law, the local authority was limited to those remedies specifically given by the contract. These did not include unliquidated damages, and so the local Authority's claim failed.[39]

Under common law, there are several ways to discharge the contract. There are;

(i) Discharge by frustration,

(ii) Discharge by repudiation,

(iii) Discharge by breach, and

(iv) Discharge by agreement.

[39] John Murdoch, And Will Hughes. (2008). *Construction Contracts: Law And Management*. Fourth Edition. Taylor & Francis.London. Ibid, Pg 333.

2.3 Discharge of Contract by Mutual Agreement

As it is their agreement which binds the parties, so by their agreement they may be loosed from the contractual tie. It is scarcely necessary to say that to render an agreement effective as a discharge it must be a valid agreement; and, to be so, it must be accompanied by all the elements, such as communication of mutual intention, real consent, parties having capacity and so on.

A contract may be discharged by an express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract.[40]

2.3.1 Discharge of Contract by Agreement as Stated in Contract Act 1950

A contract that is created by consent can be extinguished by consent, expressed or implied. The consent of all parties to the contract is necessary. Expressed consent may be given at the time of the contract or subsequently. For instance, the parties may agree at the time of making the contract that on the occurrence of an event, one or more parties will be discharged. Consent given subsequent to the contract may be a waiver, release, novation, remission or rescission.[41]

Section 63 and 64 of the Contract Act 1950 provide for the discharge of the contracts by consent. Section 63 deals with the effects of novation, rescission and alteration, and read as follows:

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[40] John Murdoch, And Will Hughes. [2008]. Fourth Edition. Ibid. Pg 334.
[41] Beatrix Vohrah & Wu Min Aun. [2010], Ibid. Pg.163

"If the parties to a contract agree to substitute a new contract for it, to rescind or alter it, the original contract need not be performed".

Novation is the substitution of a new contract for an earlier one, particularly a contract between a creditor, a debtor and a third party whereby they agree to substitute a third party for the debtor or creditor under the original contract which will be discharged. This is illuminated in Illustration which reads:

"A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth C as his debtor, instead of A. the old debt of A to B is at an end, and a new debt from C to B has been contracted".

The consideration for a new arrangement is the mutual discharge of the original contract, and consent of all parties is secured. Illustration demonstrates the need for such consent, and reads as follows:

"A owes B RM1,000 under a contract. B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the arrangement. B still owes C RM1,000, and no new contract has been entered into".

An executory contract may be rescinded by the consent of all parties to the contract. In a contract for the sale of goods, a buyer and a seller may agree to rescind the contract at any time before delivery of the goods or the payment of the price. This is not the same as the right of a party to rescind a contract when the other party failed to fulfill his obligations under it. Rescission for cause also gives the party rescinding it the right to receive damages for breach of contract. Suppose that X promises to deliver certain goods to B on a particular day and fails to carry out that promise. B may rescind the contract for breach without prejudice to his rights to compensation.

Section 64 deals with remission of performance and read as follows:

> *"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit".*[42]

In ***Pan Ah Ba & Anor v Nanyang Construction Sdn Bhd (1969) 2 MLJ 181***, the Federal Court allowed the estate of a deceased who had entered into a contract with the respondent company for the purchase of land and premises, to recover the deposit paid on the grounds that the respondent's letter to be deceased was a dispensation within the meaning of section 64. Azmi L.P., relying on the decision of the Privy Council in ***Chunna Mal Ram Nath v Mool Chand (1928)55 IA 154***, a case on appeal from India on a provision in *pari material* with section 64, stated that to constitute a dispensation, 'neither consideration nor an agreement is necessary provided of course that is clear from the evidence that the promisee had so dispensed with the performance of the promise by a voluntary conscious act and it must be an affirmative act on his part'.[43]

2.3.2 Discharge of Contract by Agreement in Common Law

An existing contract may always be brought to an end by a later contract between the parties, but the law is both complex and technical. The safest and simplest way of doing this is to enter into the new contract *under seal*, whether or not the original contract was so made.[44]

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[42] Contract Act 1950, Ibid. Sec.64
[43] Beatrix Vohrah & Wu Min Aun. [2010], Ibid. Pg.165
[44] Powell-Smith, V and Sims, J. [1987]. Ibid. Pg 18

As a matter of strict law, it is not necessary to do this where both parties still have obligations to perform under the original contract, which will normally be the case. In such an instance each party agrees to release his contractual rights in consideration of a release by the other party so that each is giving up something of value. This is called 'bilateral discharge', and the new contract will be enforceable even if it is made orally or in writing and not under seal.[45]

Where one party has fulfilled all his obligations under the original contract but the other has not, e.g. where a contractor has carried out the work but the employer has not paid for it, release will only be effective if executed under seal or if valuable consideration is given for the release. The latter is called 'accord and satisfaction'. In construction contracts problems can arise where, for example, the contractor agrees to accept less than full payment for the work he has done and the work is in no way defective.[46]

The sort of difficulties that can arise are shown by the case of ***D. & C. Builders Ltd v Rees [1966] 2 All ER 837***. The plaintiff building contractors carried out work for the defendant for which the defendant did not pay. Being in dire financial straits, the plaintiff was persuaded by the defendant's wife to accept a smaller sum than was due and to give a receipt which was stated to be 'in completion of the account'. It was held, on a preliminary issue, that the plaintiff was entitled to sue for the balance of the money as the alleged discharge was unenforceable since there was arguably no valid consideration and, in the words of Lord Denning MR, 'the debtor's wife held the creditor to ransom'.

His Lordship said:

> *'The creditor is barred from his legal rights only where it would be inequitable for him to insist on them. Where there has been a true record,*

[45] Powell-Smith, V and Sims, J. [1987]. Ibid. Pg.30
[46] Ibid. Pg. 30

under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. Buy he is not bound unless there has been truly an accord between them.'

Settlement by a lesser sum than that due would, it is suggested, be valid and binding if there was a genuine dispute as to whether the work was defective and therefore worth less than the contract price.[47]

2.4 Forms of Discharge by Agreement

Contract rests on the agreement of the parties. As it is their agreement which binds them, so by their agreement they may be discharged. This mode of discharge may occur in one of four ways;[48]

(a) By release under seal,

(b) By accord and satisfaction,

(c) By rescission of a contract which is still executor or

(d) By the operation of some provision contained in the contract itself.

[47]Powell-Smith, V and Sims, J. [1987]. Ibid. Pg.30
[48] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 516

2.4.1 Release Under Seal

The right to performance of a contract can be abandoned by release under seal. If a sealed instrument is employed, it is immaterial that the contract has been executed on one side, for the seal dispenses with the need for consideration. A release not under seal requires consideration. The agreement is then discharged by accord and satisfaction. A release is construed in the same way as any other contract. In ***B.C.C.I.S.A. v Ali [2001] 2 WLR734***, it has been held that a general release could not be interpreted as covering rights which the parties had no idea existed. In that case, Lord Hoffmann said, '*it did not release rights to stigma damages which the law did not recognize at the time of the release'*.[49]

2.4.2 Accord and Satisfaction

Discharge of a contract in return for a consideration which consists in some satisfaction other than the performance of the original obligation is termed 'accord and satisfaction'. Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.[50]

[49] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 517
[50] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 518

2.4.3 Rescission of a Contract

There are various mode of rescission to discharge of contract as follows;

2.4.3.1 By Agreement

A contract which is executor on both side may be discharged by agreement between the parties that it shall no longer bind them. This effect a rescission of the contract, and it release the parties from their obligation under it. Such an agreement is formed of mutual promises, and the consideration for each promise of each party is the abandonment by the other of its right under the contract.[51]

2.4.3.2 Abandonment

The Court can infer from a long period of delay or inactivity that the parties have agreed to abandon their contract. It must be shown that one party conducted itself in such a way that the other party reasonably assumed that it was agreed that the contract was abandoned. Court have come close to inferring an offer to abandon a contract from mere silence, although some overt act is almost always likely to be required. In the case of arbitration, legislation now gives arbitrators the power to dismiss a claim for want of prosecution irrespective of whether the arbitration contract has been abandoned.[52]

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[51] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 519
[52] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 519

2.4.3.3 Substituted Contract

Rescission of a contract may also take place by such an alteration in its terms as substitutes a new contract for the old one. The old contract may be expressly discharged in the new one, or discharge may be implied by the introduction of new terms or new parties. This method of discharge is therefore a form of rescission with a new contract superadded.[53] An example of discharge of a contract by the substitution of new terms is provided by ***Morris v. Baron & Co [1918] A.C.1***.

In the case of ***Morris v Baron***, a dispute had arisen out of a contract for the sale of cloth and an action had been begun. Before the case came on for trial the parties made an oral arrangement of which the chief terms were that the action and counterclaim were to be withdrawn, an extension of credit was to be given to the buyer for a sum admittedly due from him under the old contract, and as regards the balance of goods contracted for but undelivered, there was to be substituted for a firm contract of sale an option for the buyer to take them if he pleased. The House of Lords held that in these circumstances it must be concluded that the parties had agreed to abrogate the old contract and substitute a new one for it.

Similarly, the introduction of new parties may impliedly rescind an existing contract and substitute a new one for it.[54] Illustration reads as follows:

> *'...suppose A has entered into a contract with B and C, and that B and C agree among themselves that C shall retire from the contract and cease to be liable upon it. A may of course insist upon the continued liability of C but if A continues to deal with B after becoming aware of the retirement of C, A's conduct will probably justify the inference that a new contract to accept the sole liability of B has been made, and A cannot then hold C to the original contract.*

[53] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 519
[54] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 520

2.4.3.4 Provisions for Discharge Contained in the Contract Itself

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination or termination in certain circumstances. Apart from the statutory protection given to those dealing on the other party's standard terms and to consumers, and the power of the Court to give equitable relief against forfeiture, there is no requirement that a party act reasonably when deciding to exercise a contractual power to terminate. The party may expressly provide that, upon the happening of a certain event, either the contract shall *ipso facto* determine, or that, on the occurrence of that event, one party is to have the option to cancel the contract.[55]

2.5 Types of Discharge By Agreement

Discharge by agreement or consent may be by express or implied agreement or consent.[56] Types of discharge of contract by agreement or consent are as follows;

(i) Novation

(ii) Rescission

(iii) Alteration

(iv) Remission

(v) Waiver

(vi) Merger

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[55] J. Beatson [2002], "*Anson's Law of Contract*", Ibid. Pg 527

[56] Mr. Alexander D. Samuel, *Discharge of Contract*, Merchantile Law : http://220.227.161.86/16817 Discharge.pdf, Pg.11

2.5.1 Novation

Novation takes place when;

(i) A new contract is substituted for an existing one between the same parties, or

(ii) A contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party.

Novation should takes place before expiry of the time of the performance of the original contract. If it does not, there would be a breach of the contract. If a new contract is subsequently substituted for the existing contract, it would only be to adjust the remedial rights arising out of the breach of the old contract. If for any reason the new contract cannot be enforced, the parties can fall back upon the old contract.[57]

2.5.2 Rescission of a Contract

Rescission of a contract takes place when the parties to a contract may decide that they will forget the contract and will not bring a new contract into existence to replace it. A promise not to demand performance from each other becomes the mutual consideration for discharge of contract. It may be noted that if the parties do

[57] Mr. Alexander D. Samuel, *Discharge of Contract.* Ibid.

not take steps towards performance of a contract for a long time, this will amount to the abandonment of the contract and will bring about its implied rescission.[58]

The agreement to mutually rescind the contract may take place either before its breach by a party or after its breach.

2.5.3 Alteration

Alteration of a contract may take place when one or more of the terms or the contract is/are altered by the mutual consent of the parties to the contract. In such a case, the old contract is discharged.[59]

Differences between novation and alteration;

(i) In novation, the change in the existing contract is substantial, and in alteration it is less than that.

(ii) In novation parties may change but in alteration they would remain the same.

[58] Mr. Alexander D. Samuel, *Discharge of Contract.* Ibid.
[59] Ibid.

2.5.4 Remission

Remission means acceptance of a lesser fulfillment of the promise made. For example, acceptance of lesser sum than what was contracted for, in discharge of the whole of the debt. It is not necessary that there must be some consideration for the remission of the part of the debt. It also allows the promisee to dispense with or remit the performance of the promise by the promisor, or to extend the time for performance or to accept any other satisfaction instead of performance. The one-sided of concession of remission is given under a mutual agreement between the parties.[60]

2.5.5 Waiver

Waiver is called if the same one-sided concession is given by a unilateral declaration of renunciation. Normally, waiver is not a method of discharge by mutual agreement.[61]

2.5.6 Merger

Merger takes place when an inferior rights accruing to a party under contract merger into a superior rights accruing to the same party under the same or some other contract.[62]

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[60] Mr. Alexander D. Samuel, *Discharge of Contract.* Ibid.
[61] Ibid.
[62] Ibid.

2.6 The Practical/Procedural Approach in Dealing Issues/Disputes In Relation with Mutual Termination of Construction Contract

Disputes between a contractor or a construction company and a customer are all too common. Disputes often arise out of delays in getting the work done, unsatisfactory work, or a customer's failure to make payments. Construction-related disputes can consume a lot of time and money on the part of everyone involved.[63]

The issues arising in relation to mutual termination of contract for this study have been identified through the semi-structure interview conducted. As a result, the identified issues have been described as the following;

(i) Disputes in determining the final measurement / calculation of the final quantities;

In PWD 203A (Rev. 2007) under clause 26.4, it is stated that the Bills of Quantities, shall be deemed to have been prepared in accordance with the principles of the Standard Method of Measurement of Building Works as Published by the Institution of Surveyors Malaysia (ISM) or Civil Engineering Method of Measurement published by Institution of Civil Engineers (London) or Method of Measurement as set out in Bill of Quantities.[64]

However, if a contract has been mutually terminated, the measurement of the works executed by the contractor shall be measured in accordance with clause 54.1 of the PWD 203A (Rev. 2007).[65]

[63] http://www.sally-fitch.com/CM/FSDP/PracticeCenter/Real-Estate/Construction-Law.asp
[64] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 26.4, Pg.19
[65] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 54.14, Pg.36

Clause 54.1 stated that, if the contract is terminated the amount to be paid shall be the following;[66]

(a) The value of all work carried out up to the date of termination.

(b) The amounts payable in respect of any preliminary items so far as the Work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed.

(c) The cost of materials or goods reasonably ordered for the Works which have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Government upon such payment being made to the contractor),

(d) A sum being the amount of any expenditure reasonably incurred by the Contractor in the expectation of completing the whole of the Works in so far as such expenditure has not been recovered by any other payments referred to in this sub-clause,

(e) The reasonable cost of any protection works and removal of equipment and site facilities pursuant to termination as provided under the contract.

[66] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 54.14, Pg.36

(a) Final Measurement of Preliminaries Item

According to PWD 203A (Rev. 2007) under clause 54(b) with regard to the mutual termination of contract, the amounts payable in respect of any preliminary items so far as the Work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed.[67]

The mutual termination agreement stated that, the Contractor is entitled for payment for the preliminary items or completed under the Principal Contract prior to the date of signing of the Supplemental Agreement.

(b) Final Measurement / Calculation of Builder's Work

Builder's works shall mean Contract Sum less Prime Cost, Provisional Sum and contingencies (if any).[68]

Where the quantities of Works are stated as "provisional" in the Bill of Quantities, such quantities are the estimated quantities which shall not be taken as the actual and correct quantities of Works to be executed by the Contractor. On completion of the work, the quantities shall be ascertained by re-measurement of the works as it is actually executed and valued.[69]

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[67] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 54(b), Pg.36
[68] Special Provisions To The Conditions Of Contract, *Advance Payment On `Works' Contract*
[69] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 26.6, Pg.19

According to mutual termination of agreement, the Contractor is entitled for payment for the Works done or completed works under the Principal Contract up to the date of termination.

(ii) Materials on Site

Material on site is defined in the standard form of contract PWD 203A (Rev. 2007) under clause 20.0 which mean unfixed materials and goods delivered to, placed on or adjacent to the Site and intended for incorporation therein, shall not be removed except for use upon the Works, unless the S.O. has consented in writing to such removal. Where the S.O. has included the value of such materials or goods in any interim certificate, under which the contractor has received payment, such materials and goods shall become the property of the Government, but the contractor shall remain responsible for loss or damage to the same.[70]

However, in accordance with the mutual termination of agreement, the Contractor shall within two weeks from the date of signing of the Agreement, remove its goods and unfixed materials which have not been paid by the Government, as specified by the S.O.

[70] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 20, Pg.14

*(iii) **Performance Bond***

Under PWD 203A (2007) clause 13, the contractor shall deposit with the Government a Performance Bond or Performance Guarantee Sum in favour of the Government for a sum equivalent to five percent (5%) of the total Contract Sum to secure the due performance of the obligations under the contract by the contractor.[71] Notwithstanding anything contained in the contract, the Government shall be entitled at any time to call upon the Performance Bond, wholly or partially, in the event that the contractor fails to perform or fulfil its obligations under the contract. Meanwhile, clause 13.6 stated that, in the event that the contract is terminated, the said Performance Bond or any balance thereof shall be forfeited.[72]

A performance bond is a bond giving security for the carrying out of a contract, where a bond is a deed by which one person (the obligator) commits himself to another (the obligee) to do something or refrain from doing something (Martin, 2003). In construction contracts, 'performance bond' is a bond taken out by the contractor, usually with a bank or insurance company (in return for payment of a premium), for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event of the contractor's default, repudiation or insolvency (Robinson et al. 1996).

Rekhraj J in the case of ***Lotterworld Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor [1998] 7 MLJ 105*** stated that the purpose of performance bond in the construction industry is to perform the role of an effective safeguards against non-performance, inadequate performance or delayed performance and its production provides a security as readily available to be realized, when the prescribed event occurs, simply

[71] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 13, Pg.9
[72] Standard Form of Contract, *PWD 203A (Rev. 2007)* clause 13.6, Pg.10

failing to complete the work which had been contracted to carry out. Therefore, it is to provide the employer with some financial security in the form of a cash payable by the bank for the contractor's failure to perform his obligation under the construction contract.

There are two types of performance bonds, as set out below;

a) ***Conditional bond or default bond*** – a default bond is a contract of guarantee whereby the surety accepts 'joint and several' responsibility for the performance of the contractor's obligations under the building contract. The contractor remains primarily liable for his performance and is not protected by the bond.

b) ***Unconditional bond or on-demand bond*** – an on-demand bond is a covenant by the surety (usually a bank) to indemnify the employer following the contractor's default, subject to stated terms and up to a stated percentage sum of the main contract sum. The contractor is not a party to this arrangement.

Referring to the mutual termination agreement, the Government shall be entitled to forfeit fifty percent of the value of the Performance Bond under the Principal Contract or the Performance Sum Guarantee or recover the same amount by deducting from any money due or to become due to the Contractor failing which such deductions shall be recovered as a debt against the Contractor as the case may be and the Contractor shall not in any way question or dispute the said claim against the Performance Bond or the Performance Sum Guarantee or the said claim as a debt.

(iv) <u>Advance Payment Bond</u>

The advance payment is paid to the Contractor upon application from him together with a bank or insurance guarantee for the amount of advance to be paid, and provided that he has returned the Letter of Acceptance duly signed and witnessed, and submitted the Performance Bond and the requisite insurance policies required by the Contract.

Advance payment bond is a bond guaranteeing the repayment of advance or 'mobilisation' payments made to a contractor. This kind of bond is a common feature in building contracts where the employer made advance payments to cover certain preliminaries. Repayments are made by way of deductions from the contractor's progress payment and the advance payment bond is required to secure the employer against non-repayment of the advance payment or its remainder.

The advance payment shall be recouped when the cumulative total value of the Builder's work executed and certified (including the amount certified for materials on site) in the Progress Payment Certificates reaches twenty five percent (25%) of the total contract value of the Builder's work, by way of a fixed percentage deduction from the total certified value of the Builder's work executed (including the amount certified for materials on site) during the period covered by a Progress Payment Certificate, in all the subsequent Progress Payment Certificates on the basis that the advance payment made shall be fully recovered in the Progress Payment Certificate in which the cumulative total certified value of the Builder's work executed (including the amount certified for materials on site) reaches seventy five percent (75%) of the total contract value of the Builder's work.[73]

[73] Special Provisions To The Conditions Of Contract, *Advance Payment On `Works' Contract*, Pg.1

The liability under the advance guarantee shall be terminated upon realization by the Government of the full sum of advance paid. However, if the full sum of the advance paid cannot be realized before the completion date of the Contract or any authorized extension thereof or in the case of the Contract being determined before the date of the determination, then the balance of the advance repayable to the Government shall be recovered from the advance guarantee.[74]

The Contractor shall repay the Advance Payment paid by the Government to the Contractor whether in whole/remaining sum. The Government shall have the right to immediately call on the Advance Payment bond given by the Contractor and the Contractor shall not in any way question or dispute Government's right to the Advance Payment Bond. The Government shall have the right to claim from the Contractor the amount owing as a debt due to the Government.

*(v) **Defective Works***

Defective works means works that were completed by the contractor but were found to be not in accordance with the contract.[75]

There are provisions in most standard form of building contracts requiring the rectification of residual defects by the contractor within a stipulated period after completion. Most such contracts also provide for the withholding of retention money until the expiry of the period, for release only

[74] Special Provisions To The Conditions Of Contract, *Advance Payment On `Works' Contract*, Pg.2
[75] JKR Malaysia, CKUB Website : http://rakan1.jkr.gov.my/ckub/a_main/images%5Cpdf%5C supplementary_agreement.pdf

when the contract administrator has certified his satisfaction that the works are finally in conformity with the contract.

The Contractor shall still be responsible and liable for whatever defect or default in relation or arising out of the Works done and/or design (if applicable) prior to the date of signing of Mutual Termination Agreement.

The Contractor shall carry out all the protection works so as to secure the Site, equipment, goods, materials therein against any deterioration, loss or damage and to do all things necessary to leave the Site in a clean and tidy condition.

2.7 Supplementary Agreement of Mutual Termination of Contract

A mutual termination agreement for construction project shall cover both parties interest either for the Government and also the Contractor. The government shall pays for the work done carried out by the contractor, and the contractor must fulfill his obligations as stated in the agreement and also responsible for the work done carried out in the site. Normally, the contents of the mutual termination agreement are listed in the Appendix 'A'.[76]

[76] JKR Malaysia, Cawangan Kontrak dan Ukur Bahan (CKUB)

2.8 Conclusion

The discharge or termination of a relationship can often come as a surprise causing both confusion and resentment. The discharge of a contract means when the parties are freed from such obligation.

Under the Contract Act 1950 and Common Law, there are various ways to discharge a contract such as discharged by breach, by performance, by frustration, by repudiation and also discharged by agreement.

A contract may be discharged by an agreement that it shall no longer bind either party. Contract rests on the agreement of the parties. As it is their agreement which binds them, so by their agreement they may be discharged. This mode of discharge may occur by release under seal, by accord and satisfaction, by rescission of a contract which is still executor or by the operation of some provision contained in the contract itself.

Chapter 3
RESEARCH METHODOLOGY

CHAPTER 3

RESEARCH METHODOLOGY

3.1 Introduction

Research is a process of collecting, analyzing and interpreting information to answer questions. But to qualify as research, the process must have certain characteristics such as it must as far as possible, be controlled, rigorous, systematic, valid and verifiable, empirical and critical.

This chapter provides an overview and brief discussion about the research methodology being used by the author in achieving the objectives of the research.

3.2 Research Methodology

Selecting the correct type from the different research methods can be a little daunting, at first. There are so many factors to take into account and evaluate. This

section outlines the methodology of the study by describing the research design, research location, research respondent, research instrument, data collection and finally the background of the case study.

3.2.1 *Research Design*

In order to complete the research, the author has identified and developed the appropriate research design for this research which include aspects such as purpose of study and type of investigation;

(i) Purpose of the study

(ii) Type of investigation

3.2.1.1 *Purpose of Study*

The type of study for this research is a descriptive study. Descriptive study is a scientific method which involves observing and describing the behavior of a subject without influencing it in anyway.

This study is conducted to identify the two (2) objectives. The first objective of this study is to determine the process and procedure for termination of contract by mutual agreement in construction project, and the second objective is to identify the most frequent disputes associated with the mutual termination of contract in construction project and its solutions based on cases which are referred to the court.

3.2.1.2 Type of Investigation

The type of investigation of this research is a correlation study. It is about identifying the crucial factors associated with the problem. In this research, it is to determine the appropriate process of mutual termination regarding to the mutual termination of contract and also to identify the disputes in relation with the mutual termination of contract.

3.2.2 Research Location

The location of the project chosen for the research was in Kuantan, state of Pahang and also in Kuala Terengganu, Terengganu Darul Iman. That is the East Coast Expressway Project linking Jabor in Kuantan to Kuala Terengganu. It was chosen because of the statement by Works Minister in New Straits Times dated August 3, 2010 stated that, the RM3.7 billion Second Phase East Coast Highway six (6) packages project linking Jabor in Pahang and Kampung Gemuroh in Kuala Terengganu had been terminated based on mutual agreement for the benefit of all the parties involved and the continuation of the project.[77] Apart of that, the other factor is also due to the easy accessibility of data because the researcher has been involved in the project.

[77] *Cost of highway go up by 15%*, New Straits Times, August 3, 2010

3.2.3 Respondents

The respondents for this research include the construction professional including JKR staff, Consultants and Contractor who have been involved in the project which had been mutually terminated. Due to restricted time six (6) packages of the project have been identified as case studies for this research. For each package of the project, two (2) respondents have been identified for the semi-structure interview purposes. The respondents were among various professional with different backgrounds.

3.2.4 Research Instruments

The construction of a research instrument or tool for data collection is the most important aspect of a research because the findings or conclusions is based upon the type of information collected, and the data collected is entirely dependent upon the questions asked from the respondents.

Semi-structured interviews were conducted for this research to obtain the data and information needed. The semi-structured interviews were conducted to identify and achieving the objectives of the research. Interviews were conducted with a number of professional involved in the construction project that had been mutually terminated.

Given the inherent challenge of conducting face-to-face interviews with individuals participating in construction project that has been mutually terminated, convenience sampling was used. In total, 12 interviews with construction professional were conducted. Each interview was approximately an hour in duration.

Besides that, the actual data also have been collected based on the mutually terminated six (6) packages of the project to be considered as case studies for the research.

Apart from that, data also have been collected through documentary analysis of court cases related to the research matter and it has been used for the analysis at the final stage.

3.2.5 Data Collection

In order to achieve the objectives of the research, the source of data collected are primary data and also secondary data.

The primary data are data collected specifically for the first and second objectives of this research which are to determine the process and procedure for termination of contract by mutual agreement in construction project and also to determine the disputes in relation to the mutual termination of contract.

The first type of primary data has been collected through interviews. This technique has helped to generate some ideas pertaining to the research in question. It was through the interviews which act as the preliminary survey, the salient issues in relation to the termination of contract by mutual agreement in the case study chosen have been identified. The discussions on the issues extracted from the preliminary interviews conducted have been generally discussed under Chapter 2 (under paragraph 2.6 page 35) Further discussion on the interview process is as deliberated in Chapter 4 of this dissertation.

The second type of primary data have been collected mainly through documentary analysis from Malayan Law Journal, Construction Law Report through the LexisNexis law database via UTM library electronic database and also current law journal online database. The cases related to the research matter have been collected and only important cases have been used for the analysis at the final stage.

The secondary data is a readily available data which have been collected to achieve the second objective of this research regarding the solutions to the disputes associated with the mutual termination of contract based on legal cases which have been referred to the court. The secondary data have been obtained from research done by third parties other than the author. Sources of secondary data consists of books, articles, journal, and seminar papers. These sources are important to complete the literature review. The data also have been collected from the relevant Acts, Treasury Instruction, and Standard forms of contract.

3.2.6 Project Case Studies

The selection of the project as case studies has been explained in paragraph 3.2.2. The sources for data of project for the case study have been collected from Pasukan Projek Lebuhraya Pantai Timur Fasa 2, JKR Malaysia in Kuala Terengganu. In general, the six (6) packages for the project that had been mutually terminated are as follows;

Package no. 1

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 1A: Dari Ch 0.00 (Ladang Jabor) Ke Ch 3750.00 (Felda Neram 1)] Daerah Kemaman, Terengganu Darul Iman.

Package no. 2

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 1B: Dari Ch 3,750 (Felda Neram Satu) Ke Ch 6,700 (Sg. Jabur)] Daerah Kemaman, Terengganu Darul Iman.

Package no. 3

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu (Pakej 11: Dari Ch+163,000 Ke Ch+168,900) Daerah Kuala Terenganu, Terengganu Darul Iman.

Package no. 4

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu (Pakej 2: Dari Ch+15100.00 Ke Ch+26100.00 Dan Persimpangan Bertingkat Ceneh Dalam Kawasan Ladang Ketengah Perwira) Daerah Kemaman, Terengganu Darul Iman.

Package no. 5

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 8: Dari Ch 85,000 (Felda Kertih 6, Peringkat 1) Ke Ch 91,800 (Felda Kertih 2, Peringkat 2)] Daerah Dungun, Terengganu Darul Iman.

Package no. 6

Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 9B: Dari Ch 102,500 Ke Ch 107,700 (Hutan Simpan Bukit Bauk) Daerah Dungun, Terengganu Darul Iman.

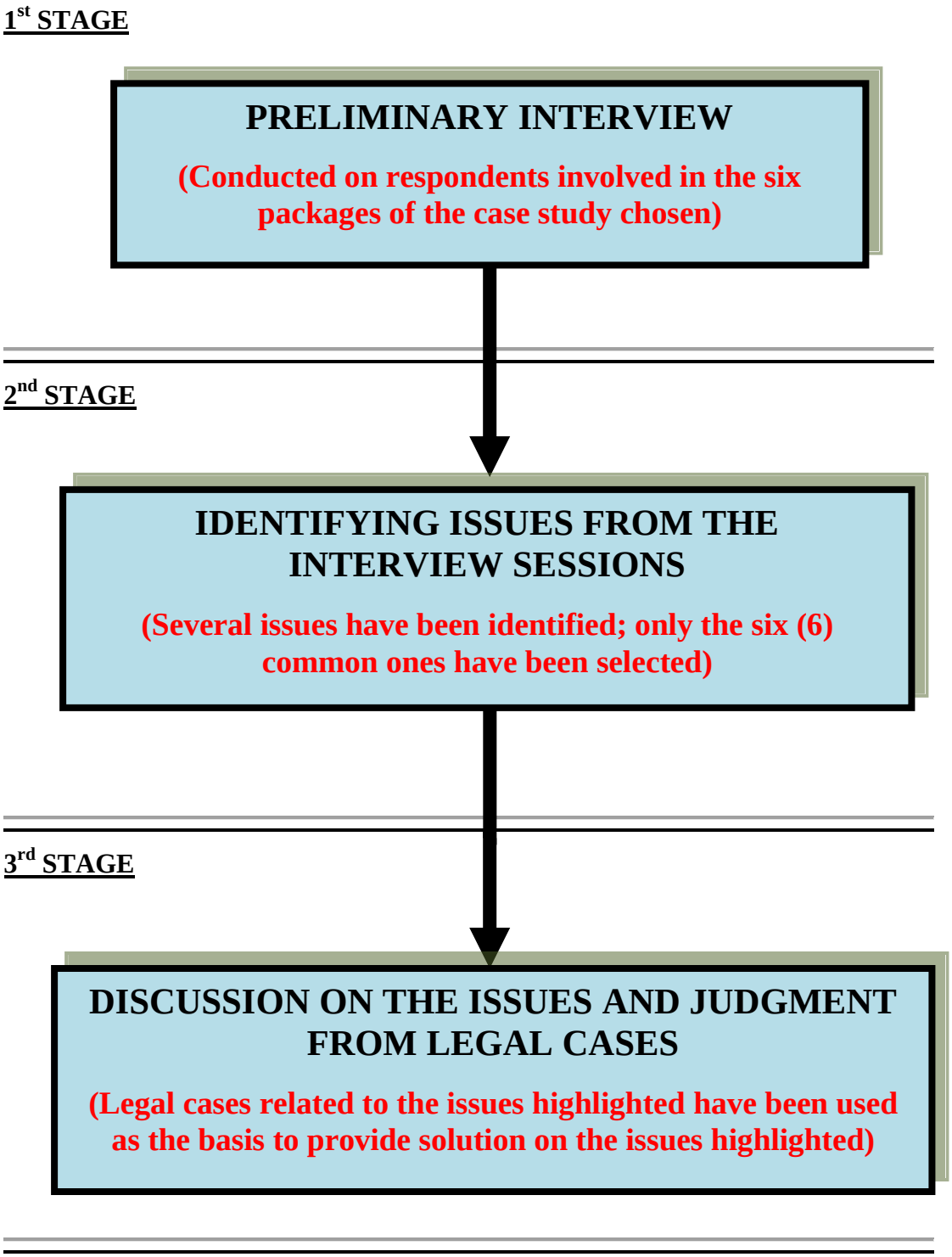

Figure 3.1 – Research Process Flowchart

3.3 Conclusion

As a conclusion, in achieving the objectives of this research, the author has adopted the most suitable and appropriate research methodology. The research methodologies of this research are divided into three (3) main methods. The methods are semi-structure interviews, case study on the six (6) packages of the identified project and also through documentary analysis of the relevant legal cases which have been referred to the court.

Chapter 4
RESEARCH ANALYSIS AND DISCUSSION

CHAPTER 4

RESEARCH ANALYSIS AND DISCUSSION

4.1 Introduction

This chapter will discuss about the research analysis done in achieving the decided research objectives as follows;

(a) First objective - to determine the process and procedure for termination of contract by mutual agreement in construction project, and

(b) Second objective - to identify the most frequent disputes associated with the mutual termination of contract in construction project and its solutions.

In order to achieve the objective of this study, the author has identified six (6) packages of a project that had been mutually terminated. Besides that, the author has

also identified the respondents who have been involved in the mutually terminated project in getting the data and information for this research. Twelve (12) respondents had been interviewed in March 2011 and they were fully supportive and very cooperative during the interview sessions. To get data and information relating to the solutions to the disputes based on cases which are referred to the court, the author collected cases from the Malayan Law Journal, Construction Law Report and other law journals through the LexisNexis law database via UTM library electronic database and current law journal online database. The cases relating to the research matter have been collected and only important cases have been used for the analysis at the final stage.

4.2 Background Of The Respondents

In getting the data and information, twelve (12) respondents had been interviewed in March 2011. They are from various professional backgrounds such as Engineer, Quantity Surveying, Consultant and Contractor who have been involved in the mutually terminated project.

From the analysis of the respondents, eight (8) persons of the twelve (12) persons or 67% are men, while four (4) or 33% of them are women. 50% or six (6) persons are employed as Quantity Surveyors, 42% or five (5) persons are Civil Engineers and the remaining 8% or one (1) person is a director of a construction company. Apart from that, 75% or nine (9) persons of the respondents are working in JKR, 17% or two (2) persons are working in Consultant Firm and 8% or one (1) person is working in a construction company.

The tables below shown the information on the respondents according to the packages of the project chosen as case study based on gender, position and organisation they are attached to.

1) Package no. 1 (LPT2 - Pkj. 1A)

		Gender	**Position**	**Organisation**
a)	Respondent No. 1	Male	Director	Contractor
b)	Respondent No. 2	Female	QS	JKR

Table No. 1 – Respondents information on package 1A project LPT2

2) Package no. 2 (LPT2 - Pkj. 1B)

		Gender	**Position**	**Organisation**
a)	Respondent No. 1	Male	Engineer	Consultant
b)	Respondent No. 2	Male	Engineer	JKR

Table No. 2 – Respondents information on package 1B project LPT2

3) Package no. 3 (LPT2 - Pkj. 2)

		Gender	**Position**	**Organisation**
a)	Respondent No. 1	Female	QS	Consultant
b)	Respondent No. 2	Male	Engineer	JKR

Table No. 3 – Respondents information on package 2 project LPT2

4) Package no. 4 (LPT2 - Pkj. 8)

		Gender	**Position**	**Organisation**
a)	Respondent No. 1	Female	QS	JKR
b)	Respondent No. 2	Male	QS	JKR

Table No. 4 – Respondents information on package 8 project LPT2

5) Package no. 5 (LPT2 - Pkj. 9B)

		Gender	Position	Organisation
a)	Respondent No. 1	Male	QS	JKR
b)	Respondent No. 2	Male	Engineer	JKR

Table No. 5 – Respondents information on package 9B project LPT2

6) Package no. 6 (LPT2 - Pkj. 11)

		Gender	Position	Organisation
a)	Respondent No. 1	Male	QS	JKR
b)	Respondent No. 2	Male	Engineer	JKR

Table No. 6 – Respondents information on package 11 project LPT2

Due to restricted time, the author has identified and chosen two (2) respondents for each package for project case study as a sample in getting data and information.

From the data collected, useful information in term of total numbers of the respondents and also the percentage were derived. The table below shown the results of the analysis of the respondents based on their gender, position and the organisation they represented.

RESULTS ANALYSIS

Item	Description		Respondent (nos)		Percentage (%)
(a)	No. of Respondents	=>	12		100%
(b)	Gender of Respondent				
	(i) Male	=>	8		67%
	(ii) Female	=>	4		33%
(c)	Position				
	(i) Director	=>	1		8%
	(ii) QS	=>	6		50%
	(iii) Engineer	=>	5		42%
(d)	Organisation				
	(i) JKR	=>	9		75%
	(ii) Consultant	=>	2		17%
	(iii) Contractor	=>	1		8%

Table No. 7 – Respondents result analysis for project case study

4.3 Background Of The Project

The proposed of the project East Coast Expressway Phase 2 (Lebuhraya Pantai Timur Fasa 2) in Terengganu is a continuation of the recently completed East Coast Expressway Phase 1 (Lebuhraya Pantai Timur Fasa 1) from Karak to Kuantan and together with the KL-Karak highway will form an expressway linking Kuala Terengganu and Kuala Lumpur. It transverses from Ladang Jabor in the south to Gemuroh Interchange in the north for a total distance of 190 km of which 127 km will be designed and implemented by JKR and the remainder by the LLM.

The Expressway shall be a high quality two (2) lane dual carriageway and furnished with a full range of facilities to benefit the traveling public with an emphasis on road safety and economical and ease of maintenance. The facilities provided includes rest and service areas, lay-byes for public and enforcement agencies, future toll plaza, emergency telephone services and provision of regional offices. It is envisage that the Expressway will spur the much anticipated development along its corridor in line with the Government's Vision 2020 policy.

The project is divided into sixteen (16) main packages. The project begun in 2005 with the first tender made in 2006 under JKR implementation. The last package was tendered in 2009. The method of obtaining tender for packages under JKR implementation were of Open Tender using JKR 203A (Rev.10/83) standard forms of contract. However, this project faced problems in completing the works because of several factors. Therefore, out of 16 packages of the contract, 6 packages was terminated based on mutual termination and need to be retendered for the benefit of the people.

So, this study focused on the 6 packages that have been mutually terminated to identify the problems and also disputes arising from the mutual termination itself. The data were gathered from the respondents through interview sessions conducted.

The data were then analysed and had been used to achieve the objectives of the study.

In general, the six (6) packages project that have been mutually terminated to be used in this study are as follows;

1) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 1A: Dari Ch 0.00 (Ladang Jabor) Ke Ch 3750.00 (Felda Neram 1)] Daerah Kemaman, Terengganu Darul Iman**.

   The information of the package as follows;

(a)	Original Contract Sum	=	RM47.57 Millions
(b)	Type of Tender	=	Open Tender
(c)	Date of Possesion of Site	=	01/01/2008
(d)	Original Completion Date	=	28/09/2009
(e)	Extended Completion Date	=	28/09/2010
(f)	Date of Mutual Termination	=	30/04/2010
(g)	Different Between Extended Date and Date of Mutual Termination	=	5 Months
(h)	Percentage of Work Completed Upon Mutual Termination	=	54%

2) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 1B: Dari Ch 3,750 (Felda Neram Satu) Ke Ch 6,700 (Sg. Jabur)] Daerah Kemaman, Terengganu Darul Iman**.

The information of the package as follows;

(a)	Original Contract Sum	=	RM40.76 Millions
(b)	Type of Tender	=	Open Tender
(c)	Date of Possesion of Site	=	03/02/2008
(d)	Original Completion Date	=	30/01/2010
(e)	Extended Completion Date	=	31/12/2010
(f)	Date of Mutual Termination	=	31/03/2010
(g)	Different Between Extended Date and Date of Mutual Termination	=	9 Months
(h)	Percentage of Work Completed Upon Mutual Termination	=	60%

3) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu (Pakej 11: Dari Ch+163,000 Ke Ch+168,900) Daerah Kuala Terenganu, Terengganu Darul Iman**.

The information of the package as follows;

(a)	Original Contract Sum	=	RM57.96 Millions

(b)	Type of Tender	=	Open Tender
(c)	Date of Possesion of Site	=	15/03/2006
(d)	Original Completion Date	=	13/11/2007
(e)	Extended Completion Date	=	31/08/2008
(f)	Date of Mutual Termination	=	17/10/2008
(g)	Different Between Extended Date and Date of Mutual Termination	=	+2 Months from extended completion date
(h)	Percentage of Work Completed Upon Mutual Termination	=	77%

4) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu (Pakej 2: Dari Ch+15100.00 Ke Ch+26100.00 Dan Persimpangan Bertingkat Ceneh Dalam Kawasan Ladang Ketengah Perwira) Daerah Kemaman, Terengganu Darul Iman**.

The information of the package as follows;

(a)	Original Contract Sum	=	RM191.06 Millions
(b)	Type of Tender	=	Open Tender
(c)	Date of Possesion of Site	=	01/09/2006
(d)	Original Completion Date	=	26/02/2009

(e) Extended Completion Date = 24/10/2009

(f) Date of Mutual Termination = 16/09/2009

(g) Different Between Extended Date and Date of Mutual Termination = 1 Months

(h) Percentage of Work Completed Upon Mutual Termination = 67%

5) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 8: Dari Ch 85,000 (Felda Kertih 6, Peringkat 1) Ke Ch 91,800 (Felda Kertih 2, Peringkat 2)] Daerah Dungun, Terengganu Darul Iman**.

The information of the package as follows;

(a) Original Contract Sum = RM50.82 Millions

(b) Type of Tender = Open Tender

(c) Date of Possesion of Site = 16/06/2007

(d) Original Completion Date = 12/06/2009

(e) Extended Completion Date = 24/06/2010

(f) Date of Mutual Termination = 26/11/2009

(g) Different Between Extended Date and Date of Mutual Termination = 7 Months

(h) Percentage of Work Completed Upon Mutual Termination = 40%

6) **Projek Lebuhraya Pantai Timur Fasa 2, Terengganu [Pakej 9B: Dari Ch 102,500 Ke Ch 107,700 (Hutan Simpan Bukit Bauk) Daerah Dungun, Terengganu Darul Iman**.

The information of the package as follows;

(a) Original Contract Sum = RM50.0 Millions

(b) Type of Tender = Open Tender

(c) Date of Possesion of Site = 01/09/2007

(d) Original Completion Date = 28/08/2009

(e) Extended Completion Date = 13/06/2010

(f) Date of Mutual Termination = 16/09/2009

(g) Different Between Extended Date and Date of Mutual Termination = 9 Months

(h) Percentage of Work Completed Upon Mutual Termination = 15%

OBJECTIVE NO. 1

4.4 To Determine the Process and Procedure for Termination of Contract by Mutual Agreement in Construction Projects.

Termination by mutual consent may be initiated by either party, by oral or written. However it is initiated, the Contract Administrator shall ensure that there is a mutual agreement to terminate before proceeding with the action. The Contract Administrator shall document the contract file with the reasons for the termination and the basis for the settlement. The settlement shall be documented as a contract modification, and shall include the information modified as appropriate to reflect partial or complete terminations such as:[78]

(1) The supplemental agreement modifies the contract to reflect a partial termination by mutual consent.

(2) The terminated portion of the contract.

(3) The Contractor unconditionally waives any claim against the employer arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of the employer to make further payments or to carry out any further undertakings under the terminated portion of the contract.

(4) The employer acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract.

[78] Bonneville Purchasing Instructions, (2007) *Contract Termination*, Transmittal 07-2, Pg.20-3

In 30 December 2010, Malaysia Government through Malaysian Finance Ministry had issued the circular namely Treasury Instruction No. 12/2010 in relation to the mutual termination of construction contract as a guideline and procedure for the public project. According to that circular, both parties either the government or the contractor may apply for the mutual termination of contract for the particular project. However, mutual termination of contract for public project will only be considered after the Contract Administrator confirm and ensure that the obligations of the contract cannot be performed after contract has been signed. Mutual termination of contract shall not be considered on the reasons of the contractor is unable to perform his obligations or the contractor was in breach of performing his contract obligations.

The Government had issued clear guideline in evaluating and makes consideration for allowing mutual termination. According to Treasury Instruction No. 12/2010, the mutual termination of contract will only be considered based on the criteria as follows;

(i) Continuously land acquisition problem for the whole or part of the project whereby will constitute to the incompletion of the project.

(ii) Financial allocation problem on the Government side, therefore the government will decided that the project will not resume.

(iii) Contract Administrator decided that the project cannot be implemented legally or physically after contract has been signed.

(iv) In line with the standard form of contract PWD 203A provisions to allow for mutual termination of contract as follows;

a) Force majeure clauses, if an event occurs by reasons of which either party is unable to perform any of its obligation under contract after contract has been signed and not because of breach of contract of either parties.

b) Suspension work order clauses, whereby the government have to give suspension work order for 12 months continuously on any particular reasons.

4.4.1 Steps the Process and Procedure of Termination of Contract by Mutual Agreement in Construction Project

In order to achieve the objective no.1 of the study, the author has conducted semi-structure interview to get the data and information about the process and procedure of mutual termination of contract in construction project identified as the case study. The respondents were the persons who have been involved in the project that have been mutually terminated.

The first step before mutual termination of contract can be evaluated and considered is that the contractor shall make application in writing stating his ground and reasons for the mutual termination.[79] This is a condition precedent for mutual termination and also in line to the guideline issued by the Government.[80]

[79] Interview, *Pengurus Besar Ukur Bahan*, Pasukan Projek LPT Fasa 2, Kuala Terengganu, 2011
[80] SPP Bil.3/2008, *Pelaksanaan Syarat Perubahan Harga Di Dalam Kontrak Kerja*, August 6, 2008

The table no.8 below show the results analysis of the respondents response on the mutual termination process of construction contract based on six (6) packages of the project case studies. Resp. 1 indicates Respondent 1 while Resp. 2 indicates Respondent 2 throughout the discussion for this part of the chapter. The numbers given in the boxes indicates the ranking steps of the mutual termination process.

RESULTS ANALYSIS

STEP	DESCRIPTION	Package no. 1 (P-1A)	Package no. 2 (P-1B)	Package no. 3 (P-2)	Package no. 4 (P-8)	Package no. 5 (P-9B)	Package no. 6 (P-11)	Ranking
Step 1	Written application by the contractor	1	1	1	1	1	1	1
Step 2	Evaluation /assessment by the S.O	2	2	2	2	2	2	2
Step 3	Preparation mutual termination agreement	3	3	3	3	3	3	3
Step 4	Approval/signature of the mutual termination agreement	4	4	4	4	4	4	4
Step 5	Implementation of mutual termination	5	5	5	5	5	5	5

Table No. 8 – Result analysis on the process and procedure of mutual termination of contract

From the analysis, it shown that every package for the project chosen as case study has the same process in relation with the mutual termination of contract. Firstly, the contractor shall apply in writing for the mutual termination of contract stating his reasons for consideration. Secondly, after he has received written application from the contractor, the Superintending Officer (S.O) of the project will do evaluation and assessment on that application. Then, thirdly a mutual termination of agreement will be prepared and signed by the contractor. Only authorized person (officer named in the appendix of the condition of the contract) is entitled to sign mutual termination of agreement. This mutual termination of agreement will be supplemental to the principle contract. The fourth steps, before the mutual termination of contract approved, the mutual termination of agreement shall be signed by the Officer named in the appendix of the condition of the contract. Only

then, the mutual termination of contract consider approved and readily to implemented.

However, based on the study carried out, the findings of the detail process and procedure of mutual termination of contract in construction projects will be elaborated as follows.

Steps 1 : Mutual Termination application

→ A contractor who has intention to terminate the contract by mutual consent shall apply in writing to the Superintending Officer. Based on analysis and according to the Treasury Instruction No. 12/2010, application for mutual termination in writing by the contractor is a condition precedent before the mutual termination will consider. Without application, the Superintending Officer will not evaluate and consider for mutual termination of contract for construction project. In the application, contractor is required to give good and relevant reasons in relation to the application of a mutual termination of contract.

Steps 2 : Evaluation/Assessment by the Superintending Officer

→ After the Superintending Officer has received the formal application for mutual termination from the contractor, the Superintending Officer must play his role to give fair consideration by evaluating and assessing the contractor application for mutual termination. The most important thing

is that, the application shall have good and relevant reasons for mutual termination. According to the Treasury Instruction No. 12/2010, if reason for mutual termination is contractor unable to perform his obligations or the contractor in breach of performing his contract obligations then that application shall not be considered.

Steps 3 : Preparing the Mutual Termination Agreement

→ The next step is the preparation of the mutual termination agreement. This mutual termination agreement is supplemental to the principle contract. Normally, this agreement is prepared by the experts in the legal practice. For project under Public Work Department, the mutual termination agreement is prepared by the legal advisor to Ministry of Work.

→ A mutual termination agreement shall consist of the relevant and appropriate clauses that need to protect both contracting parties. However, according to the Treasury Instruction No. 12/2010, there are various basic clauses that need to considered and inserted in the mutual termination agreement as follows;

- ❖ The contractor shall be responsible to the works carried out on the site.

- ❖ The contractor shall submit or return all the contract drawings for the project including the contract document to the government.

- ❖ Any payment to the contractor shall be proof and if payment is being made it shall be full and final settlement. Therefore, a contractor is not entitling to any other claims.

- ❖ The contractor shall repay the remaining sum of advance payment paid by the government to the contractor or to call on the Advance Payment bond given by the Contractor to the government.

Steps 4 : Approval of the Mutual Termination Agreement

→ Mutual termination agreement shall be signed by the contractor together with a witness. Only authorised person is entitled to sign the mutual termination agreement.

→ On the Government side, the person who is empowered to sign the mutual termination agreement is an Officer named in the appendix of the condition of contract. The mutual termination agreement will be only approved after the Officer signed the agreement together with a witness. Otherwise, the agreement is void and invalid.

Steps 5 : Implementation of the Mutual Termination Agreement

→ The mutual termination agreement can be only implemented after an Officer named in the appendix of the condition of contract signed the

agreement together with a witness. Normally, the date to enforce is the date of the Officer signed the agreement.

→ The Superintending Officer must play his role to ensure that the contractor is fulfilling the requirements and provisions stated in the agreement.

OBJECTIVE NO. 2

4.5 To Identify The Most Frequent Disputes Associated With The Mutual Termination Of Contract In Construction Project And Its Solutions.

Payments are always the factor of disputes between the employer and the contractor. What are the most frequent disputes associated with the mutual termination of contract in construction project? What are the positions especially with the value of work done performed under the principles of contract before its termination, the performance bond, the advance payment bond, material on site and also defective works when the contract would be mutually terminated?

In order to answer the above question, the author has conducted a semi-structure interview to identify the most frequent disputes associated with the mutual termination of contract in construction projects. Based on the analysis, the author has identified ten (10) issues of the disputes arising from the mutual termination of construction contract. Those issue identified in this research is based on case study of project that had been mutually terminated.

4.5.1 To Identify The Most Frequent Disputes Associated With The Mutual Termination Of Contract In Construction Projects

To identify the disputes in relation with the mutual termination of contract in construction project, data based on semi-structure interview were collected in March 2011. The findings of the study are shown as follows;

The table below shown the result analysis of the disputes / issues in relation to the mutual termination of construction contract based on the projects case study.

RESULTS ANALYSIS

	Disputes / Issues	**Package no. 1 (P-1A)**	**Package no. 2 (P-1B)**	**Package no. 3 (P-2)**	**Package no. 4 (P-8)**	**Package no. 5 (P-9B)**	**Package no. 6 (P-11)**		**Frequ-ency (no)**	**Perce-ntage (%)**
a)	Different method calculation of preliminaries item	2	2	2	2	2	0		10	83%
b)	Different method calculation of work done	2	2	2	2	2	0		10	83%
c)	Material on site - reject/keep it?	2	2	2	2	2	0		10	83%
d)	Performance bond - forfeited?	2	2	1	2	2	0		9	75%
e)	Remaining balance of advance payment	1	1	2	2	2	0		8	67%
f)	Repair defective work / remedial works	1	1	2	1	1	1		7	58%
g)	Different method calculation of VOP	0	0	1	1	1	0		3	25%
h)	Alternative design by contractor – responsibility	0	1	2	0	0	0		3	25%
i)	Approval/signatory of mutual termination agreement	0	0	1	0	0	0		1	8%
j)	Imposed LAD	0	0	0	0	0	1		1	8%

Table No. 9 – Result analysis of the disputes / issues of mutual termination of contract

From the above table no. 9, it shows the disputes / issues in relation with the mutual termination of contract. From the data collected, ten (10) disputes / issues had been identified. Eighty three percent (83%) or ten (10) persons of the respondents agreed that the issues (a) – different method calculation of preliminaries item, issue (b) – different method calculation of work done and issue (c) – material on site are the most frequent disputes / issues arose in relation of the mutual termination of contract. Seventy five percent (75%) of the issues arisen were on the performance bond. Sixty seven percent (67%) of the respondents agreed that the issue on the remaining balance of advance payment also arose in the project. Issue on defective work contributed fifty eight percent (58%). Issues on different method of calculation of VOP and alternative design by the contractor contributed twenty five percent (25%) and the remaining issues contributed eight percent (8%) are issues on approval of mutual termination of agreement and also LAD.

Due to restricted time, although from the result shown that there are ten (10) disputes/issues which have been identified but for this research a study on the disputes/issues in relation with the mutual termination of construction contract will be limited to the first six (6) highest ranking based on the percentage (%) only. Those six (6) issues that have been focused on getting the solutions of the disputes based on the law cases which are referred to the court in this research are shown in the following table.

	Disputes / Issues	Package no. 1 (P-1A)	Package no. 2 (P-1B)	Package no. 3 (P-2)	Package no. 4 (P-8)	Package no. 5 (P-9B)	Package no. 6 (P-11)		Frequ-ency (no)	Perce-ntage (%)
a)	Different method calculation of preliminaries item	2	2	2	2	2	0		10	83%
b)	Different method calculation of work done	2	2	2	2	2	0		10	83%
c)	Material on site - reject/keep it?	2	2	2	2	2	0		10	83%
d)	Performance bond - forfeited?	2	2	1	2	2	0		9	75%
e)	Remaining balance of advance payment	1	1	2	2	2	0		8	67%
f)	Repair defective work / remedial works	1	1	2	1	1	1		7	58%

Table No. 10 - First six (6) highest ranking of the disputes / issues based on percentage (%)

Only six (6) disputes / issues are selected based on the percentage of the highest ranking identified in the analysis of the data collected from the interview of the respondents. Those issues are shown as follows;

(1) Different method calculation of preliminaries items = 83%

(2) Different method calculation of work done = 83%

(3) Material on site = 83%

(4) Performance bond = 75%

(5) Remaining balance of Advance payment = 67%

(6) Defective works = 58%

4.5.2 To Identify Suggested Solutions To The Disputes Based On Decided Cases Which Have Been Referred To The Court

4.5.2.1 Preliminaries Item

(a) *Issue Arise*

According to the data gathered from the interviews conducted on the respondents, it shows that eighty three percent (83%) faced the problem to determine the appropriate calculation of preliminaries item for mutual termination project. There is different method of calculation of preliminaries items between the Superintending Officer's representative and the contractor.

(b) *Discussion on the Suggested Solution*

Preliminaries item is one of the important parts of the Bill of Quantities. The calculation of preliminaries cost is one of the hardest and complicated where there is no specific method to measure and it always differ between one project to another. Normally, the contractors will use their previous priced similar jobs as yardstick and this remains the best method to obtain the approximate cost for preliminary.

In the monthly progress payment valuation, the Quantity Surveyor (QS) often divides the Preliminaries items into three categories namely initial cost, recurring cost and final costs. Whilst the initial cost and final cost portions are fixed costs payable during commencement and on completion, the recurring cost items are usually spread proportionately over the whole contract completion period.

When there is a disruption or delay in the works, which leads to an extended period of the contract, it is usual that additional preliminaries are claimed and payable over the extended period. Additional preliminaries are in fact part of a loss and/or expense claim. These additional preliminaries should be based on actual cost incurred by the Contractor.

However, if project had been mutually terminated the preliminaries item would be questionable. When the project is mutually terminated it means that the project will not be completed. The question is how to determine the measurement or calculation of the preliminaries item with regard to the mutual terminated project?

According PWD 203A (Rev. 2007) under clause 54(b) with regard to the mutual termination of contract, the amounts payable in respect of any preliminary items so far as the Work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed.

Under the mutual termination agreement, it is stated that, the Contractor is entitled for payment for the preliminary items completed under the Principal Contract prior to the date of signing of the Mutual Termination of Agreement.

(c) *Court Case Referred*

There are no specific cases related to the preliminaries item calculation with relation to the mutual termination of contract found. However, a reference could be made based on case ***Pernas Construction Sdn. Bhd. v Syarikat Rasabina Sdn. Bhd.[2004] 2 CLJ 707.*** In this case Judge Ariffin Zakaria JCA affirms with the

learned Judge and held that, the plaintiff in principle should be paid for work done. If the amount claimed is excessive, the defendant should come up with its' own measurement or adduce evidence to show otherwise. The claim also shall be supported by the final measurement. That means, contractor is entitled to get paid for the preliminaries items that has been carried out or performed.

(d) *Decision / Summary*

According to the above discussion, normally for purpose of payment, preliminaries items are divided into three categories, namely initial cost, recurring cost and final cost.

For mutual termination of contract in construction project, the initial cost shall be paid in full amount after the items supplied by the contractor and accepted by the S.O. For outstanding items not supplied by the contractor, the appropriate deduction shall be made to the contract sum accordingly. For final cost, only items carried out by the contractor is entitled to be paid. For items still not yet performed by the Contractor, the appropriate deduction shall also be made to the contract sum accordingly. For recurring cost, the Contractor is entitled for payment for the preliminary items or completed under the Principal Contract prior to the date of signing of the mutual termination of agreement. The recurring costs item are usually spread proportionately over the whole contract completion period or sometimes based on by percentage of the work done.

4.5.2.2 Work done

(a) *Issue Arise*

According to research carried out, it shows eighty three percent (83%) of the respondents faced the problem to determine the appropriate method of calculation for work done / final measurement in relation with the mutual termination for final quantities between the client and contractor. There are different methods used by the parties to do re-measurement of final quantities.

(b) *Discussion on the Suggested Solution*

Clause 26.4 of PWD 203A (Rev. 2007) show that the Bills of Quantities, unless otherwise expressly stated in respect of any specified item or items, are deemed to have been prepared in accordance with the principles of the Standard Method of Measurement of Building Works as published by the Institution of Surveyors (Malaysia) or Civil Engineering Method of Measurement published by Institution of Civil Engineers (London) or Method of Measurement as set out in Bill of Quantities. In the English case of ***Bryant & Sons Ltd v Birmingham Hospital Saturday Fund (1938) 1 All ER 503***, it was held that the contractor's claim must succeed for excavation in rock which was not measured in accordance with the principles of the standard method of measurement under the RIBA form of contract. The standard method of measurement therein required excavation in rock to be measured separately but this was not done therein.

According to PWD 203A (Rev. 2007) under clause 26.6 it is provided that the re-measurement of the item of the work in the Bill of Quantities which are stated as

provisional would be undertaken after the completion of the Contract (it is submitted that it should mean after practical completion is achieved). The Superintending Officer is obliged under clause 27.1 of PWD 203A (Rev. 2007) to notify the Contractor to attend to any measurement made for the purpose of re-measurement. The Contractor may have to verify the measurement or to assist in the measurement carried out by the Superintending Officer or his representative. If the Contractor neglects to do so, the measurement of the Superintending Officer or his representative is deemed correct.

However, if contract have been mutually terminated, the measurement of the works done executed by the contractor shall be measured in accordance with the clause 54.1 of the PWD 203A (Rev. 2007) as explained in the Chapter 2 sub topic 2.6 (i).

According to mutual termination of agreement, the Contractor is entitled for payment for the Works done or completed works under the Principal Contract up to the date of termination.

(c) *Court Case Referred*

(i) Pernas Construction Sdn. Bhd. v Syarikat Rasabina Sdn. Bhd. [2004] 2 CLJ 707

The defendant was the main contractor of a government project for the construction and completion of a secondary vocational school ('the project'). The plaintiff was the defendant's sub-contractor appointed under a sub-contract ('the sub-

contract') pursuant to a principal contract between the defendant and the government. The plaintiff commenced work soon after the sub-contract was executed. Subsequently, the defendant instructed the plaintiff to stop work on the project site on the grounds that the piling works were not properly done and not up to standard. Both parties then executed a mutual termination agreement ('the termination agreement') whereby the plaintiff was relieved from further performance of the sub-contract. Under the termination agreement, it was agreed that the defendant would pay the plaintiff the amount outstanding for works done. The defendant, however, did not make the payment on the ground that the claim by the plaintiff was excessive.

The Plaintiff's claim against the Defendant is for the sum of RM379,854.51 being balance amount due and owing by the Defendant to the Plaintiff in respect of progress payment for work done under the sub-contract and agreed to be paid under the mutual termination agreement

Judge Ariffin Zakaria JCA held that, the plaintiff in principle should be paid for work done. If the amount claimed was excessive, the defendant should come up with its' own measurement or adduce evidence to show otherwise.

Before that, the learned Judge gave judgment in favour of the Plaintiff for the sum of RM379,854.51 (for work done) together with interest at the rate of 8% p.a. from 7.11.1991 until the date of full realization.

Judge Ariffin Zakaria JCA then held, it is common ground that this claim relates to the 4th progress claim. The Defendant contended that the award of RM379,854.51 was contrary to the terms of the mutual termination agreement which clearly provides the procedure to be followed in determining the actual amount due to the Plaintiff. DW1 in his evidence stated that for progress claim No. 4 the amount is to be determined according to actual measurement of work done. This, he said is in accordance with the mutual termination agreement. In cross examination PW1

also confirmed that the progress claims were not made on the assumption that work was done on schedule. He said they were made according to the measurements on site. He also said the initial amount claimed by the Plaintiff was RM697,592.63, this was later reduced to RM379,854.51. Still the Defendant did not agree. According to clause 9 of the mutual termination agreement all measurements for work done will be as of 24.4.1999 and the valuation of work done except for preliminaries should follow those certified by the consultant. Rightly the works, which are the subject of this claim, should have been measured in accordance with this clause and in the event the parties could not agree on the measurement of the work done then the matter will be referred to an independent party mutually appointed by them as per clause 10. As stated by PW1 until December 1990 there was no attempt to appoint an independent party to resolve this dispute.

This claim is supported by the final measurement put up by the Plaintiff attached to the Plaintiff's letter P31. This was followed by the Plaintiff's letter of 20.12.1999 in which the Plaintiff again demanded payment of the sum of RM379,854.51. The Defendant did not respond to this claim by the Plaintiff. The least the Defendant could have done in the circumstances is to put up its own measurement. The Defendant did nothing and refused to pay up on this claim.

In principle the Plaintiff should be paid for work done. The Plaintiff's claim here is for work done, therefore, in my view it is incumbent for the Defendant to come up with its own measurement or to adduce evidence before the court to show that the final cost of the project was in fact more than the projected cost due to the fault of the Plaintiff. There is no such evidence before the court. In the circumstances I agree with the learned Judge in awarding the sum of RM379,854.51 to the Plaintiff and accordingly I affirm the award made by the learned Judge under this head.

(ii) Good Carriage Sdn. Bhd. v Sendi Emas Sdn. Bhd. [1999] 1 MLJ 691

The defendant was awarded a contract ('the main contract') to complete the outside works to Tenaga Nasional Research and Development Centre at Bangi. The defendant then offered the plaintiff a tender based on the main contract for a total contract sum of RM2,251,390.31. The plaintiff contended that pursuant to three interim certificates, a sum amounting to RM253,469.67 was due to the plaintiff. The defendant pointed out that since the plaintiff had failed to complete the works under its contract, the parties had by mutual agreement terminated the plaintiff's employment as its sub-contractor. The plaintiff applied to injunct the defendant from disposing a sum of RM253,469.67 due from the defendant to the plaintiff until the final disposal of this suit.

Judge Kamalanathan Ratnam J, dismissed the application of injunction. It was held, the plaintiff had not been candid with the court. The plaintiff had signed a purported letter of agreement confirming the right of the defendant to make payments out of the sum due to the plaintiff, in the event the plaintiff failed to honour its commitments to the various sub-contractor to whom the plaintiff owed money. On the plaintiff's contention that the so-called agreement was a forgery, the court could not exercise its discretion and grant the injunction sought based on uncertainty.

(iii) Tasja Sdn. Bhd. v Golden Approach Sdn. Bhd. [2010] MLJU 489

On 6 February 1998 the plaintiff and the defendant signed the contract agreement ("the Construction Contract"). Clause 47 of the Construction Contract provided that upon the submission of claims by the Contractor (the plaintiff) the Engineer would make a fair valuation of the works properly executed by the Contractor and within 14 days from the date of any such valuation the Engineer

would issue an Interim Valuation Certificate stating the amount due to the Contractor from the Employer (the defendant). It was further provided that within 30 days of the issue of any such Interim Valuation Certificate as aforesaid the Employer would make a payment to the Contractor of the amount certified as due to the Contractor in the said Certificate.

On 20 May 1998 the Plaintiff and the Defendant entered into an agreement for mutual termination of the Construction Contract ("the Termination Agreement"). Clause 2 of the Termination Agreement provided that all satisfactorily completed work would be inspected and valued by final measurement on site. Clause 3 provided that final account would be finalised and established within one month from completion of final site measurement and submission of full particulars/documents supporting the claims made. Clause 5 provided that mode of payment for all outstanding payments and monies due and owing to the defendant derived from the final account would be by monthly installments of RM 100,000.00 and would commence from 1 February 1998. Clause 18 provided that the plaintiff would contra bungalow lots in Phase 1, Diamond Creek Country Retreat in lieu of payment to a total amount of RM1,000,000.00. The sales and purchase agreement for the bungalow lots would be executed within 14 days upon the signing of the Termination Agreement.

On appeal to Judge in Chambers on 2 August 2007 the learned judge dismissed the plaintiff's appeal with costs. The learned judge held that the plaintiff's claim which was based on the Interim Valuation Certificates and the letter dated 7 August 1998 was time-barred. In her decision the learned judge relied on the decision of the Federal Court in ***Haji Hussin bin Haji Ali & Ors v Datuk Haii Mohamed bin Yaacob & Ors [1983] 2 MLJ 227***. The learned judge rejected the plaintiff's contention that the claim was not time-barred because the claim was based on the Termination Agreement on the ground that the plaintiff's claim was not based on the Termination Agreement.

Under clause 47(d) of the Construction Contract payments were to be made within 30 days of the issue of the Interim Valuation Certificate. The 5th Interim Valuation Certificate was issued on 12 February 1998 which means the plaintiff must file the claim against the defendant by 13 March 2004 as section 6(1)(a) of the Limitation Act provides a six-year limitation period for contractual claims. With regard to the plaintiff's claim for RM1,895,905.02 as stated in its letter dated 7 August 1998 the six-year period ended on 8 August 2004. The plaintiff's claim was filed on 31 May 2005. The plaintiff was clearly out of time because for the purpose of limitation, time began to run from the earliest time at which the plaintiff could have brought an action (see ***Nik Che Kok v Public Bank Bhd*** **[2001] 2 CLJ 157**).

(d) *Decision / Summary*

The Contractor is entitled for payment for the Works done or completed works under the Principal Contract up to the date of mutual termination. The satisfactorily completed work would be inspected and valued by final measurement on site. It is suggested that final measurement shall be carried out jointly between the Superintending Officer or his representative and the Contractor. On the contention that the so-called agreement was a forgery, the court could not exercise its discretion and grant the injunction sought based on uncertainty. The court would also reject the contractual claims which was time-barred according to the Limitation Act which is, as section 6(1)(a) of the Limitation Act provides a six-year limitation period for contractual claims.

4.5.2.3 Materials on site

(a) *Issue Arise*

The issue identified with regard to material on site in relation with the mutual termination of contract was that the different method to determine the actual material on site between the client and contractor whether to accept or to reject as a material on site, material on site title, and responsibility of the material on site. Who shall take responsibility?

According to data gathered from the interviews of the respondents, it shows eighty three percent (83%) faced the problem in regard with the material on site in relation with the mutual termination project.

(b) *Discussion on the Suggested Solution*

Material on site is defined in the standard form of contract PWD 203A (Rev. 2007) under clause 20.0 which mean unfixed materials and goods delivered to, placed on or adjacent to the Site and intended for incorporation therein, shall not be removed except for use upon the Works, unless the S.O. has consented in writing to such removal.

Under the general law, once the materials and goods are built into the Works, they are regarded as fixtures onto the land and belong to the Government (see definition of land in section 5 of the National Land Code 1965). In the absence of any provision to the contrary, the Contractor’s own materials and goods which he

brings on the site remain his property until they are built into the works. This issue was held in the case of ***Reynolds v Ashby (1904) AC 406***.

Nonetheless, there are still problems that would arise in particular due to the prevalence of retention of title clauses in the contracts of merchants and suppliers. Many of these contracts contain a term whereby the seller retains title to the goods until he has been paid for them. This right is recognized in section 25(1) of the Sale of Goods Act 1957.

In the absence of retention of title clause the Contractor can transfer good title of the materials and goods to the Government. The title in these materials and goods passes and they become the property of the Government upon payment by the Government for them pursuant to the interim certificate issued. The Contractor however remains responsible for their loss or damage during the course of the execution of the Works.

Even if the property in the materials and goods have not yet passed to the Government, the unfixed materials and goods must not be removed from the Site without the consent in writing of the Superintending Officer once they are delivered and placed on or adjacent to the Works.

However, in accordance with the mutual termination of agreement, the Contractor shall within two weeks from the date of signing of the Agreement, remove its goods and unfixed materials which have not been paid by the Government, as specified by the S.O.

(c) *Court Case Referred*

(i) Dawber Williamson Roofing Ltd. v Humberside Country Council (1979) 14 BLR 70

The provision in this clause is inadequate to defect a Retention of Title clause in an action by an unpaid seller seeking delivery up of the goods against the Government. In the leading case ***Dawber Williamson Roofing Ltd. v Humberside Country Council (1979) 14 BLR 70***, a sub-contractor who had contracted to supply and fix a roof delivered a quantity of slates to the site. The main contractor was paid by the employer for these slates, but then went into liquidation before paying the sub-contractor. It was held that a Retention of Title clause in the sub-contract was effective, so that the slates remained the property of the sub-contractor.

(ii) Archivent Sales and Developments Ltd v Strathclyde Regional Council (1984) 27 BLR 98

In the Scottish case of ***Archivent Sales and Developments Ltd v Strathclyde Regional Council (1984) 27 BLR 98***, section 25 of the Sales of Goods Act 1979 was applied in the context of a construction contract. The claimants in that case supplied ventilators to a firm of contractors who were working under JCT 63 on a project for the defendants. The ventilators were delivered directly to the site, their value was duly certified, and the defendants paid the contractors. However, the contractors then went into liquidation without having paid the claimants. The claimants' action to recover 'their' ventilators from the defendants failed, since it was held that the defendants had received title from the contractors by virtue of section 25. In effect, the contractors had 'agreed to buy' the ventilators from the sellers, had been allowed

by the sellers to have possession of them and had delivered them to the defendants under a ‘disposition’.

(iii) Hanson (W) (Harrow) Ltd v Rapid Civil Engineering Ltd and Usborne Developments Ltd (1987) 38 BLR 106

In another case ***Hanson (W) (Harrow) Ltd v Rapid Civil Engineering Ltd and Usborne Developments Ltd (1987) 38 BLR 106***, where timber was supplied under a contract with a title retention clause, the main contract contained no express terms relating to interim payments and the passing of property in materials. It was held that, although interim payments were in fact made, these did not have the effect of a ‘disposition’ by the contractor of any particular materials to the employer. As a result, section 25 of the Sales of Goods Act 1979 did not apply and the timber remained the property of supplier.

(d) Decision / Summary

Once the materials and goods are built into the Works, they are regarded as fixtures onto the land and belong to the Government. In the absence of a Retention of Title clause the Contractor can transfer good title of the materials and goods to the Government. The title in these materials and goods passes and they become the property of the Government upon payment by the Government for them pursuant to the interim certificate issued. Even if the property in the materials and goods have not yet passed to the Government, the unfixed materials and goods must not be removed from the Site without the consent in writing of the Superintending Officer once they are delivered and placed on or adjacent to the Works.

4.5.2.4 Performance Bond

(a) *Issue Arise*

The Contractor was unsatisfied because the Government forfeited fifty percent (50%) of the value of performance bond for mutual termination of contract. How would the contractor able to recoup the remaining balance if they use Performance Guarantee Sum (Wang Jaminan Pelaksanaan (WJP))? Can the client claim from the Banker/Guarantor if they used Bank Guarantee for Performance Bond?

From the analysis it shows that seventy five percent (75%) of the respondents faced the problem with the performance bond due to mutual termination of contract.

(b) *Discussion on the Suggested Solution*

A performance bond is a bond giving security for the carrying out of a contract, where a bond is a deed by which one person (the obligator) commits himself to another (the obligee) to do something or refrain from doing something (Martin, 2003). In construction contracts, 'performance bond' is a bond taken out by the contractor, usually with a bank or insurance company (in return for payment of a premium), for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event of the contractor's default, repudiation or insolvency (Robinson et al. 1996).

Under PWD 203A (Rev. 2007) clause 13.1(a), the contractor shall deposit with the Government a Performance Bond or Performance Guarantee Sum in favour of the Government for a sum equivalent to five percent (5%) of the total Contract Sum to secure the due performance of the obligations under the contract by the contractor. Clause 13.3 stated that, notwithstanding anything contained in the contract, the Government shall be entitled at any time to call upon the Performance Bond, wholly or partially, in the event that the contractor fails to perform or fulfil its obligations under the contract. Meanwhile, clause 13.6 stated that, in the event that the contract is terminated, the said Performance Bond or any balance thereof shall be forfeited.

The interpretation of the operative clause in the Performance Bond is seen in case ***Teknik Cekap Sdn. Bhd. v Public Bank Bhd (1995) 3 AMR 2967*** where the Court of Appeal held that it is an "on demand" guarantee. The requirement to trigger a payout under the guarantee is a mere demand by the beneficiary (the Government) in writing specifying the breach on the part of the principle debtor (the Contractor). As a result, as between the guarantor and beneficiary, the guarantor has to pay upon demand and the beneficiary may obtain summary judgment therefore.

In ***ESSO Petroleum Malaysia Inc v Kago Petroleum Sdn. Bhd. (1995) 1 AMR 189*** the Supreme Court held that the underlying contractual disputes between the parties may be relevant if the principle debtor is seeking to restrain the beneficiary from demanding upon or receiving monies under the performance guarantee.

In the case of ***LEC Contractors Sdn Bhd v Castle Inn Sdn Bhd (2000) 3 AMR 2625***, it was held by the Court of Appeal whilst interpreting the PWD Bond worded performance guarantee given in conjunction with the underlying contract based on the PAM form of contract that the principle debtor could not restrain the beneficiary from receiving monies under the performance guarantee in the absence of fraud. In other words the performance guarantee therein is payable on demand and it

is not necessary for the beneficiary to await the resolution of the underlying contractual disputes between the parties before a demand could be so made.

(c) *Court Case Referred*

(i) ***Pernas Construction Sdn. Bhd. v Syarikat Rasabina Sdn. Bhd. [2004] 2 CLJ 707***

By agreement in writing dated 2 June 1989 ("the sub-contract"), the defendant (the appellant) appointed the plaintiff (the respondent) to be their sub-contractor for the construction and completion of the proposed secondary vocational school at Shah Alam, Selangor Darul Ehsan. It was a term of the sub-contract that the main contract documents between the defendant and the Government of Malaysia shall be read and construed as part of the sub-contract. The plaintiff claimed that they have commenced works and expended workers, materials and finances on site to proceed with the works pursuant to the sub-contract. The plaintiff alleged that in breach of sub-contract, the defendant had on 31 March 1990 and without just cause or excuse, requested the plaintiff to stop further work on site and/or the sub-contract. And pursuant to an agreement dated 12 May 1990 ("the mutual termination agreement") between the plaintiff and the defendant it was agreed between the parties that by mutual consent the sub-contract be terminated and plaintiff was relieved from further performance of the sub-contract.

The plaintiff claimed that the defendant had wrongfully called on the performance bond issued by Universal Life & General Insurance Sdn. Bhd. thus causing loss to the plaintiff in the sum of RM1,310,800.83 together with interest thereon, which the plaintiff had to pay to the insurance company.

In this case, the defendant made a call for the performance bond in the sum of RM1,074,477.83 that had been procured by the plaintiff from an insurance company as a guarantee for the due performance of the sub-contract. That led to the plaintiff's action against the defendant in the trial court that resulted in favour of the plaintiff. In its defence, the defendant claimed that the plaintiff had delayed the completion of the project and its call on the performance bond was for losses arising out of the works done by the plaintiff on the project.

It was held that, as provided in clause 11 of the mutual termination agreement the bond is to be held merely as collateral by the Plaintiff as a mean to recover any money owed by the Plaintiff to the Defendant. Therefore, for the Defendant to retain the sum claimed under the bond it is incumbent upon them to satisfy the court that the Plaintiff did owe them the said sum or an amount in excess thereof. The Defendant failed to adduce any evidence on this except to say that their costing shows that the cost of completing the project was far in excess of the contract price. The Defendant had not adduced any evidence to show what the final cost of the project was. By the date of the trial the project had been completed. Thus the final cost could be ascertained. In the circumstances, the Defendant has no right to retain the money claimed under the bond. For the above reasons the learned Judge was right in ordering that the sum of RM1,370,800.83 together with interest at 8% p.a. from 25.4.1999 till date of full payment be paid to the Plaintiff.

(ii) Karya Lagenda Sdn. Bhd v Kejuruteraan Bintai Kindenko Sdn. Bhd. & Anor [2008] 6 MLJ 636

The first respondent who was appointed the main contractor for the construction of a housing project (the project) engaged the appellant as a subcontractor for the project. The salient terms of the subcontract were the date of completion of the project, which was fixed as 30 June 2004, and the term relating to

the ascertainment of the liquidated damages payable, which was made payable at the rate of RM30,000 per day. The second respondent was the bank which issued a banker's guarantee for RM2,075,700.94, on behalf of the appellant, to the first respondent. The said bank guarantee was in the form of a bond and guaranteed due performance of the underlying building contract. When the subcontract works were not completed on 30June 2004, the first respondent granted the appellant an extension of time and revised the completion date to 22 September 2004. The bank guarantee was extended on 29 September 2004 to 31 December 2004. When the appellant failed to complete the subcontract works by the revised completion date of 22 September 2004 the first respondent issued a certificate of non-completion. The first respondent thereafter made three claims to the second respondent, bank in respect of the bank guarantee but the second respondent rejected the claims on the basis that the underlying building contract had been terminated when the claim was made.

The second respondent thereafter applied to the High Court by way of an inter-pleader proceeding to settle the dispute between the first respondent and the appellant and to ascertain the position it was to adopt in respect of the bank guarantee. In deciding whether the second respondent bank had to pay the amount stated in the bank guarantee the High Court had to determine whether the bank guarantee was a conditional or an unconditional bank guarantee/bond and then consider whether the non-production of the original bank guarantee when making a demand to the bank affected the status of the first respondent's demand. Finally the High Court had to consider whether the wording in the first respondent's demand letter to the second respondent bank was sufficient as the basis of a demand made on a bank guarantee. After examining the terms of the bank guarantee the High Court held that the bank guarantee in this case was an unconditional or 'on-demand' bond; that there was no requirement either in the underlying building contract or the bank guarantee that the original of the guarantee must be produced when the first respondent made a demand to the bank; and that the wording in the first respondent's demand letter to the second respondent bank was sufficient and that it did not need to expressly state the basis upon which the demand was made. The appellant who was dissatisfied with the decision appealed to the Court of Appeal.

The Court of Appeal came to the same conclusion as the High Court and held that the terms of the bank guarantee indicate that it is an unconditional and on-demand bank guarantee/bond. The Court of Appeal was also of the view that since the bank guarantee was an unconditional and on-demand bank guarantee, there was no necessity for a demand letter from the first respondent against the appellant asserting that the appellant had failed to perform or breached the underlying building contract. The findings of the High Court and the Court of Appeal were also similar in respect of the other issues raised. When the Court of Appeal affirmed the decision of the High Court the appellant proceeded to apply for leave to appeal to the Federal Court on eight questions of law. At the hearing of the appeal only four questions were raised for the consideration of the Federal Court. These questions required the court to consider, inter alia, whether the beneficiary of the bank guarantee or bond in this case had to expressly state that the contractor had failed to perform or had committed a breach of the underlying building contract in its demand in order for the demand to be valid; whether the clause 'notwithstanding any contestation or protest by the contractor' in the bond precluded the contractor from raising an objection as to the validity of the on-demand bond; and whether the bond which guaranteed due performance of the underlying contract lapses once the contract was mutually terminated.

Held, dismissing the appeal with costs: In the instant case, applying the principle in decided cases, there was no requirement that a beneficiary must assert clearly that the contractor had failed to perform or had committed a breach of the underlying contract. The on-demand guarantee or bank guarantee/bond in this case to which the first and second respondents were a party to was a distinct legal requirement from the underlying building contract between the appellant and the first respondent. Thus in case of such a guarantee or bond, the courts will not inquire into any breach in the underlying contract. Therefore once a valid demand is issued, as in the instant case, the second respondent bank must make payment to the first respondent. The bank had no right to object because the appellant's grievance were matters that must be adjudicated elsewhere.

It is clearly shows that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The implication of such a clause is that payment must be made upon receipt of a valid demand. In any case, even if there was a mutual determination of the contract the second respondent was still not absolved of its liability under the bank guarantee. This was because clause 1 of the bank guarantee expressly provides that the second respondent can only be released 'by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction', which was not the case here.

(iii) Nafas Abadi Holdings Sdn. Bhd. v Putrajaya Holdings Sdn. Bhd & Anor [2004] MLJU 148

In this case, the defendant (appellant) appointed the plaintiff to be their contractor for Perdana Walk in Putrajaya. On 28.3.2001 the parties discussed for mutual termination of contract but failed. However on 30.8.2001 defendant 1 (Putrajaya Holdings) sent mutual termination agreement to plaintiff but it was amended by the plaintiff. Defended 1 was not agreed. On 19.10.2001 the plaintiff was terminated the contract. Then, the defendant rejected it on 25.10.2001. However, on 27.10.2001, the defendant 1 was terminated the plaintiff contract and called for performance bond from defendant 2 (banker's).

The Plaintiff was applied for injunction to stop defendant from calling bank guarantee for performance bond.

In this case, the Judge held in favour of the Plaintiff; it was held that even though performance bond was unconditional bond/on demand, but the defendant action to calling full amount of Performance Bond sum was unconscionable

(d) *Decision / Summary*

In construction contracts, ‘performance bond’ is a bond taken out by the contractor, usually with a bank or insurance company for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event of the contractor’s default, repudiation or insolvency. Performance bond is to be held merely as collateral by the Contractor as a mean to recover any money owed by the Contractor to the Client.

In dealing with the bank guarantee, first consideration is to determine whether the bank guarantee was a conditional or an unconditional bank guarantee/bond and then would consider whether the non-production of the original bank guarantee when making a demand to the bank affected the status of the demand. Then, it is also have to consider whether the wording in the demand letter to the bank is sufficient as the basis of a demand made on a bank guarantee. When it was identified as an unconditional or 'on-demand' bond, that there was no requirement either in the underlying building contract or the bank guarantee that the original guarantee must be produced when a demand is made to the bank; and that the wording in the demand letter to the bank was sufficient and that it did not need to expressly state the basis upon which the demand was made.

The implication of such a clause is that payment by the bank must be made upon receipt of a valid demand. In any case, even if there was a mutual determination of the contract the bank was still not absolved of its liability under the bank guarantee.

4.5.2.5 Advance payment

(a) *Issue Arise*

According to the data gathered from the interviews of the respondents, it shows sixty seven percent (67%) faced the problem in getting back the remaining balance of the advance payment. Some contractor refused to allow client from claim the remaining balance from the banker/guarantor and they applied injunction from the court. Some of them, applied for postponement for paying the remaining sum of advance payment. The issues are how to recoup the remaining balance of advance payment and can client claim direct from the Banker/Guarantor?

(b) *Discussion on the Suggested Solution*

Advance payment bond is a bond guaranteeing the repayment of advance or 'mobilisation' payments made to a contractor. This kind of bond is a common feature in building contracts where the employer made advance payments to cover certain preliminaries. Repayments are made by way of deductions from the contractor's progress payment and the advance payment bond is required to secure the employer against non-repayment of the advance payment or its remainder.

The advance payment shall be recouped when the cumulative total value of the Builder's work executed and certified (including the amount certified for materials on site) in the Progress Payment Certificates reaches twenty five percent (25%) of the total contract value of the Builder's work, by way of a fixed percentage deduction from the total certified value of the Builder's work executed (including the amount certified for materials on site) during the period covered by a Progress

Payment Certificate, in all the subsequent Progress Payment Certificates on the basis that the advance payment made shall be fully recovered in the Progress Payment Certificate in which the cumulative total certified value of the Builder's work executed (including the amount certified for materials on site) reaches seventy five percent (75%) of the total contract value of the Builder's work.[81]

The liability under the advance guarantee shall be terminated upon realization by the Government of the full sum of advance paid. However, if the full sum of the advance paid cannot be realized before the completion date of the Contract or any authorized extension thereof or in the case of the Contract being determined before the date of the determination, then the balance of the advance repayable to the Government shall be recovered from the advance guarantee.[82]

The Contractor shall repay the Advance Payment paid by the Government to the Contractor whether in whole/remaining sum. The Government shall have the right to immediately call on the Advance Payment bond given by the Contractor and the Contractor shall not in any way question or dispute Government's right to the Advance Payment Bond. The Government shall have the right to claim from the Contractor the amount owing as a debt due to the Government.

(c) *Court Case Referred*

There are no specific court cases related to the advance payment bond in relation to the mutual termination of contract found. However, the reference could be made based on case related to the performance bond guarantee. It is because, bank

[81] Special Provisions To The Conditions Of Contract, *Advance Payment On `Works' Contract,* Pg.1
[82] Special Provisions To The Conditions Of Contract, *Advance Payment On `Works' Contract***,** Pg.2

guarantee for advance payment and performance bond are the same, since the bank guarantee for both normally is an unconditional or on-demand bank guarantee.

The court case for reference would be the case of ***Karya Lagenda Sdn. Bhd v. Kejuruteraan Bintai Kindenko Sdn. Bhd. & Anor [2008] 6 MLJ 636.*** In this case, it was held that once a valid demand is issued, the guarantor / bank had no right to object and must make payment to the Government. The payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. In any case, even if there was a mutual determination of the contract the bank still not absolved of its liability under the bank guarantee.

(d) *Decision / Summary*

The Contractor shall repay the Advance Payment paid by the Government to the Contractor whether in whole/remaining sum. The Government shall have the right to immediately call on the Advance Payment bond given by the Contractor and the Contractor shall not in any way question or dispute Government's right to the Advance Payment Bond. The guarantor / bank had no right to object and must make payment to the Government once a valid letter of demand is received. In any case, even if there was a mutual determination of the contract the guarantor / bank still not absolved of its liability under the bank guarantee

4.5.2.6 Protection Works / Remedial For Defective Works

(a) *Issue Arise*

From the interviews, the data gathered shows that fifty eight percent (58%) of the respondent faced the problem with the defective works. After mutually terminated, normally the projects take long time to retender. Therefore, the defective work will occur due to abandonment of the works for the long time. Because of contract have been mutually terminated, the contractor refused to do the remedial works. The issue is who shall take responsibility to repair the defective works for the project mutually terminated?

(b) *Discussion on the Suggested Solution*

Contractors usually have a general obligation under most standard forms of contract to construct and complete the works to a predetermined specification and sometimes a dual standard by adding that the works should also be to the reasonable satisfaction of the architect. Inherent in such obligations is a duty for the contractor to replace defective work with work, which is in accordance with the contract. For example clause 48 of PWD 203A (Rev. 2007) governs the rights and obligation of the parties on defects, imperfection, shrinkages and other faults in the Works which arise during the Defect Liability Period after the achievement of practical completion of the Works.

Clause 48(a) specifies that the Contractor is responsible for any defect, imperfection, shrinkage, or any other fault which appears during the Defect Liability

Period, which will be twelve (12) months from the date of practical completion of the Works.

Before the Contractor is liable to remedy them, they must arise from materials and workmanship not being in accordance with the Contract. The ascertainment as to whether they arise from materials, goods or workmanship not being in accordance with the contract lies with the Superintending Officer. Thus if any defect, imperfection, shrinkage or other fault in the Works has arisen during the Defect Liability Period, the Superintending Officer is empowered to notify and instruct the Contractor in writing to remedy them at the Contractor's own cost.

It is sometimes said that, during a rectification period, the Contractor has the right as well as the obligation to put right any defect that appear. What this means is that an employer who's discovers defects should operate the contractual defects liability procedure, rather than appoint another contractor to carry out the repairs.

(c) *Court Case Referred*

There are no specific court cases related to the protection work / remedial for defective works in relation with the mutual termination of contract found. However, the reference could be made based on case ***William Tomkinson v The Parochial Church Council of St Michael and Others (1990) 6 Const LJ 319***. In this case, an employer refused to allow the original contractor access to the site to remedy defects, but instead sued the contractor for the cost of having these rectified by another contractor. It was held that the employer's decision amounted to an unreasonable failure to mitigate the loss suffered, and the damages were reduced by the amount by which the employer's costs exceeded what it would have cost the original contractor to carry out the Works. The Court of Appeal has approved this decision.

(d) *Decision / Summary*

If any defect, imperfection, shrinkage or other fault in the Works has arisen during the Defect Liability Period, the Superintending Officer is empowered to notify and instruct the Contractor in writing to remedy them at the Contractor's own cost.

The Contractor shall still be responsible and liable for whatever defect or default in relation or arising out of the Works done and/or design (if applicable) prior to the date of signing of Mutual Termination Agreement. The Contractor shall carry out all the protection works so as to secure the Site, equipment, goods, materials therein against any deterioration, loss or damage and to do all things necessary to leave the Site in a clean and tidy condition.

4.6 Conclusion

Both parties shall always aware and understand the steps of the process and procedure in dealing with the mutual termination of contract in construction project. Written application by the contractor is a condition precedent to the S.O. in giving consideration of the mutual termination of contract.

As a conclusion, there are few dispute / issues in relation with the Mutual Termination of Contract in construction project. Even though, there was mutual consent for mutual termination of contract by parties, however in certain circumstances the dispute still arise and need to be solved wisely. In making decision, the parties shall refer to the decided court case and any provisions available to determine the appropriate solutions in their dispute matters.

This chapter also gave answers to the questions of the objectives in this study. It would conclude that, both identified objectives of this study have been achieved.

Chapter 5
CONCLUSION AND RECOMMENDATIONS

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This is the final chapter which summarizes the finding of the research in accordance with the research objectives. Problems encountered during the research as well as the recommendations for future research are also discussed in this chapter.

5.2 Research Findings

Although the small sample did not provide representative findings, the semi-structure interview was able to provide important information on the actual process and procedure to be followed for the mutual termination of contract in construction project. Apart of that, it was through the semi-structure interview also that the dispute in relation with the mutual termination of contract in construction project

have been determined and identified. Therefore, based on literature review and empirical works the followings are the findings of this study.

5.2.1 Process and procedure of mutual termination of contract

There are five (5) steps which should be followed in dealing with the mutual termination of contract in construction project as follows;

Steps 1 : Mutual Termination application

→ A contractor shall apply in writing to the Superintending Officer for mutual termination of contract. This is a condition precedent before the mutual termination will be considered.

Steps 2 : Evaluation / Assessment by the Superintending Officer

→ The Superintending Officer must play his role to give fair consideration by evaluating and assessing the contractor's application for mutual termination of contract.

Steps 3 : Preparing the Mutual Termination Agreement

→ The mutual termination agreement is supplemental to the principle contract. It shall consist of the relevant and appropriate clauses that are needed to protect both contracting parties.

Steps 4 : Approval of the Mutual Termination Agreement

→ The mutual termination agreement is only approved after an authorised Officer (officer named in the appendix of the condition of the contract) signed the agreement together with a witness. Otherwise, the agreement is void and invalid.

Steps 5 : Implementation of the Mutual Termination Agreement

→ The mutual termination agreement only can be implemented after an authorised Officer signed the agreement together with a witness.

5.2.2 Disputes In Relation With The Mutual Termination Of Contract in Construction Projects

From the findings, ten (10) disputes / issues were identified in relation with the mutual termination of contract in construction project. Those issues are shown as follows;

(7)	Different method calculation of preliminaries items	=	83%
(8)	Different method calculation of work done	=	83%
(9)	Material on site	=	83%
(10)	Performance bond	=	75%
(11)	Remaining balance of Advance payment	=	67%
(12)	Defective works	=	58%
(13)	Different method calculation of VOP	=	25%
(14)	Alternative design by the contractor	=	25%
(15)	Approval / signatory of mutual termination agreement	=	8%
(16)	Imposed LAD	=	8%

However, due to restricted time, this study only focused and limited to the first six (6) highest ranking based on the percentage (%) in getting the solutions of the disputes based on the law cases which are referred to the court.

5.2.3 Disputes Suggested Solutions Based on Legal Cases Which are Referred to the Court

Six (6) main issues / disputes were identified and further studied have been carried out to get solutions based on legal cases which have been referred to the court. From the analysis, the findings as the following;

1) Issue no. 1 – Preliminaries Item

There are no specific cases related to the preliminaries item calculation with relation to the mutual termination of contract found. However, a reference could be based on case in relation to the calculation of work done for mutual termination of contract. The Contractor is entitled for payment for the preliminary items or completed under the Principal Contract prior to the date of signing of the mutual termination of agreement.

2) Issue no. 2 – Work done

There are three (3) suitable cases were found related to the work done with relation to the mutual termination of contract. In summary, the contractor is entitled for payment for the work done carried out or completed works under the principle contract up to the date of termination.

3) *Issue no. 3 – Material on site*

There are no specific cases related to the material on site with relation to the mutual termination of contract found. However, a reference could be based on case in relation to the material on site specifically with regard Retention of Title under the Sales of Goods Act. There are three (3) suitable cases were found related to the material on site. In summary for material on site, the seller retains title to the material on site until he has been paid for them. The title of these materials on site passes and they become the property of the Government upon payment by the Government for them pursuant to the interim certificate issued. The unfixed materials on site must not be removed from the Site without the consent in writing of the Superintending Officer once they are delivered and placed on or adjacent to the Works

4) *Issue no. 4 – Performance Bond*

There are three (3) suitable cases were found related to the performance bond with relation to the mutual termination of contract. Normally, the bank guarantee for performance bond is an unconditional/on-demand bond. Therefore, the bank must made payment to the client upon receipt of a valid demand.

5) *Issue no. 5 – Advance payment*

There are no specific cases related to the advance payment with relation to the mutual termination of contract found. However, a reference could be based on cases in relation to the performance bond, because normally the bank guarantee for advance payment is also unconditional/on-demand bond.

6) *Issue no. 6 – Protection Works / Remedial for Defective Works*

There are no specific cases related to the protection works/remedial for defective works with relation to the mutual termination of contract found. However, a reference could be made based on case ***William Tomkinson v The Parochial Church Council of St Michael and Others (1990) 6 Const LJ 319***. In this case, it is suggested that the employers shall give opportunities and allow the original contractor access to the site to remedy the defects work.

5.3 Problem Encountered During Research

Constraint and insufficiency of time was the main problem encountered when writing up the report for this research. Only eight (8) weeks' time was available for this research and hence every process has been carried out in a very fast manner, especially during the data collection process, which involved collecting and sorting court cases from different law journals. Another problem is that, there are not many

cases decided by the courts either in Malaysia and England that have dealt with the mutual termination of contract in construction project led to less cases being found to support the findings. If there were more time given and more decided law cases existed, most probably the circumstances illustrated will be more comprehensive and thorough.

5.4 Future Research

After the discussion on the process and procedure for mutual termination of contract and also on the most frequent disputes associated with the mutual termination of contract in construction project has been made, the followings are the recommendations for future research;

i) Since this study had conducted on highway project as project case studies, it is also suggested that further research will examine from the other viewpoints such as mutual termination for building project or housing projects.

ii) Widen the scope to all the issues arise in relating to the mutual termination of contract in the construction project. For example, if mutually terminated project involved alternative design by the contractor, a study should be conducted on how to handle it and who is actually responsible for the design as well as the work done which have been carried out.

5.5 Conclusion

At the end of this study, it can be concluded that from the semi-structure interview important information on the actual process and procedure for mutual termination of contract in construction project have been accumulated. It was also able to determine and identified the disputes associated with the mutual termination of contract in construction project.

The most frequent disputes associated with the mutual termination of contract in construction project are disputes in determining the final measurement / calculation of the final quantities. These include calculation of final amount that the contractor should be paid due to mutual termination of contract and also to determine the final quantities re-measurement of builder's works.

Based on the findings of the study it is therefore concluded that the objectives of the study have been achieved. It is also suggested that the findings in this study to be further digested considering the present norm of dealing with the mutual termination of contract in our construction industry.

REFERENCES

Amran Mohd Majid (2009), *Pengenalan Kontrak Binaan Reka dan Bina*, Dewan Bahasa dan Pustaka, Kuala Lumpur.

Azizan Supardi, Hamimah Adnan, Jamaluddin Yaakob (2009), *Legal Analysis on Malaysian Construction Contract: Conditional versus Unconditional Performance Bond,* Journal of Politic and Law, Vol.2, No.3, September 2009.

Beatrix Vohran and Wu Min Aun (2010), *The Commercial Law of Malaysia*, Second Edition, Pearson Malaysia Sdn. Bhd., Kuala Lumpur.

CA (Joe) Davis, Daniel R. Smith (2010) *Legal Issues in Construction Contract Termination*, University of Texas, 2010.

Che Saliza Che Soh. (2010), *Buildinfo- Issue 09*, CIDB Malaysia, January 2010.

CIDB Standard Form Of Contract for Building Works 2000, Construction Industry Development Board Malaysia (CIDB), Kuala Lumpur, 2000.

Contract Act 1950 (Act 136), International Law Book Services (ILBS), Kuala Lumpur, 2010.

Cost of highway go up by 15%, (2010, August 3) New Straits Times, from http://www.nst.com.my.

Dharshini Balan.(2010), *Bad builders to blaim*, (2010, October 3) New Straits Times, from http://www.nst.com.my

DRB-Hicom : Landasan Berkembar Diserahkan Sukarela, (2005, May 16) Utusan Malaysia, from http://www.utusan.com.my

Fuel price rise likely to hit building sector, (2008, Jun 25) News Strait Times, from http://www.nst.com.my.

J. Beatson (2002), *Anson's Law Of Contract*, 28th Edition, Oxford University Press.

John Murdoch and Will Hughes (2008). *Construction Contracts : Law and Management*, 4th Edition. Taylor & Francis, London.

John Wong. (2005), *Terminated or be Terminated*. The Malaysian Surveyor. 39.1

Lim Chong Fong (2004), *The Malaysian PWD Form of Construction Contract,* Sweet & Maxwell Asia, Petaling Jaya, Selangor, Malaysia.

MBAM Article : *Construction Contract & Management Issues*, Master Builder Journal, Vol.3, 2010

Nigel M. Robinson, Anthony P. Lavers, George Tan Keok Heng & Raymond Chan (1996), *Construction Law in Singapore and Malaysi*a, Second Edition, Butterworths Asia.

Norhisham bin Abdul Ghani, (2006), *The Importance of Preliminaries Items*, Master Thesis, Universiti Teknologi Malaysia, Skudai.

Omar Al Saadoon & Eric Teo, *Coping with termination*, Master Builder Article, 4th quarter 2008.

Surat Pekeliling Perbendaharaan (SPP) Bil.12/2010, *Garis Panduan Pelaksanaan Penamatan Bersama (Mutual Termination) Bagi Kontrak Kerja*, Kementerian Kewangan Malaysia, Putrajaya, December 30, 2010.

Surat Pekeliling Perbendaharaan (SPP) Bil.3/2008, *Pelaksanaan Syarat Perubahan Harga Di Dalam Kontrak Kerja*, Kementerian Kewangan Malaysia, Putrajaya, August 6, 2008.

Standard Form Of Contract, *PAM Contract 2006 (with quantities)*, Pertubuhan Arkitek Malaysia (PAM), Kuala Lumpur, 2006.

Standard Form Of Contract, *PWD Form 203A (Rev. 2007)*, Public Work Department (PWD), Kuala Lumpur, 2008.

Tay Lee Yong, (2006), *Determination of Contract by Employer in Construction Industry*, Master Thesis, Universiti Teknologi Malaysia, Skudai.

Yow Kah Lun, (2006). *Voidable And Void Construction Contracts*, Master Thesis, Universiti Teknologi Malaysia, Skudai.

Case Law – Wikipedia Website ; http://www.wikipedia.org.wiki/construction

Case Law – LexisNexis Website ; http://www.lexisnesxis

Legal News Website : http://www.contractjournal.com

APPENDIX ‘A’

Mutual Termination of Agreement

APPENDIX 'A'

SUPPLEMENTAL AGREEMENT ON MUTUAL TERMINATION

THIS AGREEMENT made this ……. day of …….. 20….

BETWEEN

THE GOVERNMENT OF MALAYSIA as represented by the …….. and having its address at ……. (hereinafter referred to as the **"Government"**) of the one part.

AND

…… a company incorporated in Malaysia, having its registered office at ……, which has executed Contract No. …… with the Government (hereinafter referred to as the **"Contractor")** of the other part.

(The Government and the Contractor are individually referred to as "Party" and collectively referred to as "Parties").

WHEREAS.

(A) By Contract No: …… dated …… entered into between the Government and the Contractor ("Principal Contract"), the Contractor is required to **construct……** for Project . ("Project") based on the terms and conditions specified in the Principal Contract.

(B) For the commencement of the Project, the Contractor has been given the possession of the Site on .....**.** To date the Contractor has completed .....**%** of the Project even though the Project is scheduled to be completed on ..... under the Principal Contract.

(C) The Contractor has written to the Government on ..... ref: **,**..... stating that he is unable to complete the Project due to the increased of price of construction materials required for the completion of the Project which is a circumstance beyond the control of either Party and requested that the Contractor be discharged with the performance of the remaining obligations under the Principal Contract.

(D) Pursuant thereto, the Government hereby agrees that the Contractor's performance of the remaining obligation be discharged through termination of the Principal Contract upon the terms and conditions in this Supplemental Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Supplemental Agreement, unless the context otherwise requires and save as specifically defined herein, words and expressions defined in the Principal Agreement shall have the same meaning when used herein.

1.2 This Supplemental Agreement shall be read and construed and be enforceable as if the terms of the Supplemental Agreement were inserted in the Principal Agreement by way of addition or substitution as the case may be.

1.3 In the event of any inconsistencies between the provisions of the Principal Agreement and this Supplemental Agreement, the provisions of this Supplemental Agreement shall prevail to the extent of such inconsistencies.

2. CONDITION PRECEDENT BEFORE TERMINATION OF PRINCIPAL CONTRACT

2.1 The Contractor hereby agrees with the Government that as a condition precedent before the Principal Contract is terminated, the Contractor shall-

(a) Submit or return all the Contract Drawings for the Project; and

(b) Submit all receipts to show proof of payment for the purchase of the materials, goods, equipment;

to the Government within **30** days/~~weeks/months~~ from the date of signing of this Supplemental Agreement.

3. TERMINATION OF THE PRINCIPAL CONTRACT

3.1 The Parties hereby agree that the Principal Contract shall be terminated when the S.O/P.D.* confirms with the Contractor in writing that the Contractor has fulfilled the conditions specified in clause 2 of this Supplemental Agreement.

3.2 Save for the provisions expressly specified in this Supplemental Agreement, the Contractor hereby agrees with the Government that the Contractor is not entitle or shall not make any claim or demand for any payment, loss, damages, compensation or whatsoever against the Government pursuant to the termination of the Principal Contract except for payment for the Works done or completed under the Principal Contract prior to the date of signing of this Supplemental Agreement.

3.3 Notwithstanding the termination of the Principal Contract, the Contractor shall still be responsible and liable for whatever defect or default in relation or arising out of the Works done and/or design (if applicable) prior to the date of signing of this Agreement.

4. REPAYMENT OF ADVANCE PAYMENT

4.1 The Contractor hereby agrees that the Contractor shall repay the Advance Payment paid by the Government to the Contractor on ……. whether in whole/remaining sum* amounting to **RM** ..... within two weeks from the date of signing of this Agreement.

4.2 The Contractor hereby also agrees that if the amount of whole/remaining sum of the Advance Payment stated in clause 4.1 of this Supplemental Agreement is not paid to the Government within the period specified therein, the Government shall have the right to immediately call on the Advance Payment bond given by the Contractor on ..... and the Contractor shall not in any way question or dispute Government's right to the Advance Payment Bond.

4.3 Notwithstanding clause 4.2 of this Supplemental Agreement, if the whole/remaining sum of the Advance Payment stated in clause 4.1 of this Supplemental Agreement is still not paid to the Government due to whatever reason, the Government shall have the right to claim from the Contractor the amount owing as a debt due to the Government.

5. CONTRACTOR'S OBLIGATION TO PROTECT, ETC., SITE, EQUIPMENT AND MATERIALS

5.1 The Contractor agrees with the Government that the Contractor shall carry out all the protection works so as to secure the Site, equipment, goods, materials therein against any deterioration, loss or damage and to do all things necessary to leave the Site in a clean and tidy condition within **two (2)** weeks from the date of signing of this Agreement.

5.2 In the event that the Contractor fails to carry out its obligation specified in clause 5.1 of this Supplemental Agreement within the period specified therein, the Government shall have the right to employ other persons to carry

out the same and claim all cost and expenses incurred in connection with such employment against the Contractor from the Performance Bond or the Performance Sum Guarantee or as a debt against the Contractor as the case may be.

5.3 It is hereby agreed that the Contractor shall within two weeks from the date of signing of this Agreement, remove its personnel and workmen from the Site, vacate the Site and remove all temporary buildings, plant, tools, equipment, goods and unfixed materials which have not been paid by the Government, as specified by the S.O./P.D.*, failing which, the Government may (but without being responsible for any loss or damage) remove and sell any such property belonging to the Contractor, holding the proceeds, less all cost incurred, to the credit of the Contractor.

6. INTELLECTUAL PROPERTY RIGHT

6.1 Any intellectual property rights in relation to or arising out of the design, plans, calculations, drawings, developed or used for or incorporated in the Works (as defined in the Principal Contract) which payment has been made by the Government under the Interim Payment prior to the date of signing this Agreement, shall be transferred and vest in and become the sole property of the Government free and clear or all liens, royalties, fees and other charges, claims and encumbrances.

6.2 In the event that the Contractor is unable to transfer the intellectual property rights in relation to or arising out of the design, plans, calculations and drawings developed or used for or incorporated in the Works as specified in clause 6.1 of this Supplement Agreement to the Government, the Contractor hereby agrees that the Contractor shall obtain or procure the rights, licenses or permission for the Government to use design, plans, calculations, drawings developed or used for or incorporated in the Works free from all royalties, fees and other charges in respect of the intellectual property rights.

6.3 The Contractor shall defend and indemnify the Government from and against all claims, costs, damages, charges and proceedings whatsoever for or on account of infringement of any intellectual property rights in respect of any design, plans, calculations, drawings, documents, plant, equipment, machinery, material, methods or processes developed or used for or incorporated in the Works.

7. FORFEITURE OF PERFORMANCE BOND

7.1 The Contractor hereby agrees with the Government that in the event that the Contractor fails to comply with all the terms and conditions of this Supplemental Agreement, the Government shall be entitled to forfeit the full value of the Performance Bond under the Principle Contract or the Performance Sum Guarantee or recover the same amount by deducting from any money due or to become due to the Contractor failing which such deductions shall be recovered as a debt against the Contractor as the case may be and the Contractor shall not in any way question or dispute the said claim against the Performance Bond or the Performance Sum Guarantee or the said claim as a debt.

7.2 In the event that Contactor complies with all the terms and conditions of this Supplemental Agreement, the Government shall be entitled to forfeit only fifty percent of the value of the Performance Bond under the Principal Contract or the Performance Sum Guarantee or recover the same amount by deducting from any money due or to become due to the Contractor failing which such deductions shall be recovered as a debt against the Contractor as the case may be and the Contractor shall not in any way question or dispute the said claim against the Performance Bond or the Performance Sum Guarantee or the said claim as a debt.

8. CONFIDENTIALITY

This Supplemental Agreement and all matters pertaining hereto and under the Principal Contract shall be considered as confidential matter and shall not be

disclosed to any third party without prior mutual agreement unless the same is required by law.

9. COST AND EXPENSES

All cost and expenses incidental to the preparation and completion of this Agreement including stamp duties and legal fees shall be borne and paid for by the Contractor.

10. SUCCESSORS-IN-TITLE

This Agreement shall be binding upon the parties hereto and their respective successors-in-title and permitted assigns.

11. TIME

Time whenever mentioned shall be of the essence of this Agreement.

12. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of Malaysia.

IN WITNESS WHEREOF authorised signatories of each of the Parties has hereunto set their respective hands.

SIGNED BY]
For and on behalf of]
THE GOVERNMENT OF] ……
MALAYSIA Name:
Designation:
NIRC No:

……

In the presence of:-]
Name:
Designation:
Address:

SIGNED by
For and on behalf of] ……..
] Name:
] Designation:
NIRC No:

……

……

In the presence of:-]
Name:
NRIC No:
Designation: