

THE ARBITRABLE DISPUTES IN MALAYSIAN CONSTRUCTION INDUSTRY

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A thesis submitted in fulfilment of the
requirements for the award of the degree of
Master of Construction Contract Management

Faculty of Built Environment

Universiti Teknologi Malaysia

SEPTEMBER 2012

DECLARATION

I declare that this thesis entitled "*The Arbitrable Disputes in Malaysian Construction Industry*" is the result of my own research except as cited in the references. The thesis has not been accepted for any degree and is not concurrently submitted in candidature of any other degree.

Signature : 
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Date : 10th SEPTEMBER 2012...

DEDICATION

Especially to...

My beloved parents, my sister, my brothers and all my friends for their helps and understandings

Thanks for Everything!!

ACKNOWLEDGEMENT

I would like to take this opportunity to record my sincere appreciation to those who have given me their lending hand throughout the course of this research. This research would not have been successful without the great support, guidance, sacrifice and generous contributions from various parties.

First of all, I would like to express thousand thanks to my research supervisor, Dr Nur Emma binti Mustaffa. I am thankful to her for the impressive ideas, knowledge, patience and understanding that she has contributed throughout the whole duration of my research. Her guidance had led me in completing this research. Her contributions are much sincerely appreciated.

Last but not least, I am grateful to my parents, friends and relatives who had given me financial and spiritual support throughout the whole period of this research. Appreciation for their patience and cooperation during the entire research process was recorded sincerely in here.

ABSTRACT

Arbitration had been recognised as the common dispute resolution mechanism in the construction industry. The critical issue which regularly arises in the arbitration was arbitrator's jurisdiction such as arbitrable disputes issue as the arbitrator's award can be challenged if the subject-matter of dispute was not within the arbitrator's jurisdiction. Hence, the purpose of this study had determined the arbitrator's jurisdiction particular to the subject matter of arbitrable disputes in the Malaysian construction industry. Jurisdictional issue of arbitrable disputes in arbitration is a preliminary matter that must be decided prior to arbitration proceeding otherwise it will generate another dispute to be challenged in the court of litigation. This research had reviewed the relevant case law journals and the court's decisions where courts have interpreted provisions in their legislations with regards to arbitrable disputes. There are seven principles on the arbitrable dispute which can be deduced through the analysis of the 16 legal cases. The principles of the arbitrable disputes highlight that amongst others a dispute which involve a third party is not an arbitrable dispute due to the principle of privity of contract. Furthermore, the issue on point of law is not an arbitrable dispute but it may be referred to High Court as the arbitration is aimed to solve technical problem. In addition, a mere claim on a certified amount or admitted submission does not constitute a valid arbitrable dispute. The arbitrable dispute was mainly depends on the terms under the arbitration agreement and indirectly it is within the ambit of the parties to decide on. Moreover, a refusal to response or reply on a claim can lead to the existence of the arbitrable dispute. Arbitrable dispute deems to occur when the dispute crystallised on the date of submission. Arbitrable dispute can also arise in the circumstances where the submission is to be decided on the question of right or wrong whereby either one of the party is in the position of right allegation or otherwise and vice versa. In conclusion, this study established general guidelines on the arbitrable disputes to expose the parties on the reference of the right dispute to be arbitrated.

ABSTRAK

Lazimnya, timbangtara merupakan penyelesaian pertikaian yang diaplikasikan dalam industri pembinaan. Isu kuasa penimbangtara contohnya seperti bidangkuasa pertikaian merupakan satu isu kritikal kerana keputusan penimbangtara boleh dibatalkan jika subjek pertikaian adalah di luar kuasa penimbangtara. Justeru itu, penyelidikan ini dijalankan untuk mengkaji kuasa penimbangtara terutamanya dalam subjek kepenimbangtaraan pertikaian dalam industri pembinaan di Malaysia. Kuasa penimbangtara merupakan isu yang perlu dikenalpasti sebelum memulakan mana-mana prosiding kerana ia mungkin mengakibatkan lebih banyak pertikaian jika dibantah. Penyelidikan ini telah mengkaji semula kes-kes mahkamah berkaitan dengan industri pembinaan dalam hal kepenimbangtaraan pertikaian melalui keputusan hakim mengenai kepenimbangtaraan pertikaian. Terdapat tujuh prinsip kepenimbangtaraan pertikaian yang dapat disimpulkan melalui 16 kes mahkamah yang dikumpulkan dalam penyelidikan ini. Ia boleh diringkaskan seperti berikut:- Pertikaian yang melibatkan pihak ketiga dikategorikan sebagai subjek yang tidak dapat ditimbangtara. Selain itu, isu undang-undang juga merupakan subjek yang tidak dapat ditimbangtara. Hutang atas sijil pembayaran yang telah disahkan dengan jumlah pembayarannya juga tidak dapat ditimbangtarakan. Kepertimbangtaraan pertikaian adalah bergantung kepada syarat-syarat yang ternyata dalam perjanjian timbangtara. Pengabaian atas permintaan penjelasan hutang boleh menyebabkan ia membentuk sejenis pertikaian yang boleh ditimbangtarakan. Kemantapan sesuatu pertikaian boleh ditentukan sewaktu permintaan untuk menganjurkan prosiding timbangtara. Pertikaian untuk menentukan pihak yang betul atau di sebaliknya merupakan subjek yang boleh ditimbangtarakan. Kesimpulannya, penyelidikan ini telah mengariskan prinsip-prinsip mengenai kepertimbangtaraan sesuatu pertikaian dalam industri pembinaan untuk membolehkan pengguna merujuk kepada perkara yang betul untuk ditimbangtarakan.