An Analytical Exploration of Construction Contract Terms from Legal Cases

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ABSTRACT

Construction disputes are a commonality in the Malaysian construction industry. Previous researchers found that contractual issues are the main problem in construction disputes. It could also cause project delay, bad workmanship, and cost overruns if the construction contracts are not drafted properly. As such, the construction contract acts as the first security for the rights and responsibilities of the contracting parties. The construction contract in this study is based on general construction contracts, including both the main contract and subcontract, which govern the contractor's liabilities in construction. The researcher indicated that 6 sub-salient elements (Terminology, Lengthening and Consistency, Format and Presentation, Risk Allocation, Statutory Compliance, Completeness of Clauses), and a total of 11 salient elements in the construction contract in literature review which are "Certainty in Scope of Works", "Terms with Industry Conventions and Shared Meaning", "Unambiguous Words", "Plain Language", "Avoid Long Sentences and Redundant Information", "Avoid Too Many Cross-references", "Usage of Headings, Signage and Active Voice", "Clear Illustration of Procedure and Process", "Fair Risk Allocation", "Not Contrary to the Statute", and "Comprehensive with Essential Clauses". In addition, an analysis of 14 construction contract-related cases within the Malaysian jurisdiction, identified through Lexis Advance, was conducted to examine the judicial recognition of these salient elements. The findings reveal that the inclusion of comprehensive and essential clauses is the most critical element in drafting an effective construction contract, as expressly stated provisions provide the strongest evidentiary basis for enforcing contractual claims.

Keywords: Construction Contract, Terms, Malaysia

INTRODUCTION

The construction sector is highly fragmented, and the relationship between contracting parties is often adversarial (Zarabizan bin Zakaria, Syuhaida Binti Ismail, & Aminah binti Md Yusof, 2022). According to the Asian International Arbitration Centre (AIAC) Annual Report 2023, there are 873 cases of pre-registered and registered dispute cases with AIAC. In the report, the authors also examined the trend in dispute areas and found that construction-related disputes rose to 57.28% among all types of disputes, including insurance, supply contracts, oil and gas, and others. In addition, Arcadis stated that the construction disputes resolution time increased by 15% despite the average value of disputes dropping by 3% from 2020 to 2021. Notably, the trend of construction disputes is increasing worldwide, including in the Asian country of Malaysia.

According to Uff (2017), the law of contract is defined as the mutual exchange of two or more persons' obligations from a legally binding agreement. In the construction industry, the United States Federal Acquisition Regulation (US FAR) states that a contract will then bind a legal relationship obligating the seller (contractor) to furnish the supplies or services (consultant, maintenance or any construction-related services) and the buyer (employer) to pay for them (Nadar, 2023). Eventually, a comprehensively drafted construction contract can reduce the likelihood of disputes and protect the parties' ability to execute their respective roles and responsibilities (Chan, Nik-Bakht & Han, 2021), as disputes are the distinct views, demands and values of the parties leading to disagreement of the contract terms (Widjaja, 2024).

Standard form of contract could be a good choice of construction contract, but there is no 'one-size fits all' in construction contracts; the adjustment due to the governing rules, negotiating and drafting procedures may cause

ambiguity and invalid provisions in the contract (Klee, 2018; Castro, Guccio & Rizzo, 2023). Since it is a standard form of contract, parties often do not negotiate their terms extensively, making it unclear what was genuinely agreed upon when disputes occur (Chaar, 2018). Similarly, in the study of Yao, Chen and Tang (2024), both implied agreements and written contracts will increase the frequency of violations due to misunderstandings, which may jeopardise project success. Hence, the purpose of this research was to unveil the common contractual disputes in the Malaysian construction industry to act as a basis to improve the incompleteness of construction contracts.

Hence, the scope of this research focuses on the identification of construction contract disputes in the Malaysian construction industry and the ruling of the courts in the interpretation of the disputes relating to the construction contracts from 2015 to 2024. This is because identifying the type of construction disputes helps us to minimise the scope of study to the contractual issues, other than the owner, contractor or any external issues that can cause construction disputes. Next, the court ruling is important as it shows how the court would interpret the case and justify the specific issue of the construction contract, either from the ambiguous terms, readability, or incomplete contract clauses. From the court ruling, the final aim of this research is to determine the salient elements in drafting good construction contract terms through the evaluation of the legal cases.

LITERATURE REVIEW

Construction Contract

According to the Contract Act 1950, Section 2(a) and (b), a contract is a legal agreement in which the promisee makes a proposal to the promisor and expects to do or abstain from doing, or does or abstains from doing, or promises to do or to abstain from doing, something when he accepts the proposal. Its main aim is to ensure that contracting parties perform their roles and responsibilities and reduce the amount of construction disputes (Haron et al. 2020).

Apart from legal documents, Haapio (2022) advised that the contract drafter should understand that a contract is not equal to contract litigation; it is a contract management tool. A contract administrator, especially in the construction industry, would be an architect, engineer, quantity surveyor or a representative from the employer. Although they manage the contract, they are primarily people in the business and operational fields without a law degree. Thus, a contract shall be a legal document that grasps the understanding of the contracting parties.

In the Malaysian construction industry, there are a lot of standard forms of contract (SFC). The most common standard form of contracts is the Public Works Department (PWD) SFC in the government sector, and the Pertubuhan Arkitek Malaysia (PAM) SFC in the private sector. Construction Industry Development Board (CIDB) SFC, Institution of Engineers Malaysia (IEM) SFC, and Joint Contracts Tribunal (JCT) SFC are other contracts practised in Malaysia (Raja Berema, Ismail, Brahim & Nordin, 2023). However, although standard forms of contracts are comprehensive and proven over time, it is often necessary to amend the standard contract or use a bespoke contract in construction projects, as every project is unique.

Terms And Conditions

A contract is a legal document that is submitted to the court as evidence. Contractual terms, also known as contract conditions, are the words that define the scope of rights and responsibilities in the contract. However, contractual interpretation should not focus narrowly on isolated words or phrases at the expense of the contract's overall purpose, nor should undue weight be placed on any single term or clause based on Professor McMeel in The Construction of Contracts (Interpretation, Implication and Rectification) (2nd Ed, 2011) at para 1.73 cited from ***Wong Yee Boon v Gainvest Builders (M) Sdn Bhd [2020] 3 MLJ 571.***

Besides, as emphasised in the ***Wong Yee Boon*** case, the introducer agreement entered by the plaintiff was considered void in the High Court and the Court of Appeal as a breach of public policy. After the appeal, the Federal Court dismissed the previous judgment and ruled that the agreement does not involve the government as a contracting party because it is just a third party in starting a project. Also, the plaintiff did perform the contract to some extent after reviewing each of the contracts. Thus, this shows the basic principle of contractual interpretation is that a contract must be read as a whole to determine the true meaning of its individual provisions and, where possible, to give effect to every part of the agreement. Each clause in a standard commercial contract

should therefore be interpreted in a manner that is consistent with and complementary to the other terms of the contract. Since contract terms do not refer to a single specific word in a contract but rather to any related provision, condition, or clause that creates obligations, rights, and responsibilities for the parties involved. Hence, in this study, the construction terms could be referred to as words, phrases, and sentences used in the construction contract.

Furthermore, contract terms are not limited to written clauses; there are two types of terms in a contract. Based on Section 9 of the Contract Act 1950, express terms are written words in a contract, while implied terms are promises. Although implied terms govern the rights and responsibilities of the contracting parties, based on Murdoch and Hughes (2001), express terms generally prevail over implied terms, as the latter do not automatically have legal effect and may amount only to representations unless properly established. This approach reflects the application of the *parol evidence rule* in most written contracts, which limits reliance on external evidence (oral, ambiguous or incomplete evidence) that might alter or contradict the written contract (Stone, 2009). Next, Stone and Devenney (2025) also noted that this rule is not normally open to one of the parties to argue that some part of the written document should be disregarded, or interpreted in a way which is not consistent with its most obvious meaning. The rule also provides predictability by ensuring that the written contract stands as the definitive agreement, thereby reducing the scope for opportunistic reinterpretation.

Salient Elements In Drafting Good Construction Contract Terms

Within the evolving context of construction contract management, careful and effective drafting of agreements is essential to ensure that all parties clearly understand and fulfil their respective roles and obligations. Nonetheless, disputes often arise from the absence of provisions, disagreements over interpretation and ambiguities within the drafted terms. Such uncertainties create opportunities for conflict, underscoring the need for greater clarity and precision in contract formulation. By examining these underlying causes, the salient elements in drafting good construction contract terms can be identified. These elements not only mitigate disputes but also facilitate smoother project execution and reinforce adherence to contractual obligations.

Terminology

Terminology is the discipline concerned with specialised concepts and their linguistic designations or terms. Terminological work emphasises the explanation of knowledge and transmission of information in communication (Faber & Martinez, 2019). Hence, the terminology used in construction contract drafting shall support clarity, understanding and readability.

○ Certainty in the Scope of Works

Certainty in contractual terms is a foundation of a good construction contract. Without clarity and precision in obligations, responsibilities, and risk allocation, parties are exposed to unnecessary ambiguity, which often results in disputes, delays, and additional costs. Osifo, Omumu, and Alozie (2025) claimed that drafting a clear and comprehensive scope of work in the contract would reduce risk imposed on parties, including in time, quality and cost, because there are no misinterpretation issues regarding the obligations of parties in the contract. The degree of certainty embedded within contractual terms not only determines the enforceability of obligations but also safeguards the efficiency and stability of construction projects.

Besides that, the express terms in the construction contract are to establish certainty regarding the scope of work. They clearly outline the parties' specific rights and obligations and act as the primary point of reference in the event of a dispute. Courts have consistently held that when a contract is required to be in writing, its interpretation should generally be confined to the "four corners" of the document. This doctrine underlines the importance of precise drafting, as the written contract represents the final and conclusive record of the parties' agreement (Cheshire, Fifoot, & Fumston, 2012).

Ensuring certainty in the scope of work is also essential for accurately valuing variations. When an employer instructs a contractor to carry out specific tasks, the scope is defined within the construction contract and the accompanying bills of quantities, which form part of the contract. Consequently, the agreement clarifies whether certain tasks may be treated as additional work, potentially subject to a variation order claim by the contractor (Othman, 2021).

○ Terms with Industry Conventions and Shared Meaning

While the choice of a standard construction contract is important, the deliberate negotiation and mutual agreement of the contractual terms play a far more significant role in ensuring clarity, fairness, and enforceability between the parties (Murdoch & Will Hughes, 2001). This is said as construction contract conflicts often happen between parties with varying levels of expertise, educational background, and technical knowledge (Tsao, Zulkifee Abdul-Samad, Nur Mardhiyah Aziz, 2021). Moreover, in the traditional commercial contract, courts used to apply a 'literal' approach, subject only to the *contra proferentem rule*, that the drafter of the clause would interpret the words. The rationale for this rule is that courts presume contracting parties bear the responsibility of drafting language that clearly reflects their objectives. Consequently, where contractual terms are ambiguous, the court generally refrains from looking beyond the text to ascertain the parties' underlying intentions (Stone, 2009).

However, to ensure fairness, Lord Hoffmann, in ***Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896*** (also known as 'ICS'), introduced the *factual matrix* stating that the meaning of the commercial agreement shall be based on the understand of a reasonable man determined by the entire surrounding context or background knowledge of the contract (Stone, 2009). This can be seen from the 5 principles of contextual interpretation of a contract introduced by him, where:-

i) Interpretation of the meaning must be from the perspective of a reasonable person's knowledge.

ii) The "matrix of facts" must be reasonably available to the parties iii) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification.

iv) The meaning of words is a matter of dictionaries and grammars.

v) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

On the other hand, certainty in construction contracts is maintained through a "shared meaning" derived from both the "formalist conventions" and "public conventions" of the construction industry. Contractual terms must therefore communicate meanings that are not only legally precise but also intelligible within the professional standards and practices of the sector, ensuring that all parties interpret the obligations consistently and reliably (Juwita Radzi and Noushad Ali Naseem Ameer Ali, 2023). By aligning legal drafting with technical conventions, contracts achieve a form of certainty that reflects both formalist legal interpretation and the practical realities of construction work.

○ Unambiguous Words

The Cambridge Dictionary (2025) defines ambiguity as a situation or statement that is unclear because it has more than one possible meaning, and therefore is possibly confusing. A good construction contract should be formed with unambiguous words, as words that carry single or multiple layers of interpretation will lack accuracy, clarity or abstraction of symbols and grammar (Juwita Radzi and Noushad Ali Naseem Ameer Ali, 2023).

Other than that, Mehavarshni and Madhumitha (2023) stated that when the contract terms are ambiguous, there would be a drawback of subjective interpretation because different judges would have their own viewpoints, morals, and prejudices. The interest of the contracting parties may not be predictable, as subjective interpretation may lead to inconsistent legal precedent. Limitations might also result from changes in society norms and ideals. This will further extend the dispute resolution process and time when either parties try to appeal the final award.

One of the ambiguous terms of the contract is "and/or". Adams (2013) mentioned that "X and/or Y" carry meaning in the law for representation X or Y or both. However, it is ambiguous to the construction players who are not from a legal background. Instead, using the phrase "one or both of X and Y" would better replace the "and/or" structure. Another ambiguous word most common in construction contracts is the word "shall". 'Shall' is not accurate in definition as it can be interpreted as 'must', 'may', 'will', or 'should' (Radzi, Noushad Ali Naseem Ameer Ali, 2023). Hence, to avoid ambiguity, in the FIDIC RED Book 2017, under Subclause 1.2, it interprets

the explanation of "shall" as denoting that parties have the obligations to perform; whereas "may" is interpreted as by the choice of the parties whether to perform or not.

FIDIC Red Book 2017, Subclause 1.2:-

(e) "may" means that the Party or person referred to has the choice of whether to act or not in the matter referred to;

(f) "shall means that the Party or person referred to has an obligation under the Contract to perform the duty referred to;

Furthermore, employing contractual terms with precise, denotative meanings rather than connotative or ambiguous language helps to minimise uncertainty and prevent potential misunderstandings. Adriaanse (2017) mentioned that where contract terms are ambiguous, the court applies the legal principle of giving effect to the parties' intentions while also respecting the literal meaning of the words employed in the agreement. The principle is so-called "expressed intention" because it is the declaration of a party's desires, plans, or intent to enter into a legal agreement. Denotative words have fixed and transactional meanings as defined in dictionary explanations, which exclude any emotional and subjective interpretation (Ayunda Rizky Nur Rohmah & Nur Latifah, 2022). Contrastingly, connotative words refer to the emotional or cultural associations beyond a word's dictionary definition (Ayunda Rizky Nur Rohmah & Nur Latifah, 2022), and these implied meanings are too subjective and open to interpretation to be used in legal agreements. Hence, it is more suitable to use denotative words in a contract so that the interpretation of the scope of work of the parties is straightforward and leaves no room for misinterpretation.

○ Plain Language

Plain language construction contracts enhance the comprehensibility and readability of construction contracts (Ballesteros-Lintao & Ameer Ali, 2022). The contract drafter must be aware of and justify certain legal intents which are unavoidable to deliver in the modified contract. Ratzi and Qin (2021) also proposed that plain language drafting will increase common understanding of contracting parties and consequently reduce construction disputes.

What is plain language? According to the New Zealand Plain Language Act 2022, Section 5(a) and (b), plain language must be appropriate to the intended audience and clear, concise, and well organised. In other words, it could also being defines as the non-legalese terms used by the lawyers or judges, the simpler explanation is the style of English writing that are straightforward, short and use of everyday words write in the way of speak so that easy understanding by ordinary users including the lower educational background parties (Ratzi & Qin, 2021; BuildForce Canada, 2023). This is said as legal terms, legal jargon and unnecessary length and overly complicated had affected the clarity of the contract. Hence, choosing plain language is able to solve the respective issue.

However, CIDB (2023) did mention that not all legal terms can be replaced. Therefore, a comprehensive list of definitions can be given in the conditions of the contract to improve the clarification of contract terms and agreements (Zul Zakiyuddin Ahmad Rashid & Ng, 2022; Koc & Gurgun, 2020).

Lengthening and Consistency

In construction contract drafting, lengthening is often necessary to ensure that obligations, risks, and procedures are addressed in sufficient detail. The complexity of construction projects, characterised by multiple stakeholders, technical interdependencies, and unpredictable risks, means that overly brief clauses may leave dangerous gaps. Lengthened provisions can specify qualifying events, procedural requirements, and the consequences of breaches with greater precision, reducing the likelihood of disputes.

Yet lengthening by itself is not sufficient; without consistency, the very detail intended to prevent disputes may instead create confusion. Lengthened clauses must be drafted in harmony with one another and with the broader contractual framework, ensuring that terminology, timelines, and obligations do not conflict.

○ Avoid Long Sentences and Redundant Information

Longer contracts with voluminous documents and multiple stakeholders increase ambiguity and the likelihood of disputes. A good construction contract shall avoid wordiness and enhance precision and clarity. According to Peterson (2021), a general rule of thumb to keep a sentence under 25 words is to make the sentence more

compelling and increase readability. Separate thoughts should be placed in separate sentences. Each sentence that revolves around one main subject would not damage the fluidity of the writing. If the drafter over-explains and details the clause in the contract, they may make the sentences redundant and vague.

In Malaysia, the Standard Terms of Construction Contract for Renovation and Small Projects (STCC-RSP 2015) serves as an example of a contract drafted with clear and precise language. This contract was prepared by Sr. Noushad Ali Naseem Ameer Ali, a former President of the Royal Institution of Surveyors Malaysia, and is officially recognised by the Construction Industry Development Board (CIDB). It features an average sentence length of approximately 20 words, adopts a gender-neutral style, uses mainly active sentences, various numbering and listing and no multiple cross-referencing to ensure readability while avoiding overly complex phrasing (CIDB Malaysia, 2023).

Avoiding long sentences not only increases readability but also requires the contract drafter to have a deep understanding of the contract terms. It is not easy to shorten the sentences while retaining the important information. Hence, eliminating inconsistent technical information, discrepant and erroneous information, and inconsistent contract terms is one of the methods to avoid redundant information and repetitive words, and ultimately reduce sentence length (Chan, Bakht & Han, 2021; Ahmed Yousry Akal, 2022).

○ Avoid Too Many Cross-references

On the other hand, cross-references shall be minimal. The frequent use of cross-references imposes a navigational burden on the reader, resulting in a loss of focus and inefficient use of time. Since lengthening and consistency are interdependent principles, a good construction contract cannot rely on brevity, as these risks leave essential matters unaddressed; nor can it rely on detail alone, as inconsistent provisions undermine enforceability and trust. This could be seen from the case of ***Hardesty & Hanover International LLC & Ors v Abigroup Contractors Pty Ltd [2010] SASC 44***. In this case, it was observed that the plaintiff erroneously referred to Special Condition 12 (Alternative Dispute Resolution) for staged dispute resolution in relation to a notice of dispute under General Condition 12(b), which was not included in the contract. Consequently, the court held that the incorrect cross-reference to an expert determination was void, because the alternative dispute resolution clause in the parties' contract was inherently uncertain.

The case highlights the importance of accurate cross-referencing of the contract when attempting to take actions against other contracting parties. However, the more cross-references in the construction contract, the more prone one is to make mistakes in interpreting the contract and a possible lack of consistency of the contract as a whole. Therefore, fewer cross-references are easier to ensure consistency, minimising the pinball effect of the reader to bounce around trying to link the information of the clauses together (Peterson, 2021).

Format and Presentation

Contracts' format generally follows a structured sequence of sections that begin with a clear title, such as "Main Contract", "Supplementary Contract", which identifies its nature. This is followed by an introduction to the parties to the contract, using their full legal names, addresses, and roles, as well as the date on which the agreement is made. There would also be a title for the heading describing the scope of works with a specific site location.

Presentation is equally important as the format of the contract. A well-presented contract will follow the format of the contract arrangement practice in the construction industry. Hence, it is clear, professional, and easy to read.

○ Usage of Headings, Signage and Active Voice

The "signs" and "symbols" trigger specific behaviours in the construction contract. It consists of the way the readers decode the messages to enhance the understanding of a phrase or sentence (Radzi & Noushad Ali Naseem Ameer Ali, 2023).

Furthermore, the numbering and headings also enhance the readability of the contract. In the older handwritten days, the drafter was only able to emphasise text with all capital letters. However, most readers are likely to skim over text, especially when it is a chore to read, such as the contract administrator who has to read large amounts of contracts for a few projects. It is recommended to use bold and italics to emphasise the headings. Besides, placing a border around a provision using symbols, markings, or numbering is able to set off the heading from the surrounding elaboration text of the same size (Adams, 2013). In addition, the systematic numbering helps to

organise the document, making it easier to navigate and reference specific sections (Nor Marina Rosli, Nur Emma Mustaffa, & Hamizah Liyana Tajul Arifin, 2022).

Simultaneously, the active voice also functions to increase the understanding of the readers. This is said as the use of passive, avoiding unnecessary words of "by" in the sentences. Then, the active voice practises the subjectverb-object structure (Adams, 2013), where it allocates the necessary details front and centre within the sentence, providing straightforward engagement with the doer rather than the actions (Peterson, 2021). Thus, drafting a construction contract in the active voice avoids confusion about an individual's obligations (Peterson, 2021).

○ Clear Illustration of Procedure and Process

A good construction contract format shall provide readability through the drafting of a clear illustration of the procedure and process. Othman (2021) proposed that a presentation in visual patterns, such as tables, timelines, flow charts, swim lanes, companion icons & delivery icons, is a good way to illustrate the contract. This is because visual patterns ensure the operative parts of the contract remain constant and decrease the errors and issues of multiple repetitions of the same text. Simultaneously, visual patterns also shorten the sentences of the contract. For example, the comparison of the PWD 203A (Figure 1) and FIDIC Red Book 2017 (Figure 2), which clearly illustrates the procedures and processes using visual patterns, is more prominent than the procedures in other standard forms of contract.

39.3 Within 14 days of receipt of such notice, the S.O. shall carry out testing/ inspection of the Works. Pursuant to such inspection/testing, the S.O. shall –

(a) issue the Certificate of Practical Completion to the Contractor if in his opinion the whole Works have reached Practical Completion and have satisfactorily passed any inspection/test carried out by the S.O. The date of such completion shall be certified by the S.O. and such date shall be the date of the commencement of the Defects Liability Period as provided in clause 48 hereof; or

(b) give instruction to the Contractor specifying all defective works which are required to be completed by the Contractor before the issuance of the Certificate of Practical Completion.

Figure 1: Typical sequence of events from PWD 203A Procedures for Certificate of Practical Completion

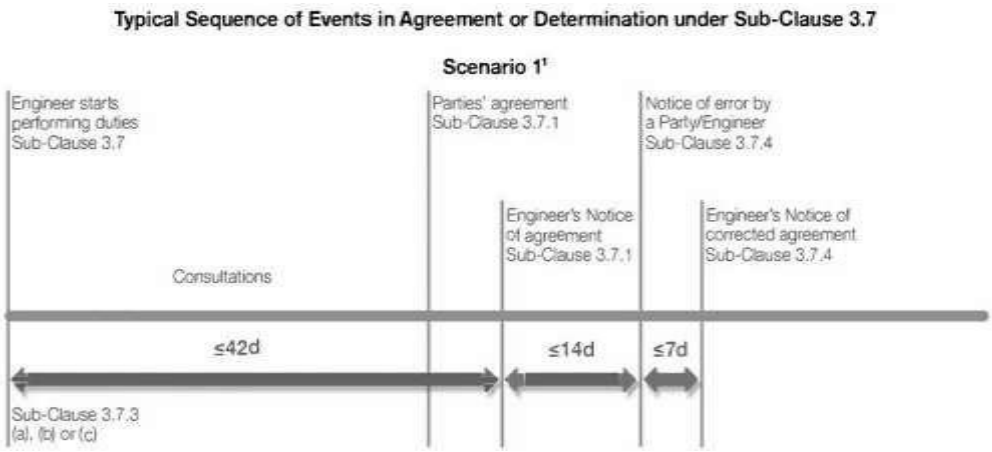

Figure 2: Typical sequence of events from Sub-clause 3.7 from FIDIC Red Book 2017

Furthermore, Haapio (2022) also demonstrated how visualisation can help prevent disputes, noting that the same contractual clause may be interpreted differently by different individuals. An example provided by Haapio illustrates a termination clause in a contract shown in below:-

"This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

However, it is noted that a different interpretation is understood by different people (See Figure 3). Hence, quoting the Father of Preventive Law, Louis M. Brown: "It usually costs less to avoid getting into trouble than to pay for getting out of trouble" Visualisation is a good practice to reduce contractual disputes.

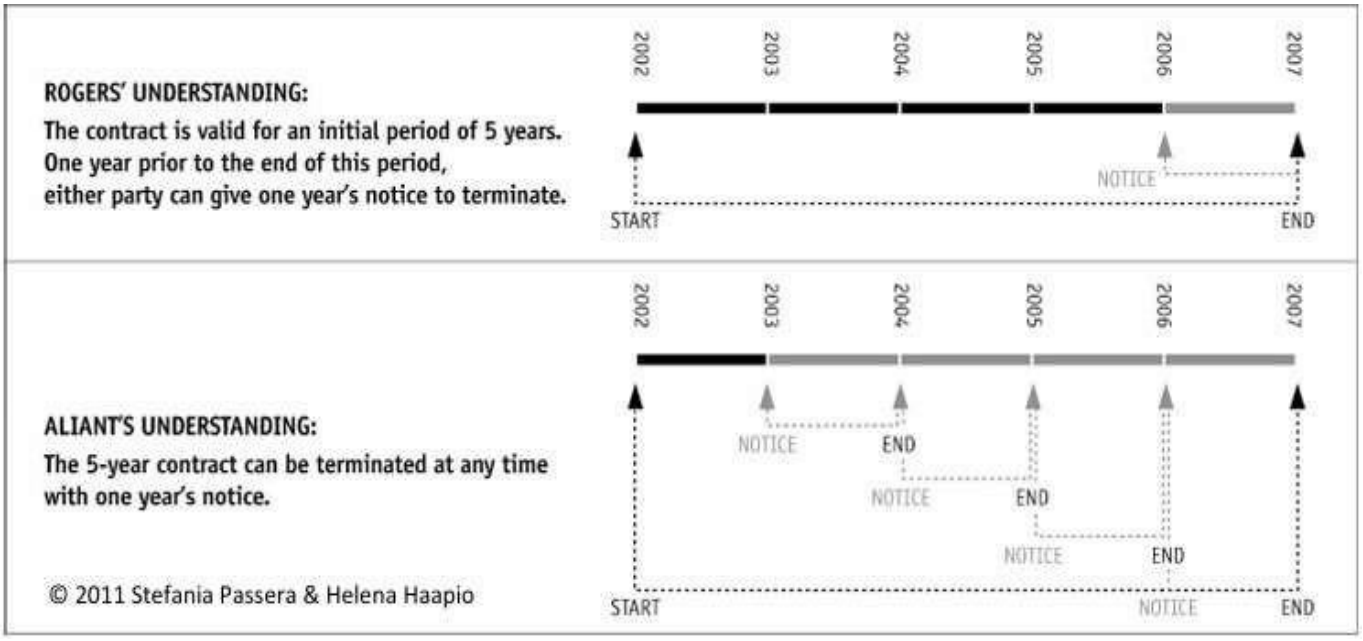

Figure 3: Two timelines that make different understandings visible (Haapio, 2022)

Risk Allocation

Risk allocation is affected by the project owner, project type, project nature, the finance involved and the contract sum (Zarabizan bin Zakaria et al., 2022; Sara Farag & Ahmed Mohammed Abdelalim, 2023). Project risks are present at every stage of a construction project, from the pre-contract phase through to completion, encompassing design, financial, regulatory, operational, and post-construction risks (Osifo, Omumu, & Alozie, 2025). Contracting parties could not avoid all risks, but they are likely to transfer risk to other contracting parties through the disclaimer clauses or catch-all clauses.

○ Fair Risk Allocation

Given that the nature of the construction contract is controlled by the dominating party (the employer), in

Chinook Aggregates Ltd v. Abbotsford (Municipal District) [1989] 35 CLR 241, the British Columbia Court of Appeal held that an owner cannot rely on a privilege clause to apply undisclosed evaluation criteria. This arose in the context of a municipal tender for a gravel crushing contract, which implemented an undisclosed local preference policy, awarding contracts to local bidders whose bids were within 10 per cent of the lowest submission. Such practices were deemed unfair to contractors who were unaware of these conditions. From the perspective of drafting an effective construction contract, this case underscores the importance of the fairness principle, which requires that risk be allocated equitably between the contracting parties.

Besides that, in the Contract Act 1950, Section 10, agreements are to be voidable if not made with the mutual consent of the parties. This means that the contract shall be freely bargained with consensus, known as "Mere ad idem". To have a meeting of minds, contracting parties would look for fair risk allocation to reduce their liabilities. However, according to Dr Nael Bunni, FIDIC special advisor, fair risks are subjective. He proposes that the following four considerations should be used when allocating risks in construction contracts (Adra, Lindsay, Northcott, & Espen, 2025):-

Which party can best control the risk or its associated consequences?

Which party can best foresee the risk?

Which party can best bear that risk?

Which party ultimately most benefits or suffers when the risk eventuates?

Satisfying the contracting parties with acceptable risks is also a way of fair risk allocation. Hence, this reduces construction disputes (Waraich, Fayaz, & Zahid, 2022). However, in the reality of the construction industry, the contractors are always the weaker party in a relationship with the employer (the paymaster), practising the principle of "take it or leave it" (Palit & Brint, 2020). This is similar to the subcontractors when entering into a subcontract with the main contractor. Hence, a construction contract can be known as the “Contracts of Adhesion” especially the standard form of contract because the adhering party (contractor) has given in to the terms and conditions of the first party (employer), who is the party with greater power, alone gets to set the contract's terms and conditions (Waraich, Fayaz, & Zahid, 2022).

Moreover, due to the privity of contract, the main contractor would not be released from the liability of the subcontractors, as the employer does not have a direct legal relationship with the subcontractors. Hence, Klee (2018) suggested that the main contractor shall secure full control of the termination of the subcontract, both domestic and nominated in the subcontract, with a statement such as:

The contractor shall reserve the right to replace at any time the subcontractor in case of failure by the latter to properly and timely perform its obligations under the subcontract.

It is argued that this clause enables the main contractor to seek compensation from the subcontractor whenever the employer makes a claim against the main contractor due to the subcontractor’s default, thereby facilitating a fair allocation of risk between the main contractor and the subcontractor.

Statutory Compliance

Statutory compliance in a construction contract refers to the adherence to all legal and regulatory requirements governing construction activities. These obligations typically include compliance with labour laws, health and safety standards, environmental regulations, building codes, tax requirements, and industry-specific legislation. By embedding statutory compliance into the contractual framework, construction stakeholders, such as contractors, subcontractors, and project owners, ensure that projects are executed in accordance with the law, minimising risks of legal disputes, penalties, or project delays.

○ Not Contrary to the Statute

Contradictions between legal provisions at the local, provincial, national, or international levels, as well as discrepancies such as inconsistencies between local building regulations and insurance policies, can give rise to contractual disputes. Chan, Nik-Bakht, and Han (2021) highlighted the need for improvements in construction contracts to always revise and fit the regulatory frameworks, national policies, and standards to better accommodate both conventional and modular construction. This is because the law takes precedence over a contractual condition.

For instance, in the case of ***Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873,*** the employer (Tioxide) challenged the adjudicator’s decision and sought to bypass the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) by referring the matter to arbitration. However, the court held that, when considering CIPAA 2012 as a whole, the statute prohibits parties from contracting out of its provisions. Section 4 of CIPAA 2012 permits all payment-related disputes in construction contracts to be adjudicated, meaning that any private contractual arrangement for dispute resolution cannot exclude the Act’s application. This case illustrates that construction contracts must align with statutory requirements, as conflicting provisions may give rise to disputes and delay the resolution process.

Completeness of Clauses

A comprehensive construction contract serves as a roadmap for all parties, defining their rights, responsibilities, and obligations. It provides certainty, reduces ambiguity, and creates a legal safeguard in case of disputes, arguments and disagreements. In addition, it sets performance standards, outlines payment mechanisms, identifies

work programme timing and specifies remedies for breach of contract. The comprehensiveness of such a contract lies in its ability to anticipate potential risks and address them proactively through clearly defined clauses.

○ Comprehensive with Essential Clauses

Key clauses in construction contracts define critical aspects of project execution and risk management. There are common contractual clauses that need to be clearly stated in the construction contract:-

I. **Payment clauses** ensure timely compensation for contractors, which is vital for maintaining cash flow and project momentum. Hence, to address finance disputes, the CIPAA 2012 was enacted, as delayed payments can lead to financial strain, project delays and even project abandonment, affecting both contractors and the employer (Adaku, Osei-Poku, Ottou & Yirenkyi-Fianko, 2023).

II. **Time-related clauses** such as commencement, completion and extension of time. This is because time is of the essence in the construction contract. Disputes often arise over issues such as changes to the commencement or completion dates, concurrent delays, the validity of Extension of Time (EOT) claims, contractors' failure to comply with contractual obligations, insufficient efforts to mitigate delays, and the justification of allowable time extensions in relation to the periods specified in the contract (Norazian Mohamad Yusuwan, Hamimah Adnan, Zul Zakiyuddin Ahmad Rashid and Nor Azmi Bakhari 2021).

III. **Delay and Liquidated Damages Clauses** are commonly used in construction disputes. The two clauses are used to determine the responsible party when the delay is either non-excusable or compensable (Lee,

Ham, & Yi, 2021). In the construction industry, it is more commonly known as the relevant events to determine whether the damages are compensable.

IV. **Variation Clauses,** which are to define the scope and nature of changes that an employer may instruct, including alterations to the construction method or sequencing of works, adjustments to the volume of additional work, and the timing of when such changes can be implemented (Sergeant, & Wieliczko, 2014). This clause also needed to compensate the contractor for extra work and protect the employer from the contractor's claim for extra work if the instructed variation was invalid (Matarneh, 2024).

V. **Suspension and Termination Clauses,** which determine the specific rounds in which rights of termination may be invoked and the operational processes that need to be followed (Mohamed-Asem U. Abdul-Malak, Farah S. Demachkieh and Kazem Y. Dhaini, 2023).

VI. **Safety and Insurance Clauses** comply with legal and regulatory standards, such as the Occupational Safety and Health (Amendment) Act 2022 (OSHA 2022), to reduce workplace hazards and improve worker well-being (Iqbal, Hussain, 2025). Subsequently, the insurance clause limits their liability through insurance coverage when there is property damage and personal injury (Meredith & Hornby, 2023). Performance Bond and Advanced Payment Guarantee are also insurance in a construction contract which is to secures the contractors from performing the contractual obligations.

VII. **Alternative Dispute Resolution (ADR) Clauses** resolve construction disputes. ADR offers a more

flexible, cost-effective, and timely solution, thus becoming a good substitute for the traditional litigation route (Gamage & Kumar, 2024; Panov, Volkova, Panova, Sichko & Petrenko, 2024)

VIII. **Flow-down Clauses** in the subcontract, as subcontractors are commonly known for back-to-back or riskshifting arrangements, where subcontractors' rights are defined by the rights granted under the prime contract, also known as the main contract (Meredith, Gerard Hornby, 2023). Hence, avoiding flow-down clauses, particularly payment provisions such as the pay-when-paid clause, can prevent subcontract clauses from fully aligning with the terms of the main contract (Assaad, Elsayegh, Mohamad Abdul Nabi, & El-adaway, 2020).

Summary Of the Salient Elements in Drafting Good Construction Contract Terms

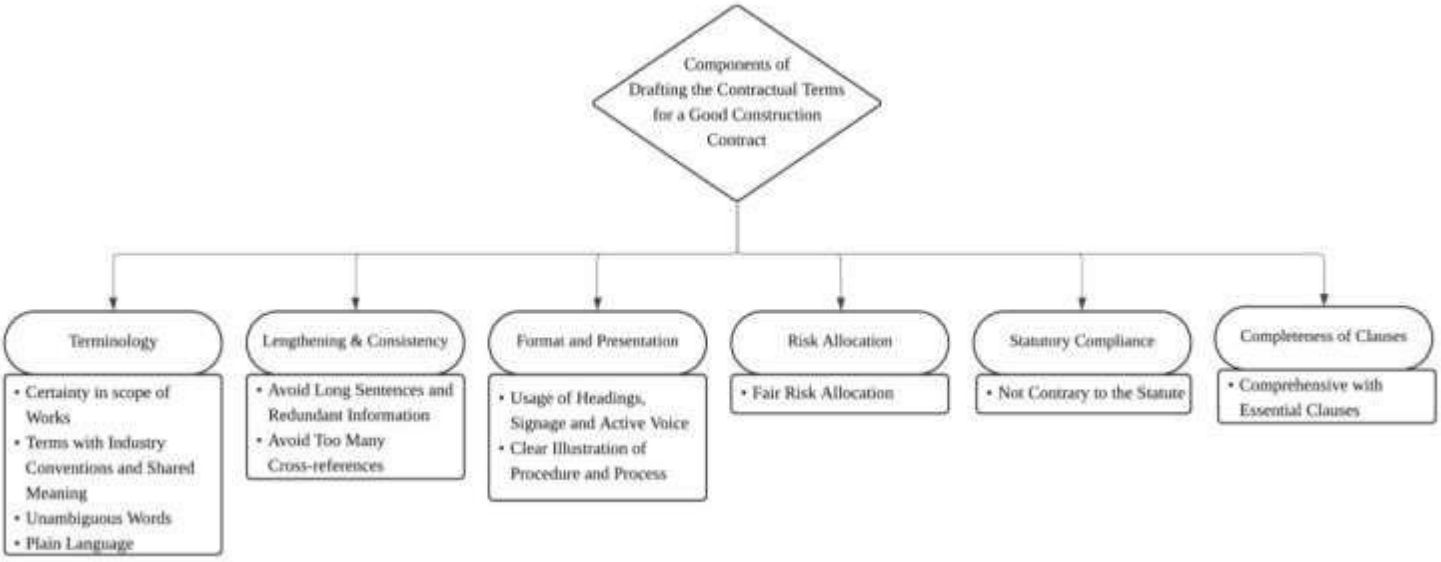

Figure 4: Summary of the salient elements in drafting good construction contract terms

RESEARCH METHODOLOGY

This research is conducted through a qualitative approach to determine the salient elements in drafting good construction contract terms with doctrinal legal cases. The initiation of the concept for this research methodology is from Koc and Gurgun (2021), Haron, Masrom and Kamal (2020) and Nor Marina Rosli, Nur Emma Mustaffa, and Hamizah Liyana Tajul Arifin (2022), who identified construction contract disputes and ambiguity through literature profiling, evaluation of 2 types of standard form of contracts (PAM and PWD) and analysis of twentytwo bespoke contracts respectively. They showed that it is possible to extract the salient elements in drafting good construction contract terms by identifying contractual disputes in the construction industry. Moreover, judicial decisions offer concrete examples of how courts interpret and apply legal principles in practice, thereby providing invaluable data for the study on how the court would interpret the ambiguous construction contract terms. The interpretation from the courts' perspective, rather than the construction players' perspectives, would also be fairer and more impartial (Chaar, 2018). Hence, doctrinal legal study, which is a kind of qualitative study, is suitable for the evaluation of the law by investigating the evolution of the legal cases from secondary data. In the study of Chan, Nik-Bakht and Han (2021) on "Sources of Ambiguity in Construction Contract Documents, Reflected by Litigation in Supreme Court Cases", they also extracted the contractual disputes from court cases.

The data collection process starts by extracting cases from the Lexis Advance platform, which is a research platform especially for the study of legal cases from 2015 to 2024. The cases are further screened down with a few attributes, as in Table 1. The included attributes to evaluate the legal cases are coded with "In"; whereas the excluded attributes are "Ex". Hence, the coding from In 1 to In 6 refer to the attributes that must be included in the cases; while Ex 1 to Ex 8 refer to the attributes that should be excluded. These attributes are important for determining case eligibility for selection in this study. After applying the selection methods in Table 1, there are a total of 14 suitable cases to be applied in this study, as shown in Table 2.

In short, to delve deep into the Malaysian construction industry, this research will concentrate on the context of jurisdiction in Malaysia through the research objectives:-

1. To identify the common contractual disputes relating to terms in construction contracts.
2. To identify the court decisions on the contractual disputes.
3. To determine the salient elements in drafting good construction contract terms.

Table 1: Inclusion and Exclusion Attributes

Attributes	**Decision**	**Coding**
Keywords for research: "Terms" & "Construction" & "Contract"	Inclusion	In 1
Content Type is "My Cases"	Inclusion	In 2
Jurisdiction in Malaysia	Inclusion	In 3
Cases that were published from 2015 to 2024.	Inclusion	In 4
Cases that were treated in the Superior Courts: Malaysia High Court, Malaysia Court of Appeal, Malaysia Federal Court.	Inclusion	In 5
Cases that were published in the Malayan Law Journal and reported.	Inclusion	In 6
Excluded cases that appear out of the top 100 of the relevance ranking in the LexisNexis search result	Exclusion	Ex 1
Duplicated Cases	Exclusion	Ex 2
Cases that are only about material supply from suppliers, but not the construction of projects, are excluded.	Exclusion	Ex 3
Attributes	**Decision**	**Coding**
Cases seeking enforcement or setting aside of adjudicator's decisions due to the excess of jurisdiction of CIPAA 2012.	Exclusion	Ex 4
Cases not related to the construction fields.	Exclusion	Ex 5
Cases involving parties in a Sale and Purchase Agreement (SPA)	Exclusion	Ex 6
Cases where the contract had yet to be formed or voided.	Exclusion	Ex 7
Cases related to the enforcement of different Acts.	Exclusion	Ex 8

Table 2: Shortlisted Cases

No.	**Case**	**Year**	**Citation**	**Court**	**Parties**
1	Pembinaan Teris Sepakat Sdn Bhd v Kumpulan Ikram Sdn Bhd & Anor (Mohd Rozi bin Salleh & Anor, third party)	2015	10 MLJ 764	High Court	Main Contractor & Subcontractor
2	CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd	2015	11 MLJ 485	High Court	Main Contractor & Subcontractor
3	Kerajaan Malaysia v Global Upline Sdn Bhd and another appeal	2017	1 MLJ 170	Court of Appeal	Employer & Contractor

4	Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia & Anor (GM Healthcare Sdn Bhd & Anor, third parties)	2018	7 MLJ 530	High Court	Employer & Contractor
5	Metro Luxury Sdn Bhd v PKNS Engineering & Construction Bhd	2018	6 MLJ 367	Court Of Appeal	Main Contractor & Subcontractor
6	Kerajaan Malaysia (Jabatan Kerja Raya) v Global Globe (M) Sdn Bhd	2019	1 MLJ 281	Court of Appeal	Employer & Contractor
7	Bina Puri Sdn Bhd v TKL Oil & Gas Sdn Bhd	2020	9 MLJ 119	High Court	Main Contractor & Subcontractor
8	Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd	2020	3 MLJ 704	Court of Appeal	Main Contractor & Subcontractor
9	IRDK Venture Sdn Bhd v Econpile (M) Sdn Bhd and another appeal	2020	MLJU 939	Court of Appeal	Employer & Contractor
10	Ahmad Zaki Sdn Bhd v SN Akmida Holdings Sdn Bhd	2021	MLJU 644	Court Of Appeal	Main Contractor & Subcontractor
11	Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal	2022	6 MLJ 967	Court Of Appeal	Subcontractor & Sub-sub Contractor
12	Sykt Pembinaan Anggerik Sdn Bhd v Malaysia Airports Holdings Bhd	2022	9 MLJ 391	High Court	Employer & Contractor
13	Kembang Serantau Sdn Bhd v Perbadanan Putrajaya and another appeal	2024	MLJU 945	Court of Appeal	Employer & Contractor
14	Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd	2024	4 MLJ 825	Court of Appeal	Employer & Contractor

FINDINGS AND DISCUSSION

From the findings of the 14 cases, it is observed that the 3 objectives of this research have been achieved.

Answering objective 1: “to identify the common contractual disputes relating to terms in construction contracts”, the research's findings indicate that all the proposed contractual disputes related to terms in construction contracts in the literature review are common in the Malaysian construction industry. This is because all the disputes are found in the reviewed cases in the past 10 years, from 2015 to 2024. Among all disputes, surprisingly, the 14 cases were mostly discussed on the “Comprehensive with Essential Clauses” regarding the “Completeness of Clauses” (9 cases), followed by “Clear Illustration of Procedure and Process” regarding the “Format and Presentation” of the construction contracts (3 cases).

Then, throughout the analysis on objective 2: “to identify the court decisions on the contractual disputes”, the courts have consistently held that, in contractual disputes, they have no jurisdiction to amend, rewrite, or introduce new terms into a construction contract. Accordingly, the fundamental rule of contractual interpretation is to give effect to the intention of the parties, construed objectively and in a manner that promotes business efficacy. This

approach reflects the inherently commercial nature of relationships between employers, contractors, and subcontractors in construction projects. Furthermore, the courts primarily interpret contractual terms based on what is expressly stated in the construction contract itself. This reinforces the critical importance of drafting construction contracts with clarity, precision, and comprehensive provisions, as the courts will not remedy deficiencies arising from poorly drafted clauses.

Thus, both objectives 1 and 2 lead to the result of objective 3: "to determine the salient elements in drafting good construction contract terms". The most salient elements in drafting good construction contract terms are the comprehensiveness of the essential clauses in the construction contract, because 9 out of 14 cases discuss the subject matter of deficiency in the comprehensiveness of the construction contract. It is believed that the reason for such a result is that the "Terminology" could be certain with supplementary documents or an expressed definition in the construction contract (Solo, 2025). Then, "Lengthening and Consistency" and "Format and Presentation" could be controlled to the most comfortable state by a professional contract drafter with opinions from the contracting parties. This is because, according to Soo and Cheng (2022), disputes can be easily avoided by ensuring properly labelled content, reasonable cross-references throughout the contract, and avoiding the chance to miss the contract details. Next, "Risk Allocation" would not need to be equally fair, because depending on the tolerance of the contracting parties, for instance, if the employers would like to transfer the design risks to the contractors (refer to design and build contract), he may need to pay more to the contractor compared to a traditional construction contract (Adra, Lindsay, Northcott, & Espen, 2025). Next, "Statutory Compliance" is also manageable by choosing a construction contract drafter with a legal background, who could solve this issue because compliance to law is a condition precedent of a valid contract (Chan, Nik-Bakht, & Han, 2021).

Although the analysis indicated the comprehensiveness of construction contract as the top main concern in construction contract disputes, it is almost impossible to draft a comprehensive contract with all the salient clauses, as the practices in the construction industry usually exclude the misrepresentation claims, implied terms or documents which are incorporated by reference but not expressly attached to the physical contract as a contract document (Rai & Loo, 2020). Moreover, the "hierarchy of precedence" or "priority" clause is also an underestimate clause in a construction contract. This clause refers to the detailed and exhaustive listing of the documents that have been expressly incorporated as contract documents in the construction contract to specify the prevailing contract document to be referred to when a conflict or a discrepancy arises in resolving ambiguities caused by conflicting documents. The FIDIC (International Federation of Consulting Engineers) 1999 suite of contracts showed an example where the order of hierarchy is from the contract agreement as the highest level of authority, following the letter of acceptance, then the letter of tender and others (Abdulrahman Kamal, 2024). In this respect, the construction contract shall focus more on including all the key clauses in the construction contract through the contracting parties' past experiences. The discussed and unwritten conditions shall also be recommended to keep a black and white written in the construction contract or any supplementary documents that are listed to be referred to in the construction contract.

CONCLUSION

In conclusion, drafting a construction contract is a complex and professional process. Any ambiguity, mistake or unwritten construction contract could lead to contractual disputes in the construction industry. The circumstances that ought to be taken into consideration are the terminology used in the contract, which affect interpretation of the contract scope of works; the length and consistency, format and presentation, which affect the ease of reading and notifying the important aspects in the construction contract; the risk allocation that is fair and reasonable to contracting parties to ensure their satisfaction while performing the contract; statutory compliance which make sure the contract is legally binding by the law; and completeness of clauses as the first substitution of claim looking by the judges when there is a contractual disputes are through the expressed provisions in the construction contract.

This research carries significant value for a wide range of stakeholders within the construction industry, including but not limited to employers, contractors, subcontractors, contract administrators, regulatory and governmental bodies, as well as academics and researchers in the field. Its contribution lies in the identification of the causes of disputes in construction projects, while also examining the contractual clauses that commonly govern such conflicts. By doing so, it provides a foundation for developing more robust and effective construction contracts

to foster better communication and understanding among stakeholders, thereby contributing to more harmonious project execution.

Ultimately, the study not only advances theoretical understanding but also delivers practical benefits that can enhance project outcomes, reduce costs, and promote more collaborative relationships among construction professionals. It is important, as moving into Construction 4.0 and Construction 5.0, that the implementation of smart contracts still requires a good construction contract to be drafted to govern the rights and responsibilities of the contracting parties. Additionally, since the construction industry is emerging with more technologies, the contract will be more complex in the future, and therefore, a good foundation of construction contract terms is needed.

However, the main limitations of this research are the small sample size and the analysis of cases from a single source of data, Lexis Advanced. The cases may not represent the whole jurisdiction of Malaysia related to the construction industry. The study is recommended to have a deeper understanding on the Malaysian construction contract disputes through case profiling for all the construction-related cases from different sources such as eLaw.my and CLJ Law.

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