



# **KNOWLEDGE SHARING SESSION WITH PERBADANAN KEMAJUAN NEGERI SELANGOR(PKNS)**

**Date: 27<sup>th</sup> November 2020**

**Venue: -via online googlemeet-**

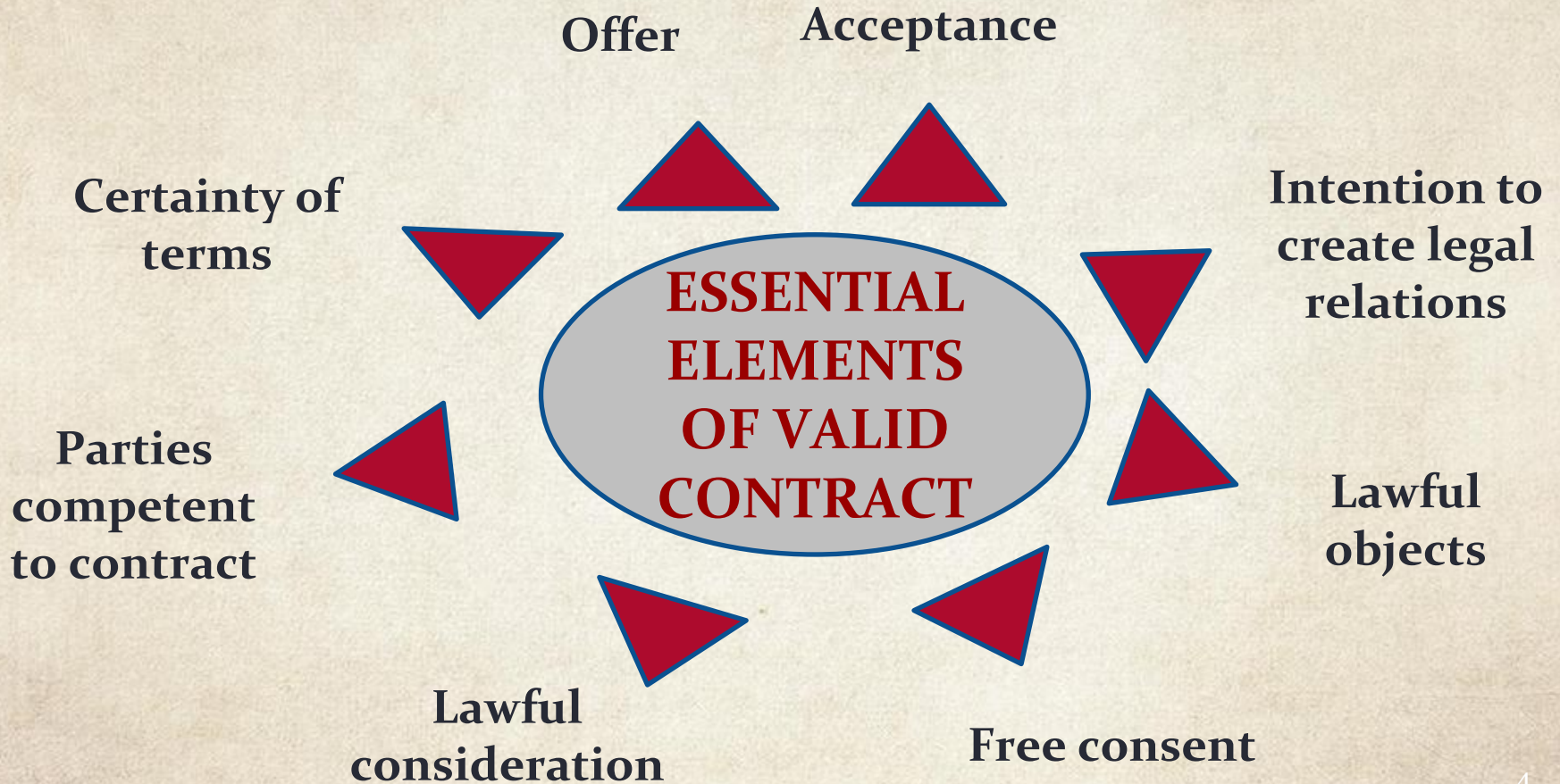
**Presented by: Messrs Tawfeek Badjenid & Partners**

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***TERMINATION OF  
CONSTRUCTION CONTRACT :  
ITS PROCESS AND  
CONSEQUENCE***



***ESSENTIAL ELEMENTS AND NECESSARY  
CONDITIONS OF CONTRACT***





## ***DISCHARGE/TERMINATION OF CONTRACT***



## **DISCHARGE OF CONTRACT**

Definition: When a contract is brought to an end, dissolved or terminated.

‘Discharged’: Where one or both parties to a contract are freed from their contractual obligations.



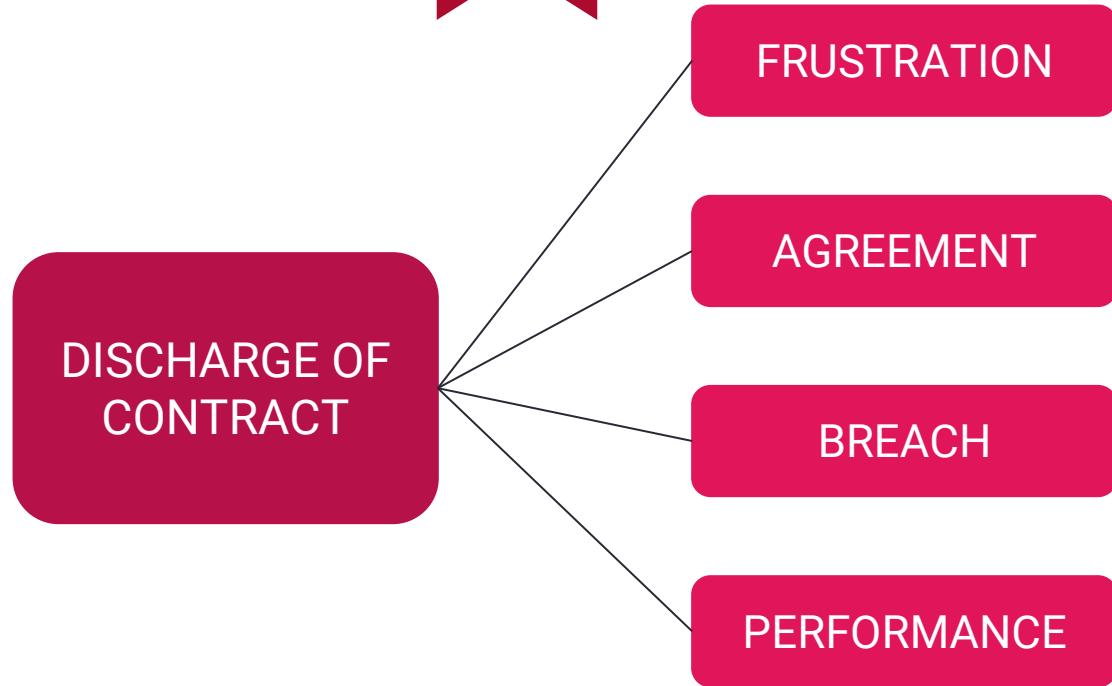
DISCHARGE OF  
CONTRACT

FRUSTRATION

AGREEMENT

BREACH

PERFORMANCE





## **A. DISCHARGE BY WAY OF FRUSTRATION**

- ◆ Sec. 57(2) of Contracts Act 1950 whereby after the contract is made, the act becomes:-
  - i) Impossible
  - ii) Unlawful due to some event which the promisor could not prevent
  
- ◆ In such circumstances, the contract will then become void.





## **B. DISCHARGE BY WAY OF AGREEMENT**

- ◆ Sec. 63 of Contracts Act 1950 : If parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.



## **C. DISCHARGE BY WAY OF BREACH**

- A contract is breached when a party fails to perform his contractual obligation.
- Every breach will give the innocent party a right to claim damages for any loss suffered
- However, serious breached will entitle the innocent party to not only claim damages but also be discharged from all future obligations.



-Sec. 40: The innocent party may rescind in two situations:

- i) Where the defaulting party refuses to perform
- ii) Where the defaulting party disables himself from performing his promise in its entirety

The contract does not come to an end automatically, but the breach gives the innocent party an option to either rescind/terminate or to affirm/continue with the contract.(voidable)



## **D. DISCHARGE BY WAY OF PERFORMANCE**

- Exact performance rule (general rule):  
Performance must be exact and precise and in accordance with what the parties have agreed.  
(Sec. 38(1))
  
- When the contract is fully performed: both parties will be discharged by performance



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- When performance is not complete/defective:
    - i) The innocent party may not want to pay until the work is completed according to the contract.
    - ii) The innocent party may want to claim for the loss suffered as a result of the incomplete/defective work.



# ***REMEDIES OF CONTRACT TERMINATION***



REMEDIES

RESCISSION OF  
CONTRACT

DAMAGES

INJUNCTION

SPECIFIC  
PERFORMANCE



## **A. RESCISSION OF CONTRACT**

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- ◆ Section 40 : “when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance”





## **B. DAMAGES**

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- ◆ Section 74 : an innocent party may claim damages from the party in breach in respect of all breaches of contract.
- ◆ The damages may be nominal (where the innocent party has suffered no loss as a result of the other's breach) or substantial (monetary compensation for loss suffered as a result of the other party's breach).



## con ..

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- ◆ For an innocent party to obtain substantial damages he must show that he has suffered loss as a result of the breach (remoteness) and the amount of his loss (measure). It is up to the party in breach to argue that the innocent party has failed to mitigate his loss. This is an equitable remedy granted at the court's discretion.



## C. INJUNCTION

- ◆ Classified under Part III of the Specific Relief Act 1950 as 'Preventive Relief'.
- ◆ An injunction will not be granted if its effect would be to compel a party to do something which he could not have been ordered to do by a decree of specific performance.
- ◆ An injunction which is an equitable remedy may be interlocutory, or mandatory. It may even be prohibitory or restraining in nature.
- ◆ An interlocutory injunction is used to maintain the status quo of the subject matter in a pending suit whilst a mandatory injunction is a court order requiring something to be done.



◆ A prohibitory injunction stops something from being done.

Example:-

-Alan wanted to sell his restaurant due to the financial problem he is facing now so he offers his restaurant for RM600k.

-Wilson is interested with his restaurant and agreed with the price given. Thus, Wilson signs a contract with Alan for take over his restaurant.

-After the contract has been signed, another buyer, Taylor is also interested with Alans restaurant and willing to pay higher price, RM 630k.

-So Alan changed his mind and going to sell his restaurant to Taylor.

-Wilson has the right to apply an injunction from the court to stop Alan from selling his restaurant to Taylor.



## **D. SPECIFIC PERFORMANCE**

- ◆ It is a decree by the court to compel a party to perform his contractual obligations.
- ◆ It is usually only ordered where damages are not an adequate remedy. It is a general rule that specific performance will not be ordered if the contract requires performance or constant supervision over a period of time and the obligations in the contract are not clearly defined.
- ◆ Specific performance is often ordered in relation to building contracts because the contract deals with results rather than the carrying on of an activity over a period of time and it usually defines the work to be completed with certainty.

# CONSTRUCTION LAW IN MALAYSIA :-

- 1 . WHAT IS CONSTRUCTION LAW IN MALAYSIA
2. LAWS THAT GOVERNS CONSTRUCTION LAW IN MALAYSIA
3. ESSENTIAL ELEMENTS IN CONSTRUCTION CONTRACT
4. RELEVANT CLAUSES IN CONSTRUCTION CONTRACT
5. SAMPLE OF CONSTRUCTION AGREEMENTS
6. STANDARD FORMS IN MALAYSIA
7. TERMINATION OF CONSTRUCTION CONTRACT
8. REMEDIES



# **1. WHAT IS CONSTRUCTION LAW**

Construction law involves any legal issue related to the construction of a building or other structure. It is the combination of all of the areas of law that apply to construction work.





***LAW THAT GOVERNS  
CONSTRUCTION LAW IN MALAYSIA***

## Applicable Laws In Malaysia

-Developments and buildings in West Malaysia are primarily governed by

- *Town and Country Planning Act 1976*; and
- *Street, Drainage and Building Act 1974*

-This legislation provides the minimum standards for the control and construction of street, drainage and building.

-It also sets out the procedures regulating application for, amongst others, building plan approvals as well as the requirements for fire-fighting services.

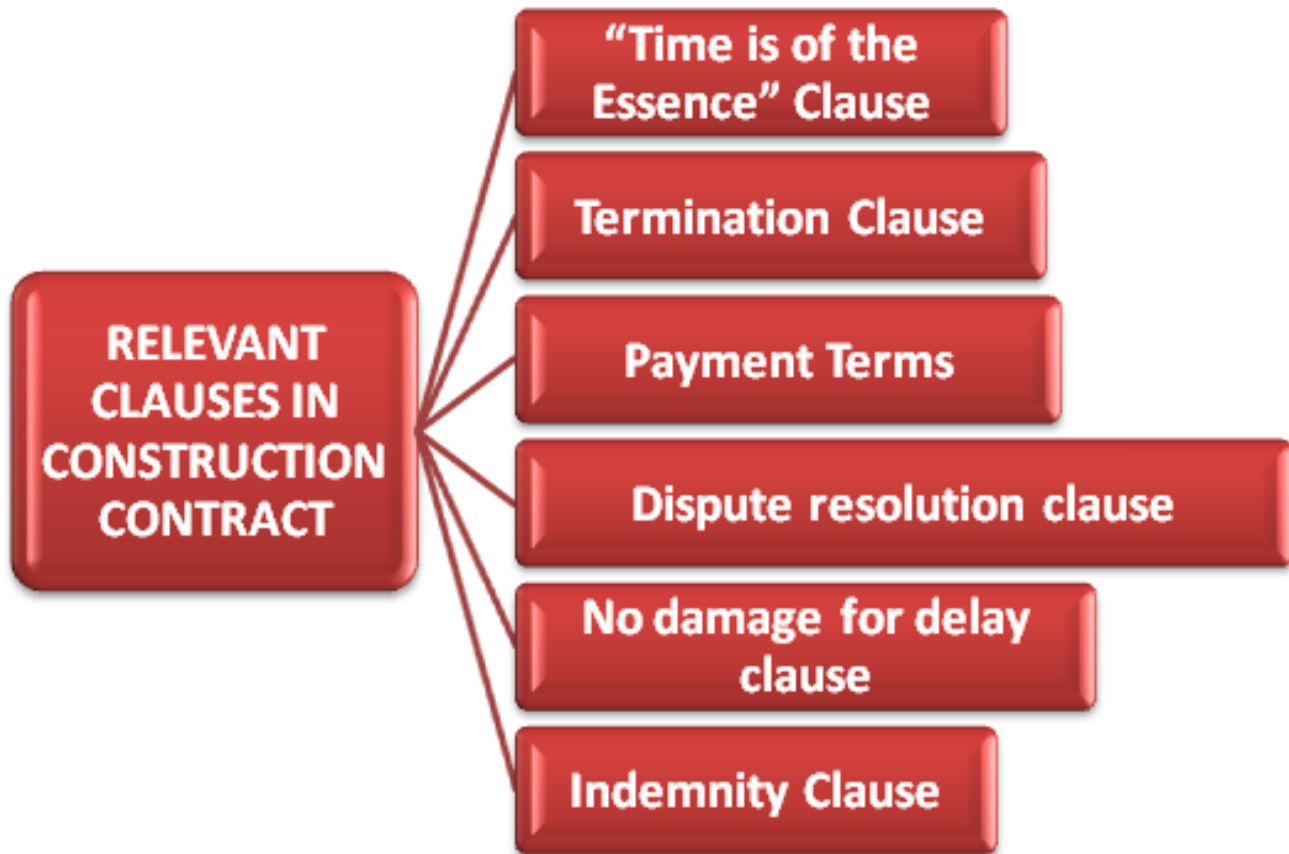
## Applicable Laws In Malaysia

Depending on the complexity, size, and nature of the project, there may be other applicable legislation:-

- (a) The Federal Roads Act 1959;
- (b) The Quantity Surveyors Act 1967;
- (c) The Registration of Engineers Act 1967;
- (d) The Architects Act 1967;
- (e) The Malaysian Highway Authority Act 1980;
- (f) The Construction Industry Development Board Act 1994;
- (g) The Federal Roads (Private Management) Act 1984;
- (h) The Road Transport Act 1987; and
- (i) The Town Planners Act 1995.



***RELEVANT CLAUSES IN CONSTRUCTION  
CONTRACT***





***STANDARD PKNS CONTRACT  
DOCUMENTS***



# STANDARD PKNS CONTRACT DOCUMENTS

## Dokumen Kontrak

- (a) Part A – Introduction to Tenderers
- (b) Part B – Letter of Acceptance of Tenderer
- (c) Part C – Conditions of Contract
  - i. Forms of Contract
  - ii. Appendix & Addendum to Conditions of Contract



## STANDARD PKNS CONTRACT DOCUMENTS

### Dokumen Kontrak

- d) Part D – Special Requirement Contract
  - i. Material Purchase from SIC and Vendor
  - ii. List of Vendors Products Used
  - iii. Employment & List of Sub-Contractor Bumiputera
  - iv. Employment of Landscaping's Contractor
  - v. Compliance with Occupational Safety & health And Environmental Requirements





## **STANDARD PKNS CONTRACT DOCUMENTS**

### Dokumen Kontrak

- e) Part E – Specifications
- f) Part F - Sample of Bank Guarantee  
Guarantee Form  
(Security Deposit/Performance Bond)
- g) Part G – Declaration Forms (Tenderer’s Particulars)



## **STANDARD PKNS CONTRACT DOCUMENTS**

### Dokumen Kontrak

- h) Part H – Surat Akuan Pentender
  - i) Surat Akuan Integriti
  - ii) Pemberitahuan Dasar Keselamatan & Kesehatan Pekerja Dan Alam Sekitar



# ***TERMINATION OF CONSTRUCTION CONTRACT***



-The termination of contract at common law occurs when a valid and enforceable contract is brought to an end either by it becoming impossible to perform due to unforeseeable circumstances at the time the contract was formed or by the actions of one or both parties.

-In Malaysia, a contract can be terminated in law under Section 40 of the Contracts Act 1950, which reads:

*“When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.”*

**REASONS TO  
TERMINATE THE  
CONSTRUCTION  
CONTRACT**



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graph LR; A[REASONS TO TERMINATE THE CONSTRUCTION CONTRACT] --- B[Breach of contract]; A --- C[Frustration]; A --- D[Convenience]; A --- E[Rescission]; A --- F[Suspension]; A --- G[Determination];
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**Breach of contract**

**Frustration**

**Convenience**

**Rescission**

**Suspension**

**Determination**



## A. BREACH OF CONTRACT

- ◆ If one of the parties to a **contract** fails to perform as required by the **contract**, this may constitute a **breach of contract**.
- ◆ If the **breach of contract** is serious (a **material breach**), then the innocent party may also consider that it is discharged from any further **obligations** under the **contract**.
- ◆ Where one party behaves in such a way as to indicate that it no longer intends to accept its **obligations** under the **contract**, this is considered to be a **repudiatory breach** (or fundamental **breach**), allowing the innocent party to terminate the **contract** and to sue for **damages**.



## ...BREACH OF CONTRACT

- ◆ Generally, the **contract** will set out what those breaches are, but they might include:-
  - Refusal to carry out **work**.
  - Abandoning the **site**.
  - Removing **plant** from the **site**.
  - **Failure** to make **payments**.
  - Employing others to carry out the **work**.
  - **Failure** to allow **access** to the **site**.
  - **Failure** to proceed **regularly and diligently**.
  - **Failure** to remove or **rectify defective works**.



## B. FRUSTRATION

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- ◆ **Frustration** occurs when circumstances that are not the fault of either party mean it is impossible to continue with the **contract**.
  
- ◆ The **contract** will come to an end without any party being considered to be in **breach**. However, parties must be certain that a **frustration** event has occurred so as not to be in **breach of contract**.





## ...FRUSTRATION

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- ◆ Example : Force majeure (exceptionally adverse weather conditions, global pandemic)
- ◆ Force majeure provisions might provide for circumstances that could otherwise be considered **frustration** events, and so result in **termination** of the **contract**.
- ◆ **Force majeure** is generally considered a **relevant event** in **construction contracts** which will allow for an **extension of time** and a **claim for loss and expense** rather than **termination**. This may be in the interests of both parties.



## C. CONVENIENCE

- ◆ A general rule to contract is that neither contracting parties can avoid carrying out his duties under the contract unless a breach is committed by the other party. Therefore, if there is no breach done by the contractor, the client has to allow the contractor to proceed with the works and carry out his duty of paying the contractor according to the contract terms.
- ◆ However, one such clause can be incorporated into the contract that allow the employer to legally terminate the contract unilaterally, that is, a Termination for Convenience clause. By invoking such a clause, if available, the client will not be considered breaching the contract.



## ... CONVENIENCE

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- ◆ This can be useful for example if the **client** fails to secure sufficient **funding** for the **project** to proceed. However **termination** for convenience can leave the terminating party open to significant **claims** by the other party.
- ◆ Termination for Convenience clauses are predominantly used by Employers to unilaterally terminate a contract without having to prove default of the Contractor. Such clauses have been held by courts to be enforceable, provided that the termination is done in good faith and is not fraudulent.



## D. RESCISSION

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- ◆ **Rescission** is a process of returning both parties to the position they would have been in had they not entered into a **contract**. This might be appropriate for example if there is a serious error in the **contract**.



## ***E. SUSPENSION***

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- ◆ **Suspension** is used for example, if the **client** has difficulty in raising funds to pay for the **work** to proceed at the speed anticipated by the **contract**.
- ◆ Non-payment or delay in payment is a common occurrence in the construction industry. When faced with such a situation, a contractor would understandably be most tempted to suspend or “slow down” its works until payment is made by the employer.

**Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1997] 1 CLJ Supp 448**

Low Hop Bing J (as his lordship then was) held as follows:-

*“In my opinion, in the absence of a specific provision in the contract, a contractor has no automatic right to suspend works simply because one or two of his certificates have not been paid”.*

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**Ban Hong Joo Mines Ltd v Chen & Yap Ltd [1969] MLJ 83; 85**

*There is no intermediate right in a building contract to suspend works. If the contractor insists on the continued performance of the contract, ie. he affirms the contract, he must himself continue to perform his primary obligations under the contract, ie. to continue performing the contract works. This is why suspension of the works by the contractor, ie. not continuing with his primary obligations, becomes itself a repudiatory breach by the contractor.*

*Even if the plaintiff can establish that the defendant is in repudiatory breach of contract, the plaintiff would have no right to suspend works, but instead would have had to elect to either terminate the contract or insist on due performance. By suspending works without valid legal cause, the plaintiff has in fact repudiated its contractual obligations. This repudiation entitled the defendant to terminate the contract, which was duly done on 3 July 1992. As there was no provision in the rudimentary contract between the parties conferring a right to suspend works for non-payment of certified sums, the plaintiff's admitted suspension was wrongful.*

-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.



# DIFFERENCE BETWEEN DETERMINATION AND TERMINATION

	DETERMINATION	TERMINATION
DEFINITION	The end the contractor's employment under the contract	The end of the contract itself.
CAUSATION	-May happen if one of the parties has ceased to perform their obligations under the contract.	-May happen when the contract becoming impossible to perform due to unforeseeable circumstances at the time the contract was formed or by the actions of one or both parties.
EXAMPLE	-The contractor no longer proceeding regularly and diligently with the works. In this situation, the contract itself remains in place , and so do the rights of both parties.	- One of the parties to the <b>contract</b> behaves in such a way that it indicates it no longer intends to accept its <b>obligations</b> under the <b>contract</b> .

## DIFFERENCE BETWEEN DETERMINATION AND TERMINATION

MAIN DIFFERENCE	<p>-It is the Contractor's employment which is determined, BUT NOT terminated.</p> <p>-When the employment of the Contractor has been determined, the procedures, mechanisms and forms of recovery and remedies are <u>as provided in accordance with the provisions of the contract.</u></p>	<p>-It is the contract that can be terminated, BUT NOT determined.</p> <p>-When a contract has been terminated, then such recovery and/remedies are <u>to be dealt with outside the contract.</u></p>



***TERMINATION PROTOCOL [JKR 203A (2010)]***



## **TYPES OF TERMINATION BY THE EMPLOYER UNDER THE JKR 203A (2010)**

- ◆ Termination on Default by the Contractors under **Clause 51 Conditions of Contract (Part C)**
- ◆ Termination on National Interest under **Clause 52 Conditions of Contract (Part C)**
- ◆ Termination on Corruption, Unlawful or Illegal Activities under **Clause 53 Conditions of Contract (Part C)**
- ◆ Mutual Termination under **Clause 50 Conditions of Contract (Part C)**(suspension of work).



## EVENTS OF DEFAULT (CLAUSE 51.1)

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- i. fails to commence work at Site within 2 weeks after the Date of Possession;
- ii. suspends or abandons the carrying out of the Works or any part thereof for a continuous period of 14 days;
- iii. fails to proceed regularly and diligently with the performance of his obligations under the Contract;
- iv. Fails to execute the Works in accordance with the Contract;
- v. Persistently neglects to carry out his obligations under the Contract



## EVENTS OF DEFAULT (CLAUSE 51.1)

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- vi. Refuses or persistently neglects to comply with written notice ..  
In relation of defective work or equipment...
- vii. Fails to comply with the provisions of clause 47 (sub-contract);  
or
- viii. Fails to comply with any terms and conditions of the Contract



## GENERAL DEFAULT (CLAUSE 51.2)

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- i. The Contractor become bankrupt;
- ii. The Contractor become insolvent or compounds with or enters in an arrangements or compositions with its creditors;
- iii. An order is made ... for the winding up of the Contractor ...
- iv. A professional liquidator, receiver or manager .... Duly appointed ... possession taken by or on behalf or creditors ...
- v. Execution is levied against a substantial portion of the Contractor's assets



## 1. PRE-TERMINATION STEPS

- ◆ Letter to Contractor (Instruction/Reminder)
- ◆ Supporting Documents
  - ◆ Documents evidencing hand over of Site Possession
  - ◆ Photographic Evidence
  - ◆ Site Diary
  - ◆ Letter by SO to the Contractor recording that there was no work at the Site





# 1. PRE-TERMINATION STEPS

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## Important Notes

- ◆ Termination is a drastic step and should be only be resorted to as last resort
- ◆ Most of Events of Defaults itself provide that it is only where the Contractor is in breach “regularly” or “persistently” that such breaches would tantamount to an event of default
- ◆ The remedy available to the Employer for breaches not amounting to event of defaults would like in damages
- ◆ The recommended steps to be taken pre-termination is not meant to be exhaustive and in the event of doubt, the Employer should seek legal / contractual advise as to whether a particular breach tantamount to Event of Default



## 2. NOTICE OF DEFAULT

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***Notice of Default*** shall include, amongst others, the following:-

- ◆ Identification of the Event(s) of Default [including its relevant contractual provision] that the Employer relying upon;
- ◆ Illustration of the Event(s) of Default by reference to previous any previous letters, notices, Non-Compliance Report(s), S.O.'s instructions on the particular default(s);
- ◆ The period to remedy the Default(s);
- ◆ Highlight the consequences of failing to remedy the Default(s)



## 2. NOTICE OF DEFAULT

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### IMPORTANT NOTE:-

- ◆ Notwithstanding that clause 51.1 appears to leave the notice period open ended, i.e. “*or any period determined by the Government*”, such period must be reasonable / meaningful and cannot be oppressive for purposes of ensuring that the Contractor cannot remedy the Default(s) in time;
- ◆ If the Employer is uncertain as to which Event(s) of Default to rely upon, the Employer should seek legal / contractual advice in order to determine the relevant Event(s) of Default.



### 3. NOTICE OF TERMINATION (CLAUSE 51.1(b))

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*If the Contractor fails to remedy the breach within such period, the Government shall have the right to forthwith terminate this Contract by giving written notice to that effect*

***“Notice of Termination”***



### 3. NOTICE OF TERMINATION (CLAUSE 51.1(b))

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Notice of Termination shall, inter alia:-

- ◆ Be issued only after the period to remedy the Default(s)
- ◆ Make reference to the Notice of Default;
- ◆ State the fact that the Default was not remedied within the period to remedy Default;
- ◆ Provide evidence that the Default was not remedied within the period;
- ◆ State the consequences of termination [**Clause 51.1(c)**]



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

### CONTRACTOR

- ◆ Forthwith cease all operations of the Works [**Clause 51.1(c)(i)(A)**]
- ◆ Carry out any protection works so as to secure the Site, equipment, goods, materials therein against any deterioration, loss or damage and to do all things necessary so as to leave the Site in a clean and tidy condition [**Clause 51.1(c)(i)(B)**]
- ◆ Remove its personnel and workmen from the Site [**Clause 51.1(c)(i)(C)**]



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

### CONTRACTOR

- ◆ Vacate the Site within the time stipulated by the S.O. and remove all temporary buildings, plant, tools, equipment, goods and unfixed materials which have not been paid by the Employer, as specified by the S.O. [**Clause 51.1(c) (i)(D)**]
  
- ◆ Either:-  
  
Terminate all third party contracts entered into by the Contractor for the purposes of this Contract;



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

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### CONTRACTOR

Assign to the Employer, if so required by the S.O., at no cost or expense to the Employer, the benefit of any agreement for the supply of materials or goods and/or for the execution of any work or services for the purposes of this Contract; or

Allow such third party to enter into a contract with the Employer or any person deemed necessary by the Employer for the purpose of completing the Works;





## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

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### CONTRACTOR

PROVIDED THAT the Employer shall not be obliged to pay any third party for any materials or goods delivered or any work executed or services for the purposes of this Contract (whether before or after the date of termination) for which the Employer has paid but the Contractor has failed to make payment to the third party. **[Clause 51.1(c) (i)(E)]**



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

### CONTRACTOR

- ◆ At no cost to the Employer, hand over to the Employer all plans, designs, specification and other relevant documents relating to the Works [**Clause 51.1(c)(i)(F)**]
- ◆ Pay to the Employer for any losses and damages as a result of termination of this Contract. [**Clause 51.1(c)(i)(G)**]
- ◆ Shall not be released from any of its obligations under the Contract [**Clause 51.1(c)(i)(H)**]



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

### EMPLOYER

- ◆ Call upon the Performance Bond or forfeit the Performance Guarantee Sum. **[Clause 51.1(c)(ii)(A)]**
- ◆ Enter and repossess the Site. **[Clause 51.1(c)(ii)(B)]**
- ◆ Be entitled to carry out and complete the Works on its own or employ any other person to carry out and complete the Works. **[Clause 51.1(c)(ii)(C)]**



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

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### EMPLOYER

- ◆ Be entitled to claim against the Contractor for any losses, costs, expenses and damages suffered as a result of termination of the Contract [**Clause 51.1(c)(ii)(D)**]



## 4. CONSEQUENCE OF TERMINATION (CLAUSE 51.1(c))

### GENERAL NOTE

**Clause 51.1(c)(iii)** also provides that:-

- ◆ *“for the avoidance of doubt, the Parties hereby agree that the Contractor shall not be entitled to any form of losses including loss of profit, damages, claims or whatsoever upon termination of this Contract under this clause.”*
- ◆ However, for this to apply, the termination ought to be found to be lawful in the first place, should there be a dispute on the legality of the termination.



# 8. REMEDIES

**THE END**

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