I.E.M. CONDITIONS OF CONTRACT: A COMMENTARY

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GENERAL INTRODUCTION AND COMMENTS

The Institution of Engineers, Malaysia has, in May 1989, published the IEM Conditions of Contract for Works of Civil Engineering Construction (hereinafter referred to as "IEM 1"). What follow are the views of a student of construction law towards this new form.

To call this work a 'Commentary' is a misnomer. This Commentary to IEM 1 as it is called, has stepped beyond the usual ambits of a 'traditional' commentary. In a nutshell, it has attempted to

(a) analyse the clauses, their intent and purpose, their rationale and their scope;

(b) with modest audacity, to suggest (possibly coloured by the writer's prejudices and limited knowledge) possible amendments and improvements in the provisions of the clauses contained therein, including their scope, philosophy, drafting and others;

(c) to point out inconsistencies and/or ambiguities inherent in the form; and

(d) to seize the opportunity to elaborate on certain aspects of construction law applicable in Malaysia, especially where they are still relatively not well settled/documented and where they differ from English law.

A construction contract form can be perceived as one which allocates risks to the two contracting parties i.e. the Employer and the Contractor with the Engineer acting as a contracts administrator.

Generally, the form is perceived to be acceptably equitable in its allocation of risks though what is a 'balanced' risk allocation is an ideal which the contracting parties, representing different vested interests, may find it impossible to attain.

The form follows a traditional approach of Employer vs Contractor with the Engineer acting as an independent contracts administrator. In this Commentary, no mention is thus made to other possible forms of contracting arrangement.

With due respect, it is clearly evident that the form is a result of what is commonly referred to as 'scissor and paste' job. To borrow Ir. Th'ng Yong Huat's elegant language, 'IEM 1 is the result of hybridization of various contract forms". This, though not without its strength, may be the cause of the following: -

(a) as will be seen from the text that follows, and with respect, inconsistencies abound;

(b) the form seems to lack a central and coherent theme/philosophy; and

(c) the form lacks an identity, an IEM identity.

In this regard, may I audaciously suggest that the form be given an overhaul: amendments to individual clauses may not be adequate. It is not denied that this may destroy the stated objectives of IEM 1 i.e. "simplicity, familiarity and standardisation". The result obtained may however be that IEM 2 can be one which is distinctively IEM.

In the course of writing this Commentary, opportunity has been taken to elaborate on certain aspects of construction law, especially those where the law is not settled, or where disagreements persist and also where it is seen to be necessary as it differs from English law. Locally decided cases (as reported in Malayan law Journal) have been cited where relevant and necessary. Examples regarded as worth mentioning are clauses 10, 28, 29, 30, 24, 40, 43, 44, 51 and 52. It will however be difficult to deny that traces of "writing down whatever that comes to your mind" will I believe make their presence felt. Views expressed are however those which the writer holds in his personal capacity.

It seems to me now a mandatory practice, even a custom, to include a note of acknowledgement for any assistance which a writer receives for producing the pages that follow. Primary thanks are due to all my former and present colleagues and superiors from whom I have benefited: from working with them and in the course of discussions. Mention must also be made to the several legal firms in town whose libraries have provided copies of some of the cases cited and especially to Puan Jamaliah of IEM library for her assistance with various books. To Puan Sharifah goes my gratitude for the typing of this Commentary.

Lastly, but not the least, this work is affectionately dedicated to Bin, to whom all errors and omissions will naturally be attributed! Joke aside, the usual author's disclaimer applies. The writer welcomes all constructive criticisms and comments and will appreciate if errors can be brought to his attention.

Ir. Oon Chee Kheng
27th October 1992

CLAUSE 1: DEFINITIONS AND INTERPRETATION

(01) This clause is the definition clause of the IEM Conditions of Contract (hereinafter in this Commentary as 'the Conditions"). It is noted that only a few of the often-repeated words are defined in this clause. This, I submit, is a good practice compared to other contracts such as PLUS Conditions of Contract where the draftsman has attempted to put up a formidable list of definitions. This, though not without its advantages, may carry the dangers that meanings and construction not intended for certain words and/or phrases may unintentionally creep in. This is more so when "Contract" or "Contract Documents" means a series of documents which, more often than not, are drafted by different individuals.

Contract or Contract Documents

(02) The word "means" followed by a list of nouns suggests that the list of nouns is merely enumerative. If an exhaustive list is intended for any word to be defined, I suggest the phase "means and includes" be used instead.

(03) I suggest that the words "when completed" be added after the phase "Articles of Agreement". Articles of Agreement will need to be stamped in accordance with the provisions of Stamp Act 1949.

(04) It seems to be a common practice that the Articles of Agreement are more often than not executed after Works have actually begun. This, however, does not mean that it is only upon the sealing of the Articles that a valid and binding contract comes into existence. As stated by Raja Azlan Shah J. (as His Highness then was) in **Chee Kheng Hong v. Government of the Federation of Malaya (1966)** 2 MLJ 33 at pp. 37-38,

> "The unconditional acceptance of a tender by the employer binds both parties and a contract is thereby formed, the terms of which are ascertainable from invitation to tender, the tender, the acceptance and any other relevant documents."

(05) I propose that "Letter of Understanding where applicable" be included as part of the Contract or Contract Documents.

(06) Article 1 of the Articles of Agreement states that words used in the Articles shall have the same meanings as assigned to them in the Conditions. However, Article 2 is at variance with them in the Conditions. However, Article 2 is at variance with the definition accorded to "Contract" or "Contract Documents" in the Conditions with the inclusion of "(j) Other Tender Documents (if any)". If any document were to be inserted here, can it be considered as part of the Contract/Contract Documents?

(07) Since they constitute part of the Contract documents, I suppose the use of the word 'Contract" in "Contract Drawings' serve to distinguish them from 'Working drawings": see below paragraph (28)

(08) I respectfully submit that "priced bills of Quantities' be the correct one in lieu of mere "Bills of Quantities". For the avoidance of doubt apart, one will find it hard to construe an unpriced BQ as forming part of Contract/Contract Documents.

(09) It is expressly stated that the Contract Documents "shall be complimentary to one another" thus eliminating any priority ranking among the documents. This is further enhanced by Clause 8 (a) of the Conditions. However, whether this will completely eliminate the common law rules of construction such as (a) written words will take precedence over drawings; (b) specifies over generalities, etc. remain unclear.

It is generally regarded that the conditional terms of a contract (or conditions) shall take precedence over terms in all other documents in the sense that breach of a conditional term and breach of other terms (warranties and inorminate terms) can lead to different consequences: see the triple case of **Suisse Atlantique Societe d' Armement Maritime S.A. v. N.V. Rotterdamse Koleu Centrale (1967)** Ac 361; **Photo Production Ltd. v. Securicor Transport Ltd. (1980)** AC 827; and **Hong Kong Fir Shipping Co. Ltd. v. Kawasaki K.K. Ltd. (1962)** All ER 474. See also the local case of **Associated Metal Smelters Ltd v. Tham Cheow Toh (1971)** MLJ 271. Breach of a conditional term is regarded as one, which goes to the root of the contract (a fundamental breach), which enables the innocent party to be discharged from further performance of the contract. Breach of a warranty merely allows the innocent party to claim for damages (compensation) pursuant to s. 74 Contracts Act 1950.

It is also noted that the distinction of conditions vis-à-vis "warranties" and 'inorminate terms" has also been applied by the Malaysian Court despite the fact that such classification is not found in our Contracts Act 1950 (Revised 1974). The doubt thus remains as to whether this survives the statement viz. "these documents shall be complimentary to one another" which in effect says that the contract documents and the terms therein contained rank pari-passu with one another. Further thoughts should be put on this.

(10) It seems to me a rather glaring inconsistency that the phrases 'under this contract", "terminate the contract"; "performance of the Contract"; "execution of this Contract"; "vitiate this contract"; etc. are used throughout the conditions. Certainly only one cannot perform, execute, terminate or vitiate a series of documents"! Though we may take comfort for the inclusion of the phrases "except where the context otherwise requires", these phrases still seem to me to be pejorative expressions. A suggestion I respectfully forward can be that "Contract" and "Contract Documents" be assigned different meanings. This

should, I believe, clarify any lingering doubts; or at least satisfy some pedants. In this Commentary, I have used them with different meanings assigned as will be apparent from what follow.

Employer

(11) I suggest that "Employer" be made to include 'any assigns upon agreement with the Contractor' or 'any assigns with the concurrence of the Contractor". This gives flexibility to the Employer as well as the contractor. The agreement of the Contractor is necessary here as both English and Malaysian laws do not permit unilateral assignment of contractual liability.

Contractor

(12) The definition for "Contractor" is reproduced in toto from the ICE Conditions or FIDIC Conditions. This definition is generally satisfactory. The word covers 'persons, firm or company" and includes 'Contractor's personal representatives, successors and permitted assigns". In view of the realities of the Malaysian construction industry, I wonder if joint-venture arrangements and partnerships are adequately covered by this definition? I suggest that this definition be studied in more details.

(13) If it is the tenet and falls within the general philosophy of the Conditions in relation to the possible liability of the Contractor to the Employer and/or Engineer, I suggest that the term 'Contractor" wherever it appears in the conditions be widened to include sub-contractors (both domestic and nominated) and extended further to include labour only sub-contractors. Careful consideration is required if this is the intention. If this is agreed, consideration may need to be accorded to Clauses 27, 28 and 29 of the Conditions. This will be further elaborated below.

Engineer, Engineer's Representatives

(14) These two definitions are considered together as they are inter-related. I think it is right and proper that only the term "Engineer" be used throughout the Conditions instead of "Engineer's Representative" save in Clauses 2 (b) and (c). By Clause 2 (a) of the Conditions, the Engineer is vested with the responsibility (duty? Power? or both?) of the Works. Clause 2 (c) states that the Engineer may delegate to the Engineer's Representative "any of the powers and authorities of the Engineer" – this itself spells the irrelevance of any reference to the "Engineer's Representative" in all other clauses. In addition to this, any reference to the responsibility or powers of the Engineer's Representative in the Conditions may be at variance with Clause 2 (a).

(15) As a follow-up of paragraph (14) above and with regard to the term as used and practiced in this country, one can find grounds, legal and practical, to object to

the inclusion of the phrase "or any clerk or works' in the definition of Engineer's Representative. Firstly, this term is not defined anywhere in the Conditions. Secondly, with the presence of the resident engineer or any assistants of the Engineer, this term as included in the definition for "Engineer's Respective" is submitted to be unnecessary.

(16) The remedy a possible lacuna in the Conditions in view of paragraph (15) above, it is suggested that Clause 2 (b) be further elaborated to include words to the effect that the Engineer's Representative shall be entitled to engage/employ such assistants as he deems desirable and necessary to assist him in the execution of his duties and the exercise of his powers; etc. See later on the comments to Clause 2.

Works, Permanent Works, Temporary Works

(17) "Works" is defined as the summation of both Permanent Works and Temporary Works. It seems to me that in this sense only physical works are covered by this definition. The defect in this definition can be apparent, see commentary to Clause 47, paragraph (03).

(18) "Temporary works" is defined as all temporary works of every kind required in or about the execution, completion or maintenance of the Works. Though one may argue that whether a work is temporary work or not is obvious on the face of it, one can also add that the definition is unhelpful. "Works" as is defined includes temporary works and this circular definition does not seem to lead one to any clear idea.

(19) I suggest that "Permanent Works" be slightly amended to mean the permanent works "to be executed, completed and maintained in accordance with the Contract".

Site

(20) This term as defined is a complete reproduction from FIDIC Conditions. It has been rightly criticised by I.N. Duncan Wallace QC in his commentary of the FIDIC Conditions and it is submitted that his criticism may well be heeded.

(21) As defined, "Site" means (a) lands where Works designed by the Engineer are to be executed; (b) any other lands and places provided by the Employer for any other purpose as may be specifically designated in the Contract as forming part of the Site".

(22) This definition of "Site" is of importance for several reasons. Firstly, it defines the geographical limits of the Engineer's powers. Secondly, this may be the area within the confines of which is where insurance liability lies; etc. Contrary to

more common usage of materials paid on "Site", this seems to be of not much relevance: see comments to Clause 47, paragraph (04).

(23) From the breakdown of the definition as in paragraph (21) above, it seems that the Engineer is not given the power to designate any area as part of the "Site"; the definition only covers areas (already) provided by the Employer and "specifically designated in the Contract". This can lead to difficulties if and when Contractor writes to request the Engineer to designate and area a "Site". I suggest that this possible omission be looked into.

(24) As can be adduced from this definition, the "Site" is not necessarily confined to the area enclosed by the right-of-way.

Constructional Plant

(25) This definition does not seem to be very important as it is, as far as I can gather, not much used in the conditions. Exceptions are Clauses 12 and 51 (C) (ii) where "plant" rather than "constructional plant" is used. The word "constructional", it is submitted, may not be tautologous as it may first appear. As example, a generator for electricity for the site office and workshop may not be "constructional".

(26) It seems to me that the Conditions stop short of vesting property of all constructional plant brought to site onto the Employer. Even if it is so and in view of the development of the law on the retention of title clause, the effectiveness of such a clause is doubtful. Please note that the latest edition of ICE Conditions (6th Edition 1991) has replaced this term with "Contractor's Equipment" which seems to be of wider ambit.

Drawings

(27) It is unclear as to what are the drawings that are 'referred to in the Specification" as normally the Specification does not carry drawings in its usual sense, nor does it refer to them.

(28) Further, it is unclear as to what are those drawings as there already exists another term "Contract Drawings". If it is the intention to distinguish between Contract Drawings and the so-called 'working drawings" the latter of which are those issued during the currency of the Contract, I suggest that these be named accordingly. This, it is submitted, should erase the uncertainties on the use of these two terms.

Approved and Directed

(29) The thrust of Clause 1 (b) is that the words 'approved" and "directed" wherever used in the Conditions shall mean approved or directed in writing and approval

and direction are to be constructed accordingly. This, it is submitted, is a good policy. But what mars an otherwise good move is that phrases such as "approved in writing" continue to be rampantly used throughout the Conditions!

(30) I will suggest that the same policy be applied to the words 'instruct" and "instruction". With due respect to the Engineers, it seems to me that many Resident Engineers find it hard to overcome their writing inertia in this regard. I will also suggest that, further to paragraph (29) above, all disapprovals must also be issued in writing.

Singular and plural Terms

(31) The only comment on Clause 1 (c) is that the expression "where the context requires" seems to be redundant and in my view, superfluous and unnecessary.

Marginal Headings or Notes

(32) The effect of Clause 1 (d) is that it rightly erases all doubts with regard to the status of marginal headings and notes. Left still in doubt are those title headings of each and every clause. Should the title headings be used in the construction of the Conditions? Clear words should be used to dispel any lingering doubts on this.

CLAUSE 2: Duties of Engineer and Engineer's Representative

(01) Clause 2 (a) is an important clause. Firstly, it signifies that the Employer has "dropped out" of the Contract in the sense that he plays no part in its administration. Secondly, and subsequently and consequently, the Engineer's role assumes a quasi-judicial character and that of a certifier. It also indirectly affirms the independent role of the Engineer. See the well-known case of **Sutcliffe v. Thackrah (1974)** 1 All ER 859.

(02) The Contractor is required to deal with the Engineer with respect to "all questions regarding any work". Notwithstanding the use of the word 'all', possible exceptions exist e.g. Clause 52.

(03) The duties (?) of the Engineer's Representative are broadly spelt out in Clause 2 (b) which at the same time also restricts the scope of these duties. This makes sense as the powers with respect to variations and time extensions are usually retained by the Engineer.

(04) Perhaps a digression can be made here. The Conditions, apart from allocate to which contracting party a risk should fall, also detail the rights and liabilities of both parties. In addition, it can also be said that the Conditions formalise the duties and powers of the Engineer under the Contract. The reason for the distinction made here between duties and powers is that duties, unlike powers,

cannot be delegated. Therefore, I respectfully submit that Clause 2 (b) can be amended to read, perhaps, as follows; "The Engineer's Representative shall be responsible to the Engineer and is delegated with the powers to watch and supervise …..". This concept is useful as the delegatee of powers, in this case the Engineer's Representative, is under a fiduciary duty and this ties well with his professional status and independent role.

(05) The point made with respect to commentary in Clause 1, paragraph (16) can be put into its perspective here.

(06) Though Clause 2 (c) status that the Engineer may delegate to the Engineer's Representative <u>any of the powers and authorities</u> rested in the Engineer, it is submitted that the two power as specified in Clause 2 (b) i.e. (a) order any work involving delay or extra payment by the Employer, and (b) make any variation of or in the Works, continue to be exercised by the Engineer. It is not clear to me what are 'authorities" and I suppose the mere use of the word 'powers" will be sufficient.

(07) At its present form, proviso (i) to Clause 2 (c) can work extreme hardship, and I may add, unfairness, to the Contractor. As a matter of construction practice and procedure, approvals or disapprovals should be given within reasonable time. One cannot image the situation if an Engineer orders the rejection and removal of piles after the bridge beams have been launched?! Many hypothetical examples to illustrate the possible unreasonable results that can arise from this based on a literally and strict reading of this proviso and it is not proposed to make further attempts here.

(08) It is suggested that this proviso will have to be read together with Clauses 5 (a) (vi) and 9 (b).

(09) See also Clause 1, paragraphs (14) and (15).

<u>CLAUSE 3: Scope of Contract</u>

(01) The first observation one can make of this clause is that its language is obscure. I wonder what can be made out of this, which reads like "The Contractor shall upon and subject to these Conditions in compliance therewith …."?

(02) One point that is puzzling is this: since all the Contract Documents are expressly stated to be complimentary to one another, why then is it still felt the need to define the scope of the Works as follows; "The Contractor shall <u>upon and subject to these Conditions of Contract</u> construct and complete …."? I venture to add this is a contradiction in terms.

(03) With "Contract" as defined, the Clause's title heading seems to be out of place. viz "Scope of Contract". I will add that may be "Contractor's obligations" will be more appropriate, and correct, here. See also the point raised in this Commentary, Clause 1, paragraph (32).

(04) It seems to me that the Contractor's obligations are stated in this clause. The first paragraph of the clause expressly obligates the Contractor to "construct and complete" and the second paragraph deals with his obligation to maintain. One cannot fail to notice that design is not one of his obligations. It is noted that only the scope of Works ifs implied and easily ascertainable from Article 1 of the Articles of Agreement, Clause 4 of these Conditions also covers the later part with respect to materials, goods and workmanship.

CLAUSE 4: Work to be to Satisfaction of Engineer

(01) As is used in this clause, the Engineer still retains control of temporary works, which is part of "Works".

(02) This clause, it is submitted, is reproduced in toto from Clause 13 of the previous ICE Conditions of Contract. The first paragraph can be broken into two parts: a) "Save in so far as it is legally impossible …." And b) "Save in so far as it is physically impossible ….". These two will be analysed in the following paragraphs.

(03) The law of contract differentiates between two forms of legal impossibility: (a) initial impossibility, i.e. inherent impossibility on or before the Contractor commences work or more accurately on or before the formation of Contract; and (b) supervening impossibility which is the impossibility arises (or which is caused) after contract formation and during performance of the contract. These should thus be borne in mind when the true intention and consequences of this clause are dissected. See generally s. 57 Contracts Act 1950.

(04) Presumably, legal impossibility arises when either the whole or part of the Works is, or becomes, prohibited by law. It is submitted that this legal impossibility must be such that (a) which leaves no other avenue for the party alleging it: e.g. a mere <u>interim</u> injunction should not be regarded to have fallen in this category; (b) which has no other legal means of circumventing it, i.e. not possible work in such a way that the circumstances leading or giving rise to, the legal impossibility will be of no relevance.

(05) I feel it necessary to give the following illustration. It is, I believe, settled law that the (freehold) owner of a piece of land also has exclusive rights to the air space above it: see **<u>Bernstein</u> v. <u>Skyviews</u> (1977)** All ER 902 though there is at least one weak English authority which suggests a slightly different approach. Let's assume the construction of a multi-storey highrise building in the heart of

the city, which has very limited right-of-way. It is further assumed, and reasonably so, that the construction of this building will necessitate the erection of a tower crane. Now, it is submitted that if the boom of the tower crane encroaches into the airspace of neighbouring landowners and an injunction were to be taken, does this constitute a legal impossibility? If it is possible to site the crane in such a way that the neighbouring land will not be affected, or to use other means of lifting equipment or other types of cranes, then this falls under category (b) in paragraph above and hence this is not a legal impossibility on the party alleging it. If, assuming our hypothetical situation goes, it is the case that a tower crane must be used and that the situation cannot be avoided, then two possible interpretations may ensue: (a) this is a legal impossibility (or more specifically, initial impossibility), or (b) against whom the legal impossibility is alleged, reference may be made to Clause 14 of the Conditions on Inspection of Site though this may not be convincing. I do not propose to discuss this issue at length here.

(06) There may be a tendency to equate "physically impossible" to "physically difficult" and it is suggested that this tendency must be resisted or else this clause will lose much of its intended purpose. The same applies if performance and completion of the contract are only possible by means other than those contemplated by a reasonably experienced contractor: this does not constitute physical impossibility. See also the observations of Lord Radcliff in **Davies Contractors Ltd. v. Fareham U.D.C. (1956) AC 696:**

"… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed becausethe circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

(07) "…. to the satisfaction of the Engineer "suggests that the Engineer will have certain powers which he can exercise in circumstances that he is not satisfied. This will be discussed at a later stage.

(08) It may seem on a first reading that the phrase "touching or concerning the Works" has considerably widened the powers of the Engineer. As is read here, the powers of the Engineer may not have a geographical limit: see for contrast Clause 1 paragraph (22). In addition, his powers to instruct variations, limited in Clause 23, seem to have been widened here. This process of giving analogies can go on and I suggest that this phrase be critically studies in more details and, if and where possible or relevant, be somewhat qualified. As it is, I will still submit that the limitation of the Engineer's powers in the various clauses still holds. Powers when granted cannot be exercised in such away that it is unfettered: this is a well-settled common law principle.

CLAUSE 5: Engineer's Instructions

(01) With respect to Clause 5 (a), I personally do not see the need to list down the areas where the Engineer can issue instructions. I furnish the following reasons for having felt this. (a) The powers to issue the listed instructions are already detailed in various relevant clauses of the Conditions. (b) Clause 5 (a) (ix) is in a sense repetition in one sentence Clauses 5 (a) (i) – (vii). (C) Is the list an exhaustive list, barring (viii). See also Clause 8, paragraph (05).

(02) It is suggested that one cannot be too seriously reading into the words "absolute discretion". See on this point Clause 4, paragraph (08).

(03) I will think that it is more accurate to state Clause 5 (a) (v) in the following way. "(v) the removal from the Site …." Similarly in Clause 5 (a) (viii), "….. to the carrying out, completion and maintenance of the Works …..".

(04) In Clause 5 (b), I wonder why "Engineer's instructions" is not used in lieu of the more wordy "all instructions issued to him by the Engineer" since the phrase is expressly stated and explained in Clause 5 (a)?

(05) The two points worth nothing in Clause 5 (b) are these. (a) It is only seven (7) days after a written notice from the Engineer requiring him compliance with a particular instruction and not seven (7) days from the issue of the instruction, does the power given to the Engineer therein arise; (b) a power to set-off any payment to the Contractor is given this clause for which see later.

(06) In as much as I object to the lack of a definition for "cost", I will also object to the use of the phrase … all costs incurred ….". I believe this should be amended to read "……. All costs reasonably incurred ….". It comes as a matter of surprise that "cost" or for that matter "expense" is not defined. It may be alright not to define "loss and expense" as there are judicial pronouncements on this.

(07) A suggestion, which I wish to forward with respect to Clause 5 (c) is that all references to "Seven (7) days" be amended to read "as soon as possible and in all circumstances not exceeding five (5) days". Sentences should be restructured to suit this, of course.

(08) "Loss or expense" as in used in Clause 5 (d) is not defined anywhere in the Conditions. It is surprising to note that the concluding part of this clause uses, instead, "loss and/or expense"? !

CLAUSE 6: Notices

(01) Though it is my view that serving of notice does not per se entitle one to secure his rights, neither does a failure to serve one be fatal to his later claim, I nevertheless still feel that this can be a good administrative practice to all the parties involved in the administration and management of the Works. In this sense, serving of notice is merely a directory and not a mandatory requirement of the party who is supposed to serve it.

(02) The inclusion of this clause also reinforces the idea that notices have to be served: e.g. matters recorded in minutes of meeting do not constitute a serving of the required notices. It may be, though still arguable, that this clause excludes the common law doctrines of constructive and imputed notice.

(03) For Clause 6 (a), I will add that notice can also be served to the Contractor via his superintendent on site who usually bears the title of project manager/site agent/contracts manager/site manager. The requirement of such a person is included as a clause in the Conditions and such a person must be approved by the Engineer: see Clause 18.

(04) What have happened to the serving of notice(s) to the Engineer? Compare Clause 2 (a).

(05) For the avoidance of doubt, it is better to expressly state that all notices must be in writing, see also paragraph (02) above.

(06) The means of serving notices on a company as given in both Clauses 6 (a) and (b) are in accordance with s.350 of Companies Act 1965 which states that "A document may be served on a Company by leaving or sending it by registered post to the registered office of the Company". s. 4 of the said Act expressly defines "documents" as including notices.

CLAUSE 7: Contract Documents

(01) It is submitted that the phrase "after the execution of this Contract" as used in Clause 7 (b) is vague. "Executed" and 'Executory" of a contract refers to the stage of its formation. The law as it stands in Malaysia and the common law world is that given in the dictum of Raja Azlan Shah J (as His Highness then was) in **Cheng Keng Hong**: see Clause 1 paragraph (04). I suggest that the furnishing to the Contractor of these Contract Documents be tied to Clause 38 on commencement time. This is meant for avoidance of all doubts.

(02) With respect to Clause 7 (b), since "Contract Documents" is defined to include contract drawings, does it mean that the Contractor is entitled to a total of three (3) sets of contract drawings? Reading Clauses 7 (b) (i) and (ii) and Clause 1 (a) (i) together could produce this interpretation.

(03) I personally do not see the need to include "(if any)" after "Specification" in Clauses 7 (c) and (d).

CLAUSE 8: Sufficiency of Contract Documents

(01) For comments to the first sentence to Clause 8 (a), see Clause 1, paragraph (09).

(02) The words "discrepancy" and "divergence" are first used but then for unknown reason, the word "ambiguity" is used instead in the proviso in Clause 8 (b). It is suggested that uniform wordings be used: in this case I propose "discrepancy or ambiguity" be used throughout. It is further noted, and unfortunately so, that in Clause 5 (a) (ii), the phrase "any discrepancy in or between the Contract Documents as referred to in Clause 8 (b) hereof" is used.

(03) It is noted that any delay caused by the Engineer in rectifying any discrepancy or divergence is not listed as a ground for extension of time under Clause 43. It is proposed that this be so added. This, I believe, is reasonable as this is no fault of the Contractor and it can encourage the Contractor to notify all such discrepancies or divergence. No doubt it is stated that the Contractor will be paid "expense" incurred as a result of the compliance with the Engineer's rectification of such discrepancies or divergences, it does not seem to me to be right to argue that whatever possible extension of time can be adsorbed in the "expense" and valued accordingly as such.

(04) It is expressly stated in Clause 9 (a) that the Contractor shall provide everything necessary for the proper execution of the Works until its completion …. "How's about the situation after completion and during the Defects Liability Period?"

(05) It is interesting to compare Clause 5 (d) and the proviso to Clause 8 (b) and note the differences in requirements between the two. In this serves an additional reason of my disagreement of Clause 5 (a) as I first suggested in commentary to Clause 5, paragraph (01). Can we go further by saying that Clause 5 (d) and the proviso to Clause 8 (b) themselves constitute some discrepancies?

(06) Is it possible that upon receipt from the Contractor of any "discrepancy or divergences" (as is used in the Clause), the Engineer shall issue explanation or clarification? As the clause now stands, "… the Engineer shall issue instructions …" renders the Engineer duty-bound for the same even though Clause 5 (a) (ii) does cater for Engineer's power to issue instructions in this regard.

CLAUSE 9: Materials and Workmanship

(01) The purpose of Clause 9 (a) is to re-state the implied common law obligations of the Contractor with respect to the use of materials and exercise of skills: see the twin cases of **Gloucestershire C.C. v. Richardson** (1969) 1 AC 480 and **Young & Marten v. McManus Childs Ltd.** (1969) 1 AC 454. See also Hudson's Building and Engineering Contracts, 10th Edition, pp. 273-306. This, it is submitted, should be beyond dispute.

(02) I will think it is more appropriate to substitute "Contract Documents' for "Bills of Quantities and/or Specification". The reason for this suggestion in this: there may be amplification of the Engineer's requirements in Contract Drawings or special requirements incorporated in the Letter of Acceptance as a result of post-tender negotiations etc.

(03) As is earlier suggested [see Clause 8, paragraph (05)], Clause 9 (b) has to be read in conjunction with Clause 5 (a) (vi) and the proviso to Clause 8 (b).

CLAUSE 10: Unfixed Materials and Goods

(01) Before one goes on with the discussion and commentary of this clause, a question, which needs to be asked is this, "What are unfixed materials and goods?"

It is submitted that the law relating to fixtures is similar to English law, despite the fact that there is a National Land Code (NLC) in Malaysia and the torrens system of our land law: see s.5 of NLC on the definition of land especially (d). In fact, in **Goh Chong Hin v. Consolidated Malays Rubber** (1924) 5 FMSLR 86 Sproule CJC states at pp. 91-92: "The general rule is that whatever is annexed to the realty becomes part of it". This, it is submitted, echoes Lord Blackburn's pronouncement in the English case of **Holland v. Hodgson** (1872) LR 7 CP 308 to the same effect. It follows from this discussion that fixed materials and goods 9or fixtures) call for no further elaboration as they are in law the property of the realty owner (in our case the Employer). Unfixed goods and materials, which do not possess this "status", are thus the rationale for this clause.

(02) It is not uncommon for some standard forms of contract to vest property of goods and materials on the Employer upon them, being brought to Site. The clause however spells quite a difference. It states that property of goods and materials only passes to the Employer after the Contractor has been paid pursuant to Clause 47 9Payment to Contractor and Interim Certificates).

(03) One ambiguity arisen from paragraph (02) above, is this. It is my view that upon payment to the Contractor of unfixed goods and materials, a sale is completed and property passes from the Contractor to the Employer. This is in accordance with s. 19 (1) of Sale of goods Act 1957. It is, however, settled law that property passes at the same time with risks but this clause seems to spell that only

property and not the responsibility of the risks, or risks themselves, passes. This aspect of the clause therefore needs to be scrutinized in detail to ascertain the actual intent, and extent, together with its efficiency. I personally feel that the title retention effect of this clause is ineffective: see s. 25 91) Sale of Goods Act 1957.

(04) It is noted that the discussion above applies to unfixed materials and goods delivered to, placed on or adjacent to the Works: seems from this that there is no requirement that the said goods and materials must be on "Site".

(05) I suggest that the words "from Site" be added after "shall not be removed ….". moving from place to place within the Site does not need to secure engineer's approval: to require so would be impose too many bureaucratic constraints to the detriment of all parties concerned. However, should this suggestion be taken, one must still look to paragraph (04) and the wordings of the clause be adjusted accordingly.

(06) It is an open question, following from paragraph (05) above, in a situation if only partial payment for indivisible goods has been made. To remedy this, I suggest the words "or part thereof" be added after the word "payment" in the second paragraph of this clause.

CLAUSE 11: Statutory Obligations

(01) Though it is stated in Clause 11 (a) that the Contractor shall give all notices and pay all charges, at least one exception can be found to which the Employer is duty bound for the same: this is provide in Clause 57 on Stamp Duty. It is noted that this clause only deals with giving of notices and payment of fees and charges, compliance with provisions of written law etc. is given in Clause 11 (c). In fact, there are English Judicial pronouncements of implied obligations of the Contractor given in 9 (a) and (c) and if these are applicable in Malaysia which the should, then even in the absence of these two clauses the Contractor will still be duty bound to the same.

(02) The phrase "written law, regulations and by laws" are used in Clauses 11 (a), (c) and (d). "Written law" is used, I presume, to mean statute law to distinguish it from unwritten or common law. Though not expressly stated, it is submitted that the word covers both Acts of Parliament and Enactments of State Legislatures.

"Regulations" and "bylaws" are both delegated legislations. However, since these two are expressly named and the clause gives no room for the exercise of ejusdem generis rule to include other like devices, it seems that rules, code of practices, government circulars etc. are not covered. To remedy this, I suggest to use the phrase "written law, statutory instruments and other delegated legislations …..". "statutory instruments" covers a wide range of delegated legislation but as some

academic commentators do not view bylaws as a statutory instrument, hence the phrase "other delegated legislations".

(03) The phrase "in relation to the execution of the Works" is used in Clause 11 (a) whereas "may be applicable to the Works" is in 11 (c). It may be asked if these two phrases reproduce the same intent and effects when used on like phrase viz "written law, regulation and bylaw".

(04) The main comment for Clause 11 (b) is that the word 'cost" is not defined. However, it seems that cost borne by the Employer is only confined to "permanent connections to public sewers and permanent water and electricity supply". Telecommunication lines are not included?! The word "permanent" should also be borne in mind as temporary relocation works are not covered by this clause.

(05) Since the word 'Works" is defined to include temporary works, the phrase "or any temporary works" as used in Clause 11 (d) is not regarded as necessary. It is noted that this clause is only applicable as a result of variations necessitated by a change of law after date of tender and not date of commencement of Works: it is submitted that this makes sense.

(06) I feel it is sufficient for the Contractor to give a notice stating that a change of law etc. has necessitated variations to be made to the Contract; he does not need to "apply for an Engineer's Instruction". As can be seen from Clause 23 (Variations), the Engineer "shall make any variation … that may in his opinion necessary … in his opinion be desirable ….", the onus is hence on the Engineer to instruct accordingly; he is duty bound to do so!

(07) Clause 11 (d) only applies to any change in law "which necessitates any variations to the Works", thus changes in law which do not necessitate variations to be made are not covered. Hence, and for example, annual Finance Act, which amends tax rate is not a ground for claiming for extras. It is part of Contractor's commercial risks.

(08) The first observation of Clause 11 (e) is that questions will be asked as to why is this sub-clause included in a clause with title heading "Statutory Obligations".

(09) It can be further observed that the Clause 11 (e) is substantially reproduced from Clause 27 of both ICE and FIDIC Conditions. With due respect, I suggest that the "missing words" of the original ICE/FIDIC clause be added back to this clause. The words "as between the Employer and the Contractor" are particularly important for the following three reasons. (a) It is possible that the Employer may not be the 9freehold) owner of the land, or area designated as "Site", so there may be claimant to object found on site whose title will prevail over that of the Employer. (b) As is explained in commentary to Clause 1, paragraphs 20-24, the definition of "Site" itself ambiguous. (c) Under certain

statutes, fossils, historical finds, minerals etc. are the property of the government. Treasure trove for example belongs to the Government when found bona vacantia: see **A.G. of the Duchy of Lancaster v. Overton (Farm) Ltd.** (1982) 1 All ER 524.

(10) It may be appropriate, since the title heading reads "Statutory Obligations", to make the following suggestion: The Contractor shall take due notice and comply with the Factories and Machineries Act 1967 and all rules, orders and regulations made pursuant thereto. It is noted that s. 2 (1) (x) of the said Act expressly defines "any premises, place or space where any building operations or works of engineering construction are carried out" as being a "factory" and hence such areas thus fall within the province of the Act.

(11) Further to paragraph (10) above, I will also suggest that words to the effect of Contractor taking cognisance/notice of Street, Drainage and Building Act 1974 be incorporated.

CLAUSE 12: Patent Rights and Royalties

(01) This clause is similar to ICE/FIDIC Clause 28. No further comment will be made here except that relating to licensing fees. From a reading of Clause 12, this does not seem to be included and doubt persists if Contractor incurs extra expenditure in securing licenses necessary for the Works, will such expenses be included in the determination of final Contract Sum?

CLAUSE 13: Setting Out

(01) With respect, I question the need to incorporate the words "in relation to original points …. Given by the Engineer in writing". Is it the intention to exclude survey data/information as given in contract drawings? I will think that it is sufficient just to state this; "The Contracts shall be responsible for the true and proper setting out of the Works".

(02) It is a trite principle that the Contractor is only responsible for wrong setting out when the data/information given by the Engineer is correct and that he will not be responsible when the data/information given is incorrect. In the latter case, it is provided in the clause the expense of rectifying the errors shall be borne by the Employer. It is noted that the clause only refers to the expense in rectifying the errors. No indications is given as to any consequential losses and delays incurred as a result. Presumably this is the intention if it is read in conjunction with the penultimate paragraph of this clause.

(03) It is submitted 'and other things …" shall be constructed ejusdem generis with bench marks, sight rails, pegs etc.

(04) The last sentence of the clause which states "The Contractor shall provide every assistance and everything necessary for checking by the engineer" is puzzling. Does this sentence impose obligations on the Contractor to supply all survey instruments, engage chainmen, labourers, even surveyors for the use of Engineer? I suppose this clause should somewhat be qualifies.

(05) In this and all other clauses [save Clauses 2 (b) and (c)], it is submitted that reference to "Engineer's Representative" is not appropriate: see in relation to this Clause 1 paragraphs (14) and (15).

CLAUSE 14: Inspection of Site

(01) This cause obligates the contractor to inspect and examine the Site and it carries the implication that the Employer gives no warranty in relation to its physical conditions. This clause, it is submitted, is in its very nature a very controversial and disagreements will frequently surface as to its province and the actual obligations it imposes on both the Contractor and the Employer. Before we go on with a discussion of this clause, one will not fail to notice that though this clause is substantially though not entirely reproduced from ICE/FIDIC forms, there is no clause to the effect of "sufficiency of tender" in the Conditions similar to that in ICE/FIDIC.

(02) It may be instructive to breakdown the clause for the purpose of analysis. The clause states that the Contractor shall be deemed of analysis. The clause states that the Contractor shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied himself as to

(a) The nature of ground and subsoil;
(b) The form and nature of the Site;
(c) The extent and nature of work, materials and goods necessary for the completion of the Works;
(d) The means of communication with and access to the Site; and
(e) The accommodation the Contractor may require.

The Contractor will also deem to have obtained for himself

(f) All necessary information as to risks, contingencies and all circumstances influencing and affecting his tender.

(03) It will be apparent that this is a formidable list and given today's competitive tendering, it is doubtful if the Contractor can accomplish all these within the short span of calling of tenders and submission of his bids. To absolutely require the Contractor to accomplish all the above is to fail the reasonableness test! It is therefore submitted that the clause has its limits. Max Abrahamson in his book

engineering Law and the ICE Contracts 4th edition at pp. 57-63 discusses the issue and concludes inter-alia that

(a) pre-tender investigations may be limited by the time available: this, it is submitted, is reality of present commercial life;

(b) "The more extensive be information given by the Employer about the site … the more significance an experienced contractor will reasonably attach to it, and the less it will be practicable for a tenderer to test the information by his own investigations."

The following paragraphs attempt to briefly explain the province of the clause and also its limits. All these are personal views, of course.

"The Nature of ground and Subsoil"

(04) Longman Dictionary of Contemporary English defines 'nature' as inter-alia, "the qualities that make someone or something different from others; character". Therefore, from a close reading of this phrase the Contractor's obligation may not be as endlessly wide as it may first seem to be. He does not, for example, need to know the various exact locations where soft materials will be encountered; it is not his responsibility if an old buried sewer pipe traverses certain part of the Site etc. The Contractor, however, has to content with the site condition and difficult ground condition is not a ground for claiming for revised rate or extension of time. He has to take the difficulty of working on this ground and the subsoil in his rates and his programming of the Works. It is also repeated here that "difficulty" as is here does not mean "impossibility:" see Clause 4, paragraph (06).

"The Form and nature of the Site"

(05) In our context, the said Dictionary defines "form" as "shape; outward appearance". In this sense, it is felt that this does not add much help to the illustration of Contractor's obligation.

"The Extent and Nature of the Work, Materials and Goods Necessary for the Completion of the Works"

(06) In this regard, it is not possible for the contractor to aver that there is a shortage or inavailability of materials within acceptable distance from the Works. Increased cost as a result of longer transportation distance is thus the contractor's responsibility. It may be that the word "extent" negatives any possible Contractor's claim on the ground of a loss of economies of scale. It can be said

that "nature of the work" has covered the above with respect to the supply of labours. The above discussion, it submitted, may be negatived by the occurrence of a force majeure.

"The Means of Communications with and Access to the Site"

(07) This obligates the Contractor that the construction of access and haul road in his responsibility. "Communication" can be construed quite widely to include physical communication such as transportation etc. and others such as telephone, facsimile, telex etc. facilities.

"The Accommodation He May Require"

(08) This is explicit from the face of it. It also remains to be said that the provisions of laws relating to the health and safety of the workmen given in the various laws relating to employment must also be adhered to: see to this Clause 16.

"In General to Have Obtained for Himself All Necessary Information as to Risks, Contingencies and All Circumstances Influencing and Affecting His Tender"

(09) This, to use a cheeky and borrowed phrase, serves as a "mother of all clauses". As stated earlier, the Conditions serve to allocate risks to the different contracting parties and thus "all necessary information on the risks … all circumstances …." need to be read with this in mind. It is further submitted that this aspect of the clause should be read and construed together with all other clauses where the risks are expressly stated to be on the Contractor. It certainly does not mean that the Contractor is to shoulder all inherent risks in the execution of the Works. It is my opinion that it is only reading in this light, which gives any commercial efficacy to this part of the clause.

(10) It is sometimes said that this clause excludes the liability of the Employer with respect to the suitability of the site. With respect, I fail to agree. "Suitability" should not here be equated with "difficulty" and an unsuitable site, which renders the performance of the contract physically impossible will vitiate the whole Contract and the Contractor should be entitled to a claim in quantum meruit. See for comparison Clause 4 paragraph (06).

(11) The disclaimer given at the end of the clause, "The Employer gives no warranty for the information or document either as to accuracy or sufficiency …" only applies as far as it does not constitute misrepresentation in law: **Morrison-Knudsen v. Commonwealth of Australia** (1972) BLR 114. The disclaimer it is submitted has to be construed strictly. It is interesting to note that only

"Employer" is mentioned in the disclaimer and questions will surface as the role of the Engineer in this respect.

The Engineer has no contractual relationship with the Contractor and thus the privity of contract principle will disallow any Contractor's action against the Engineer on contractual ground. The Engineer, however, owes a common law duty of care to the Contractor, which in recent years has somewhat been limited: see **Pacific Associates v. Baxter** (1989) 16 Con LR 90.

CLAUSE 15: Employment of Workmen

(01) With the present labour market in the construction sector and the change in government policy, I suppose "only Malaysian citizens" in Clause 15 (a) is not quite correct and this can be amended to read "only Malaysian citizens and residents" and should be extended to include all holders of a valid working permit issued by the relevant government authority.

(02) I suppose in "the Department of Labour of the State in which this contract is performed" the underlined words should be amended to read "the State or States" to account for projects which extend across State boundary e.g. highway project. Even though Clause 1 (c) states that word importing the singular only also includes the plural, the context may not be apparent here, hence the suggestion. It may be worthwhile to check the provisions of Employment Act 1955 to ascertain the exact legal requirements. See also Clause 11 (a).

(03) I wonder whether it is wise, appropriate, or indeed, correct and desirable, if the obligation of the Contractor as spelt out in the conditions extend to those obligations imposed by various spelt out in the Conditions, these obligations stay.

CLAUSE 16: Compliance with Employment Ordinance 1955 etc.

(01) Two oversights need to be corrected here. 9a) Employment Ordinance 1955 is now known as Employment Act 1955 (Revised 1981); and (b) Employee Provident Fund Ordinance 1951 (now Act) has now been repealed: see s. 75 Employee Provident Fund Act 1991.

(02) I suppose "other law (sic) relating to the employment of workmen ….." includes Workers' Minimum Standard of Housing and Amenities Act 1990.

(03) The phrase "any subsequent modification or reenactment thereof" is used in Clauses 15 9b), 16, 17. I suggest that the phrase be slightly reworded to read "any subsequent revision, amendment or reenactment thereof". I think it is not

often that legal people speak of modification of the laws. Law revision is carried out with the authority of revision of Laws Act 1968.

CLAUSE 17: Days and Hours of Working

(01) Generally no comment on this clause except the following minor matters.

(a) in (i) I will prefer "designated weekly day of rest"; and
(b) in (ii) "any gazetted public holiday …." The word "designated" is considered necessary as different States have different rest days.

CLAUSE 18: Contractor's Superintendence

(01) to be consistent with the rest of this clause, the word "agent" as used in the ninth and tenth lines should be replaced by "agent or representative".

(02) Since the Conditions are meant for works of civil engineering construction, I will suggest that, to ensure uniformity of usage and designation, that the Contractor's agent or representative be designated "site manager". This is to avoid the use of the various verities of terms such as site agent, project manager, contracts manager and others. "Project Manager" though a more commonly used term is not suggested here: this is to avoid confusion with those construction professionals who are involved in project management.

(03) Is it necessary to require that the Contractor's agent or representatives must be an engineer within the meaning of s. 2 of Registration of Engineers Act 1967 (Revised 1987)? This provides that an "engineer" is "a Civil Engineer …. Or other person qualified to be registered under this Act".

(04) I presume the words "and as long thereafter" extends the Contractor's obligation in this clause to the Defects Liability Period.

CLAUSE 19: Wages Book and time Sheets

(01) No comment.

CLAUSE 20: Default in Payment of Wages

(01) No comment but I will suggest that the implication of this clause be further studied.

CLAUSE 21: Removal of Workmen

(01) I suppose "has caused delays" calls for some clarifications. Thought it is a standard and common clause that removal of workers who are incompetent and of bad character, but removal of person who "has caused delays" may raise eye-brows if it is given a strict interpreted to include those who have physically obstructed he smooth execution of the Works.

(02) I venture to add that those people who are grossly negligent and reckless in their works should also fall under this category.

(03) As can be seen, this clause limits the grounds for the removal of workmen from site. The Engineer or his representative cannot remove person or persons (including Site Manager) who possesses personality clash or character difference with the resident engineer. I will venture to add that those site managers who 'talk contractually' and are zealous protectors of his employer's rights do not fall under this category. Such differences can be settled by other means but not by exercising the power under this clause.

CLAUSE 22: Access for Engineer to the Works etc.

(01) As is explicitly stated, Engineer's right of access is not restricted to 'Site' only but extends to all areas and premises where to work is being carried out.

(02) It is not very clear what are the Contractor's obligations with respect to "do all things reasonably necessary to make such right effective", I suppose these refer to such facilities or assistance as the Contractor is in a position to give and which are "reasonably necessary".

(03) It is also noted that this clause is restricted to "Engineer and Engineer's Representative", others who are not concerned with the Works are thus excluded: e.g. civil engineering students on study tour. In the later case it is submitted that this is not the intention of this clause.

(04) It may be argued by some legal purists that this clause is inconsistent with the Contractor's rights to possession of site. However from a practical viewpoint, this right of Engineer will necessarily be implied anyway if the Engineer is to fulfill his duties and discharge his responsibility in the day-to-day supervision of the Works.

CLAUSE 23: Variations

(01) Without an express provision in the Conditions, the Engineer will not have the power to instruct variations. This clause thus confers powers on the Engineer to order variations and at the same time defines the limit of his powers. Definition of soft for "variation" is also provided in this clause.

(02) It is my view that the words "that may in his opinion be necessary …. or …. desirable" spell the limits of the Engineer's powers. It is not, as a commentator notes, tantamount to "for any reason" which implies absolute discretion. The Engineer, in the exercise of his power under this clause, must satisfy himself based on his honest professional judgment, that the two tests of necessity and desirability are satisfied. I will further hold that impartiality and independence of the Engineer must always be upheld here.

(03) It is admitted that what constitute necessity and desirability can be a matter of degree and conclusive proof of which may not be easy. However, it is submitted that if the Engineer's order for variations fails the above two tests, then the Contractor may not be bound for the same or, alternatively, a separate contract can be concluded or the valuation of the variations does not need to be in accordance to that laid down in Clause 24.

(04) In addition to the fact that this clause confers the Engineer with the powers to instruct variations, it also imposes on the Engineer a duty to do so. This is evident from the use of the duty imposing word 'shall' in "The Engineer shall make any variation …..".

"Increase or Decrease the Quantity of any Work …."

(05) This, it is submitted, must be read in conjunction with Clauses 23 (b), 24 and 26 (a), it must be stated that a mere increase or decrease of the quantity compared to that in BQ is not per se a variation to the contract: see Clause 23 9b). As per Clause 26 (a), the quantities are expressly stated to be estimated quantities only.

(06) The discussion and conclusion reached in paragraph (05) above will need to be qualified. Firstly, if the rates in the Contract have been rendered "unreasonable or inapplicable" in the opinion of the Engineer as a result of the increase or decrease in the quantity, then a suitable rate has to be reached upon agreement such rates is conferred on the Engineer: see Clause 24. For overall effect, see also Clause 24 (c).

"Omit Any Such Work"

(07) In a lump sum contract, this will in most circumstances be a variation. In a schedule of rates contract, the quantity concerned will simply not be measured and paid. In both cases, attention will need to be paid to Clause 24 (c).

"Change the Character or Quality or Kind of Any Such Work"

(08) This says that if the Engineer's instruction in effect brings about the change of quality of the work from a more inferior to a more superior one, then the Contractor is entitled to a variation order. I will further add that this will include a requirement that the Contractor must use more superior materials. Quality, it may be said, is defined mainly in the specification and contract drawings, which lay down the technical requirement of the Works. The Contractor, as can be inferred from here, need not give a better quality of work than that specified in the Contract Documents.

"Change the Levels Lines Position etc."

(09) It is not clear to me what are exactly covered here. Changes in levels, lines etc. will inevitably lead to changes in the quantity of work which are already well covered in Clause 23 (a) (i), above.

"Execute Additional Work … Necessary for the Completion of the Works"

(10) There are people who argue that this part of the clause is misleading and unnecessary as the Contractor is contractually bound to complete the Works anyway. The inference is that this should not and cannot be a variation. With respect, I fail to agree. The sub-clauses (a) (i) – (iv) may not be exhaustive as to give the Engineer power to instruct any variation and his power is thus enlarged in (v) with respect to the type of work which he has the power to instruct. A limiting criterion is that such extra works as he will instruct must be "necessary for the completion of the Works" hence the words "any kind" must be read with this in mind. Works "necessary for the completion of the Works" may not be indicated in the Contract Drawings or Specification and also beyond the knowledge of a reasonably experienced contractor. One possible area I can think of is changes in the programmed sequence of construction.

(11) I will prefer 'final contract sum" to "adjusted contract sum" for obvious reasons.

(12) It can be said that Clause 22 (a) gives an indirect definition of the types of works, which can be variations. This is useful for disputes such as that arisen in **Blue Circle Industries PLC v. Holland Dredging Company (UK) Ltd.** (1987) 37 BLR 40 can be avoided: see discussion by Professor Vincent Powell-Smith in his book Problems in Construction Claims pp. 34-36.

(13) The first sentence of Clause 10 (b) i.e. "No such variations shall be made by the Contractor without an order in writing of the Engineer" calls for further elaboration. It is submitted this does not render the effect of making an order in writing a condition precedent to financial recovery by the Contractor. The effect of this clause is to spell to the contractor that there cannot be a unilateral performance of an obligation beyond the stipulations in the Contract.

(14) The second proviso of this Sub-clause 10 (b) in effect compels the Contractor to obey any verbal instruction of the Engineer, which is to be rectified in writing by the Engineer. The third proviso shifts the initiative of confirming a verbal instruction of the Engineer to the Contractor.

CLAUSE 24: Measurement and Valuation of Works Including Variations

(01) Clause 24 (b) deals with the valuation of extra or omitted works and sets out the applicable procedure for this. Two distinct tasks are involved in the valuation process: one is the determination of the quantity involved and the other the choice of applicable rates. The second of these tasks is dealt with in this sub-clause but to my knowledge the first task is not mentioned anyway in the Conditions. I will thus suggest that for quantifying the additional works, reference shall be made to working drawings given by the Engineer or where such are not available or applicable, by in-situ measurement in which case Clause 24 9b) is applicable. For omitted works, quantity should be taken-off from Contract Drawings.

(02) Though not expressly stated in this clause, I suppose the Contractor can seek redress in arbitration pursuant to Clause 55 when disagreement to fixed rates ensues.

(03) It may be argued that the policy behind Clause 24 (b) shifts a substantial amount of risks to the Employer. This may be right but I will submit that it makes practical sense, not least of which is its recent support in the Privy Council: see **Mitsui Construction v. Attorney General of Hong Kong** 91986) 33 BLR 1. This case however has received mixed response with both praise and disdain heaped on it. It may be noted in passing here that the **Mitsui Construction** case was decided largely on the interpretation of a clause, which is in pari-materia with this Sub-clause 24 (b). A caveat may however be entered here.

(a) Privy Council opinions are now not binding on Malaysian courts but are submitted to be of high persuasive value.

(b) Judicial decisions on the interpretation of a clause in one standard form are not necessarily conclusive when considering the similarly worded provisions of another form: per Lord Bridge in **Mitsui construction** case at p. 18: a useful aid to construction and may be …. Positively misleading."

(04) It may be hard to reconcile Clause 24 (b) and Clause 26 (a). It is also said that the coexistence of both Clause 14 and Clause 24 (b) is not a comfortable one.

Clause 26 (a) states that the quantities set out in Bills of Quantities (BQ) are only estimated quantities and this implies that the Employer is not to be held liable if

the quantities are incorrect. In other words, the contractor will bear the risks if the actual quantities exceed that of the estimated quantities. Reading this together with Clause 24 (b), this will seem to produce an ambiguity. However, I wish to suggest that the key to an understanding of these two clauses lies in the determination of what "nature or amount" will render the rate or price contained in the Contract "unreasonable or inapplicable". Lord Bridge in the **Mitsui Construction** case comments that the estimated quantities in the BQ are "wildly wrong" and it is submitted this can be used as a test. What constitutes "wildly wrong" will be a question of fact. Alternatively, if it is felt that the above test leaves too much grey area and is not sufficiently deterministic, I suggest the following formula be used, which only operates if the actual executed quantity of a particular BQ item exceeds the quantity in corresponding BQ item by more than 40%. The rate in the BQ will need to be revised upwards by a rate revision factor (RRF) greater than 1 base on the following formula:

$$RRF = 1 + \frac{(A - 1.4\,B)}{A}$$

Where A = actual executed quantity
B = BQ quantity

Consider the following: A= 100,000 m^3 and B = 50,000 m^3 at a rate of 1.50 per m^3, then new rate will be:

$$\text{new rate} = \left[\, 1 + \frac{(100{,}000 - 1.4 \times 50{,}000)}{[\,100{,}000\,]} \,\right] \times 1.50$$

$$= \$\ 1.95 \text{ per } m^3$$

However, please note that this rate is only applicable to the quantity beyond 1.4 times the corresponding BQ quantity. In this example thus, if no rate revision is carried out, total amount paid will be \$ (100,000 x 1.5) = \$ 150,000 whereas with rate revision, amount paid will be in two parts, the second part is possibly a variation order:

1st part: amount paid = \$ (1.4 x 50000) x 1.5

= \$ 105,000

2nd part: amount paid = [100000 – (1.4 x 50000)] x 1.95

= \$ 55,500

thus making a total payment of \$ (105,000 + 55,500) i.e. \$ 160,500 compared with \$ 150,000 for the case of unrevised rate.

(05) It does not need much elaboration to recognise that the use of the word "omission" will render rate revision downward possible.

The above formula will also need to be slightly adjusted to cater for rate revision downward based on the same principle.

(06) It is of interest to note what does the word "nature" actually connote in Clause 24 (b) as the phrase "… nature … of any omission or addition relative to the nature or amount of the whole of the Works …." seems rather abstract. The "nature" of something is non-tangible and adding or omitting the "nature" of something may not be helpful in an understanding of this part of the clause.

(07) The second proviso in Clause 24 9b) makes the serving of notice a condition precedent to the contractor's claim, and the Engineer's exercise of power, pursuant to Clause 24 (a) and (b). It is advised that the Contractor should act accordingly and serve the required notice. The question which may be asked is, Is the discussion between Engineer and Contractor on possible agreed rates pursuant to Clause 24 (a) and (b) triggered by a contractor's notice or should the Engineer be duty bound and exercise his professional judgment and his role as a certifier and takes his own initiative for the same? I venture to add that the answer to this question can be used, along with others to argue against the mandatory requirement of the serving of notices. Lack of a notice should not be fatal to the Contractor's claim.

(08) Clause 24 (c) makes ample sense and will be welcomed by most Contractors. It also, to my view, negates a separate ground of claim on "loss of profits".

(09) It is stated in Clause 24 (d) that "The Engineer may order in writing that any additional or substituted work shall be executed on a daywork basis". It is suggested that this is hard to reconcile with Clause 22 (on variations). I will suggest that this be somewhat qualified, and the sentence reworded to read something like "The Engineer may instruct that any work which cannot properly be measured and valued shall be executed on a daywork basis."

(10) I personally do not feel that Clause 24 (e) is necessary. Firstly, Contractor will even in the absence of this clause try to extract whatever amount; which he feels he is entitled anyway. He will do this in his monthly application for interim payment. Secondly, as in Clause 47 (a), it is stated that "the Engineer shall make a fair valuation of the works properly executed and of the materials and goods delivered to or adjacent to the Works …" of each monthly claim statement. Thirdly, does this requirement constitute a second (mandatory?) notice, after one has been served pursuant to Clause 24 (b)? other grounds may be advanced and it is submitted that these will suffice.

CLAUSE 25: Plant Temporary Works and Materials

(01) The same effect purportedly intended for materials brought to site as in this clause is already covered in Clause 10 and it is surprising that this is repeated here. As with Clause 10, there are no clear words vesting the property of the constructional plant and temporary works onto the Employer.

(02) The draftsman is perhaps a little bit over cautions (though with no harm) of including Clauses 25 (b) and (c). Between the time the Contractor is granted with site possession and the handing over of the Works, the Contractor is in effect the licensee of the land/site on which the Works are executed: see **London Borough of Hounslow v. Twickenham Garden Development** (1970) 3 All ER 326 and the Contractor is thus responsible for his own plant etc. on site. After handing over of the Works, the license ceases to be operative and he shall remove all plant and unused materials.

CLAUSE 26; Measurement

(01) Clause 26 (a) and its significance has been discussed in several parts of this Commentary: see Clauses 14, 23 and 24.

(02) It is submitted that Clause 26 establishes the nature of the Contract being a re-measured or schedule of rates contract.

(03) Most methods of measurement have tried to reduce in-situ measurement to a minimum and when the necessity dictates, the procedure is as set out in Clause 26 (b). (To my understanding there is no IEM Standard Method of Measurement). It is suggested that in-situ measurement can be kept to a minimum and if possible completely eliminated by a carefully drafted method of measurement and working drawings in cases of variations. This may be argued as putting risks on the contractor but as is noted, the Contractor has sufficient safeguards in the conditions against this.

CLAUSE 27: Sub-Letting and Assignment

(01) it is a trite contractual principle that privity of contract exists only between the contracting parties: in our regards the Employer and the contractor. See **Kepong Prospecting Ltd. v. Schmidt** (1968) 1 MLJ 170 on the applicability of the doctrine of the privity of contract in Malaysia. Therefore, it follows that the Sub-contractors have no privity with the Employer and hence even if the Sub-contractors have been approved by the Engineer for Works on the Contract, the Contractor will still be liable for acts, omissions etc. of the Sub-contractors. Words such as "…. Shall not relieve …." Thus import no extra significance.

The remaining sentences of sub-clause (a) re-state this principle, for the avoidance of doubt I suppose.

(02) It is expressly stated in Clause 27 (9) that the provision of labour on a piecework basis shall not be deemed to be sub-letting, however the situation is not as clear with respect to "labour-only" sub-contractors. My own view is that sub-letting on a "labour-only" basis does not constitute sub-letting, which requires the approval of the engineer. This view can be inferred from

(a) The clause only states that "the Contractor shall not sub-let the whole or any part of the Works …"; labour is only one ingredient, besides materials, plant etc. which establishes "Works";

(b) It is further stated in this clause that "The Contractor shall also be responsible for the acts …. Of any Sub-Contractor (including in this instance, "labour-only" sub-contractors). ….." : if "labour-only" sub-contractors were to be intended to be included as an essential part of the clause the engagement of whom requires the approval of the engineer, the words 'in this instance" would not have been necessary.

(03) It is not clear what does "Expect where otherwise provided by this Contract" actually refer to. The only relevant clause I can think of is with reference to Clause 28 (Nominated Sub-Contractors and/or Nominated Suppliers).

CLAUSE 28: Nominated Sub-Contractors and/or Nominated Suppliers

(01) It needs to be recognised at the onset that the applicable law with respect to nominated Sub-contractors is in a state of flux with contradicting decisions handed down by courts and are hard to reconcile. The Singapore Standard Form SIA 87 drafted by I.N. Duncan-Wallace has, with respect, taken the "easy way out" by placing all risks on the Contractor. The Employer thus is in a relatively more comfortable position: he has the benefits the Nominated Sub-contractor system offers and somebody else will bear the entire risks inherent in the system. This, it is respectfully submitted, may not be sound commercial policy, and, even so, equitable.

(02) It is perhaps right and proper that a definition should be accorded to the phrase "Nominated Sub-contractors/Suppliers". In this regard, Clause 28 (a) attempts to provide a definition. Clause 28 (a) names two categories of persons who may be nominated sub-contractors/suppliers:

(a) All specialists etc. executing any work or service, or supplying any materials or goods for which the Prime Cost Sums are included in the Bills of Quantities; or

(b) All specialists etc. for which the Engineer has given instruction in regard to the expenditure of Provisional Sums.

As can this be seen, it is necessary to refer and to read Clauses 28, 29 and 30 together for a proper understanding of the province of this Nominated Sub-contractor/Supplier system, and its inherent policy in the Conditions.

(03) With reference to the two categories of persons mentioned above who can Nominated Sub-contractors, it will be noticed that one refers to Prime Cost Sums and the other to Provisional Sums. Therefore, notwithstanding the definition and purpose of Provisional Sums in Clause 30 (a), the expenditure of Provisional Sums can also be introduced with respect to Nominated Sub-contractors: in this regard, see Clause 30 (c).

(04) Clause 28 (b), it seems to me, has been drafted to protect the interest of the Contractor: at least the Contractor's hand will not be tied with any possible remedies. The Contractor is protected in three ways:

(a) obligation and liabilities of Contractor under the Contract are also to be borne by the Nominated Sub-contractor and the later is required to indemnity the Contractor to the same;

(b) the Nominated Sub-contractor will need to indemnity the Contractor for any of his negligent acts.

In addition to these, as can be gauged from Clause 30 (a),

(c) the Contractor is entitled to profit and/or attendance charged from the employment of the Nominated Sub-contractor.

(05) Having stated the favourable position of the Contractor as in paragraph (04) above, it may be necessary to examine the wordings of Clause 28 (b) in greater details.

"The Contractor shall not be required … or be deemed to the under any obligation to employ any Nominated Sub-Contractor"

(06) This seems to me that the Contractor's cannot be implied to have an obligation to employ any Nominated Sub-Contractor who declines to accept contract provisions containing as in 9a) and (b) in paragraph (04) above.

"Like obligations and liabilities"

(07) If given their strict and literal interpretation, the words may not include obligations and liabilities, which the Contractor believes he is being burdened with. As a case in point, the Contractor may need some extra time to complete some works falling outside the domain of the sub-contract works, if the Nominated Sub-Contractor is only subjected to "like obligations and liabilities" as those of the Contractor's under the Contractor's under the Contract, the Nominated Sub-Contractor will have the same completion date as that of the Contractor's! May be the wordings should be revised to read something like 'such obligation and liability which will enable the Contractor to met his own obligations and liabilities which will enable the Contractor to meet his own obligations and liabilities under the provisions of this Contract".

"negligence"

(08) Clause 28 (b) 9i) deals with contractual liabilities, therefore the word "negligence" in Clause 28 (b) (ii) must by inference, refer to tortuous liabilities.

"misuse by him … of any Constructional Plant or Temporary Works provided by the Contractor."

(09) One disturbing question will spring into mind here: does this include those Constructional Plant and Temporary Works brought in for the purpose of the sub-contract works by the Nominated Sub-Contractor himself? May be the wordings here also ought to be revised as in their present form, the consequences seem to be restricted to those arisen as a result of misuse of plant etc. provided by the Contractor.

(10) Much as Clause 28 (b) gives some protection to the Contractor, Clause 28 (c) provides the same to the Nominated Sub-Contractor. In this regard, the Contract seems to place this on the promptness of payment for works done fro the Contractor to the Nominated Sub-Contractor.

(11) As ca be gauged from this clause, the Engineer can only exercise the power to protect financially the Nominated Sub-Contractor when there are sums owing by the Contractor to the Nominated Sub-Contractor which had been included in a previous interim certificate and before the certifies **further** sum in respect of that same Nominated Sub-Contractor work in the subsequent certificate pursuant to Clause 47.

(12) The wordings of Clause 28 (c) are now examined in more details as follows.

"Inform the Engineer in Writing hat he has reasonable cause for withholding or refusing to make such payments"

(13) The words should be taken to include the facts or reasons, which form the Contractor's "reasonable cause" to act as he does. It is further inferred that

since the Employer is given the right to a sanction for the Contractor's alleged failure, the Engineer will have a power to decide whether the Contractor is justified in his action for withholding or refusing to make the relevant payment to the Nominated Sub-contractor.

"deduct by way of set-off"

(14) "Set-off" is usually taken to imply a defence upon being sued; this implies that a right to bring a legal action is thus ruled out: "it is to be used as a shield, not as a sword".

(15) Set-off is an inherent common-law rights and it is submitted, even in the absence of any express words stating so, a right of set-off will still be available to the party to whom a sum of money is being owed: in this sense, set-off is used in a slightly different context than that in the preceding paragraph. Very clear words will be required to deny the right of set-off.

(16) In stating as above, it is submitted that the "Dawnays' Principle" as enunciated in the case of **Dawnays Ltd. v. F.G. Minter Ltd** (1971) 2 All ER 1389 (an English Court of Appeal decision) which said that the Employers were liable to pay Contractors in full (r Contractors to Nominated Sub-contractors) on interim certificate without any right of defence or set0off for any breaches of contract, is hereby not followed. In fact, the House of Lords has overruled **Dawnays** and the cases decided on the same principle in **Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd.** (1974) AC 689. it is noted that the Malaysian Court has in the case of **Bandar Raya Developments Bhd v. Woo hoe Kan & Sons Sdn Bhd** (1972) 1 MLJ 75 accepted the Dawnays' principle but this was before the decision in **Gilbert-Ash.** However, in **Alliance (M) Engineering Co. Sdn Bhd v. San Development Sdn Bhd** (1974) 2 MLJ 94, Gill CJ in the then Federal Court, in an appeal for an Order 14 summary judgment, stated at pp. 98-99.

"That brings me to the only other ground of appeal which in the effect that the learned trial judge erred in law regarding the House of Lords' decision in **Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.** as a precedent binding on him and failing to take into account the decision of this court in **Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd** to the contrary. It is to be observed that the decision of this court in the **Bandar Raya** case was based substantially on **Dawnays** case … **Dawnays** case, however, was disapproved by the House of Lords in **Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.** in which it was held that only be taken away by clear, unequivocal words. Although this decision of the House of Lords was not binding on the learned trial judge, I do not think he was wrong in following it."

Gilbert-Ash, therefore, should be taken as the law in Malaysia, a right of set-off is hence available unless it is denied by "clear, unequivocal words" in the Contract.

(17) Clause 28 (a) makes a distinction between Nominated Sub-Contractors and nominated Suppliers. Ambiguities or at least confusions arise as only "Nominated Sub-contractors" is mentioned in the remaining part of Clause 28 even though expressions such as "work or goods" and "work done or goods supplied" precede 'Nominated Sub-contractor". If it is the policy that Nominated Suppliers are not to be excluded, I suggest that Clause 28 (a) be reworded slightly by deleting the words "suppliers" and "nominated Suppliers", as the case may be from the said clause. This will have the effect of having both the Sub-contractor for works and suppliers of goods be collectively known as Nominated Sub-contractors for the purpose of this clause and which is in line with the rest of the clause's wordings.

CLAUSE 29: Responsibilities of Contractor for Nominated Sub-Contractors and/or Nominated Suppliers

(01) The preceding clause i.e. Clause 28 deals with the administration of the Nominated Sub-contractors and their rights and liabilities. The present clause attempts to deal with some of the pitfalls of this Nominated Sub-contractor system.

(02) If the suggestion advanced in paragraph (15) of Clause 28 were to be adopted, all references to "suppliers", "nominated suppliers" and associated words and phrases will need to be deleted.

(03) Clause 29 (a) re-states what I think is settled law. The Contractor is responsible to the employer for all acts, omission faults etc. of his sub-contractors, either domestic or nominated. This is explained by saying that there is no privity of contract between the Employer and the various Sub-contractors: see **Kepong Prospecting Ltd v. Schimdt** (1968) 1 MLJ 170 cited earlier. As a case in point, the Contractor will still be responsible for the quality of works and fitness of materials used by his Nominated Sub-contractors: see **Kepong Prospecting Ltd. v. Schmidt** (1968) 1 MLJ 170 cited earlier. As a case in point, the Contractor will still be responsible for the quality of works and fitness of materials used by his Nominated Sub-contractors: see **Young & Marten v. Mc Manus Childs Ltd.** (1969) 1 AC 454 and **Gloucestershire C.C. v. Richardson** (1969) 1 AC 480. The Employer may be able to bring an action against the Nominated Sub-contractor in tort (though not in contract) for negligence in the construction of works: see the House of Lords decision in **Junior Books Ltd. v. Veitchi** (1982) 3 All ER 201. **Junior Books**, however, must now be seen as a case decided purely on its own special facts and should thus be not followed. In fact, **Junior Books** has since been overruled (on the point under discussion) by a series of recent decisions such as **D&F Estates v. Church Commissioners** (1982) 2 All

ER 992; **Simaan General Contracting Co. v. Pilkington Glass Ltd.** (1988) 1 All ER 791 and others. See also the landmark decision of **Murphy v. Brentwood D.C.** (1990) 2 All ER 908.

(04) In the well-known English House of Lords case of **North-West Metropolitan Regional Hospital Board v. T.A. Bickerton & Sons Ltd.** (1970) 1 All ER 1039, it is established that the Employer will be required to make a fresh nomination of a Sub-contractor if the original Nominated Sub-contractor fails, whether as a result of his (Nominated Sub-contractor's) insolvency or repudiation. In another House of Lords decision in **Percy Bilton Ltd. v. Greater London Council** (1982) 20 BLR 1, this principle is re-affirmed. Clause 29 (b), therefore, is an attempt to circumvent this development of the law, which to some extent, negatives an advantage accrued to the Employer of the Nominated Sub-contractor system.

(05) Clause 29 (b) provides that upon failure of the originally appointed Nominated Sub-contractor, the burden of continuing performance of the original scope of the Nominated Sub-contractor's works fall onto the Contractor, in two ways:

(a) the Contractor (not Employer) can employ another Sub-contractor to execute the Works with the consent of the Engineer; or
(b) the Contractor himself can complete the Works.

If the attractive feature of the Nominated Sub-contractor system is the need, or desirability, or securing the service of specialist contractors, option (b) above makes a mockery of this. Option (a), if successfully exercised, will arouse people's amazement as to why the Nominated Sub-contractor system was resorted to in the first place. Whether this is practical remains to be seen: it depends I suppose on the nature of the specialist works involved and any commercial realities and/or complexities. Nevertheless, the clause as drafted represents a policy decision of the drafting committee.

(06) The first part of Clause 29 (b) represents what need to be done upon failure of the originally Nominated Sub-contractor. The proviso to this sub-clause gives the commercial aspects. It is submitted that there are several aspects all of which need to be scrutinized in details: (a) delay and its associated costs; (b) financial loss as a result of the Nominated Sub-contractor's withdrawal. With respect to costs, the proviso states that "… the Contractor is entitled to be paid the same sum … as would have been payable had the original Nominated Sub-Contractor completed the sub-contract without ay default". This may be a little comfort to the Contractor if it contains some profit element.

(07) In **Percy Bilton** (cited earlier), it is held that, upon the liquidation of the original sub-contractor, the Employer is bound to make an effective renomination and he is responsible for any loss due to delay in making the renomination but the financial loss arising from the failure of he original Nominated Sub-contractor

falls on the Contractor. This position, however, will need to be read in the light of the provision in this Contract to the effect that renomination will be exercised by the Contractor, not the Employer.

(08) Following from the reasoning in **Percy Bilton** stated in paragraph (07) above, it seems to me that the Contractor will be burdened with the delay and its associated costs as a result of the failure of the original nominated Sub-contractor. This follows from the stated decision, which holds that since the employer is duty bound to make a fresh nomination, he will be burdened with the delay and its associated cost. In our case, that duty falls onto the Contractor. If this position is held to be correct, it can hence be seen that upon failure of the Nominated Sub-contractor, the Contractor is responsible for

(a) the delay as a result of this failure;
(b) the cost as a result of this delay;
(c) financial costs consequent and subsequent to this delay.

The result is that no extension of time can be granted.

(09) It may be asked, and understandably so, what then are the remedies of the Contractor and how can he protect himself from such responsibility? The following are some suggestions:

(a) the extraction of a performance bond and indemnity from the Sub-contractor;
(b) see Clause 28 (b) (i);
(c) sue the Nominated Sub-contractor for breach of contract but, unfortunately what may be obtained can only amount to a paper judgment as the Contractor may in the case of insolvency of the Nominated Sub-contractor, join the queue of creditors; etc.

(10) It is stated in paragraph (08) above that no extension of time can be granted as a result of the failure of the Nominated Sub-contractor. On a first reading of sub-clause (k) of Clause 43 (Delay and Extension of Time) the two views may be in conflict. However, it is submitted that sub-clause (k) of Clause 43 is not applicable in this instance due to the following:

(a) it only applies to the delay incurred by Nominated Sub-contractors which is “caused by some reasons affecting their work as stated above in sub-clauses (a) to (j) inclusive”;

(b) it applies to the performance of the Nominated Sub-contractor when he is executing the Works but is delayed due to some stated factors (i.e., in sub-clauses (a) to (j) but, as is in our case, the delay is due to the default or failure of the Nominated Sub-contractor and the delay arisen as a result;

(c) in the situation of Nominated Sub-contractor under discussion, the delay may even be due to non-performance of the Nominated Sub-contractor whereas sub-clause (k) of Clause 43 refers to the performance of the Nominated Sub-contractor during the currency of the Contract.

CLAUSE 30: Prime Cost and Provisional Sums

(01) Notwithstanding the definition of sort given in Clause 30 (a) on Prime Cost Sum, I append below the observation by Lord Reid in **North-West Metropolitan Regional Hospital Board v. T.A. Bickerton & Sons Ltd.** (1970) 1 All ER 1039 at p. 1041 which explains the nature of the Prime Sum and also nominated Sub-contractors:

"The employers put out for tender bills of quantities and drawings. With regard to the greater part of the work the bills were detailed and the contractor filled in its price. But certain parts of the work were reserved for sub-contractors to be nominated by the employers. With regard to these parts, no details were given and sums known as prime cost sums were inserted by the employers as estimate of what these parts were likely to cost. So the tendering contractor had no concern either with the details of this work or the price to be paid for it. The work was to be part of the contract work and so the contractor's tender was made up of the sums for which it offered to do its part of the work together with the prime cost sums settled by the employers. The employers obtained tenders from specialists, selected by them for the prime cost work and then, when they had made their contract with the contractor, they instructed the contractor to enter into a contract with the contractor whom they nominated in terms which they dictated, having settled those terms with the nominated Sub-contractor. Then, if the sum to be paid to the nominated sub-contractor differed from the estimated prime cost sum, as it almost certainly would, the Contractor's contract price for the whole work was adjusted to take into account of this difference."

(02) Clause 30 (a) will be of interest to Contractors as it indirectly states that "profit and/or attendance charges" will be available to them in the Nominated Sub-contractor system. It is further noted that this clause also provides how the Prime Cost Sum items in the Bills of Quantities are to be administered.

(03) Clause 30 (b) explains the nature of provisional sum and its financial arrangement in the Contract. It must be borne in mind, however, that provisional sum is to be contrasted with provisional quantities, which may be indicated in other parts of the Bills of Quantities.

(04) A feature of this Contract lies in Clause 30 (b) with the effect that the expenditure of provisional sums can involve Nominated Sub-contractor and be administrated in the same way as a Prime Cost Sum.

(05) Clause 30 (d) allows the Contractor to tender, and if accepted by the Employer, execute works for which prime cost sums are provided in the Bills of Quantities. With this in mind, I suppose Clause 30 (a) on the definition of prime cost sum will need to be slightly reworded to accommodate this for in its present form, the prime cost sum was defined as that "for works or services to be executed by a Nominated Sub-contractor…." And excludes the possibility of Contractor carrying out the same.

CLAUSE 31: Artisans and Tradesman

(01) As has been observed earlier, the Contractor when given possession of Site is a licensee of the Site on which Works are executed: Clause 25 paragraph (02). Further, under Clause 38, the Contractor is to be given the possession of Site, which prima facie allows him to exclusive possession during the currency of the Contract. Therefore, in the absence of this clause, the Employer will have no right to have works carried out on the site by others, which do not form part of the Contract.

(02) I suppose "or others" after "artisans or tradesman" can be interpreted ejusdem generis to include other trades and skills.

CLAUSE 32: Indemnities to Employers in Respect of Personal Injuries and Damage to Property

(01) Before further discussion is advanced on the clause, two legal concepts will need to be understood first. The first concept deals with occupier's liability and the second on the liability of independent contractors.

Occupier's Liability

(02) It must be borne in mind that, in Malaysia, occupier's liability is still very much governed by common law, so the English Occupier's liability Acts 1957 and 1982 have no application in Malaysia.

(03) Generally, with respect to premises, liability is based on occupancy or control, not on ownership. Therefore, in our case, the Contractor who is given occupancy (possession) for the duration of the Contract is, in this sense, the occupier of the Site.

(04) Mention is also made to s. 3 (Interpretation Clause) of the Factories and Machineries Act 1967 on "occupier" which, "in relation to a factory means a person who occupies or uses any premises as a factory". It is noted that a construction site is a "factory" within the meaning of the Act, see s.2 of the Act.

(05) It can therefore be seen that, the Contractor, as the occupier of Site, is subjected to two forms of duty of care, one under common law and the other statutory.

The Contractor, as the occupier of the Site, owes a common law duty of care for mishaps etc. occurred on Site. Further, the Contractor is under a statutory duty, via the Factories and Machineries Act 1967, to the people within the "factory".

Independent Contractors

(06) The general principle of the law may simply be stated thus: Although an employer is responsible (or vicariously liable) for the negligence and other wrongdoings of his workers, he is not responsible for that of an agent who is not a servant but an independent contractor. In the Employer – Contractor relationship within the context of the construction industry, the Contractor is an independent contractor.

(07) It must however be noted that the above principle is not absolute; there still exist certain cases in which an employer is liable for the acts, or omissions, of an independent contractor.

(08) The discussion and the underlying principles governing the liability of the Contractor (paragraphs (02) to (06)) may thus lend some comfort to the Employer and may even suggest that Clause 32 any need to be dispensed with. This may not be so. Firstly, as can be gauged from paragraph (07), the Employer may not be entirely liability free. Secondly, the use of the indemnity serves as a double insurance against any possible third party claims and lends more weight to the Employer's case. Further, with the furnishing of an indemnity the Contractor will be restrained to seek redress in litigation.

(09) Clause 32 (a) deals with the requirement of the Contractor to indemnity the Employer "in respect of personal injury to or death of any person" whereas Clause 32 (b) concerns with "injury or damage of any kind to any property real or personal (including the Works and any other property of the Employer)".

The wordings of this clause are now examined in more details below.

"… whether arising at common law or by statute ….."

(10) Liabilities under common law and under statue have both been discussed above. It is worth nothing that the corresponding clause in the PAM/ISM 69 Form, indemnity needs only be given to in respect of claims arising under any statue this seems to exclude the indemnity from any claims in negligence. This, however, does not absolve the Contractor from his liability.

"…Arising out of or in the course of or by reason of the execution of the Works"

(11) This, it is submitted, is of restraining effect limiting the scope of the Contractor's possible liability but it seems to me to be wide enough to encompass most conceivable mishaps. However, if the mishap is due to an act or omission of the

Employer, his servants or agents, it is submitted that this may not be covered by the indemnity.

(12) It is submitted that in those risks where the Contract expressly requires the Employer to take out insurance policies of his own, this may exclude the liabilities covered by the indemnity.

(13) Clause 32 (c), it is submitted, seems to me to be an attempt to circumvent the principle as laid down in **AMF (International) Ltd. v. Magnet Bowling Ltd.** (1968) 2 All ER 798. In the **Magnet Bowling** case, a third party recovered damages against both the Employer and the Contractor. The Employer, however, was held not to be entitled to recover from the Contractor under an agreed indemnity because his liability was in part the result of his own negligence through the architect's lack of supervision. In this regard, it may further be pointed out that indemnity clauses are often very strictly interpreted. Therefore, the enforceability of Clause 32 (c) is very much in doubt in view of the **Magnet Bowling** case.

CLAUSE 33: Insurance Against Personal Injuries and Damage to Property

(01) The opening lines of the clause unambiguously state the following prerequisites of the requirement of insurance:

(a) the insurances in addition to the requirement of an indemnity pursuant to Clause 32; and

(b) Works cannot commence without the insurance in place.

(02) The words "in respect of personal injuries or death arising out of or in the course of or by reason of the execution of the Works" are almost identical to corresponding wordings in Clause 32 (a). Similarly, the words "in respect of injury or damage to property, real or personal, arising out of or in the execution of the Works and whether or not such injury, death or damage is caused by negligence …." Are almost identical to corresponding words in Clause 32 (b). It is submitted that these specify the types of risks that should be covered by the Contractor's insurance policies. It however must be noted that the words in the bracket in Clause 32 (b) i.e., "including the Works and any other property of the Employer" are not included in Clause 33 (a).

(03) The Contractor will have to note of the amount of excess to be borne by the Contractor under the insurance affected: see Appendix to the Conditions. See also Appendix for minimum cover for any one accident or series of accidents arising out of one event.

(04) Clause 31 is to be read together and contrasted with Clause 24 especially on the scope of the insurance coverage in both clauses. Clause 33 deals with personal

injuries to, death of, or damages caused to, a third party. Clause 34 whereas insures against damages caused to the Works.

(05) The insurances affected and maintained by the Contractor will need to incorporate several specific requirements as specified in Clause 33 (b). The three requirements are self-explanatory except requirement (b) calls for some clarification. It is not clear to me who are the "engineers, architects and surveyors and their representatives and employees". Used in their small case "e", "a" and "s", it seems to me that these refer to the people in their occupational sense. If this is so, I will submit that this may not be the intention of the drafting committee. May be these can be amended to read "the Engineer, his agents, representatives and his employees". Further, in their current form, the words as used are very loose: for example, who is a surveyor? Must he be one registered with the Board of Surveyors or Institution of Surveyors? etc.

(06) In taking our the required insurance policies, the Contractor is required to take note of the following requirements:

(a) they have to be in the joint names of the Employer and the Contractor;

(b) the Sub-Contractors have to be covered: or alternatively the Sub-Contractors have to effect and maintain the insurance policies to the same effect;

(c) the period under insured will be "for the whole construction period and in such manner that the Employer, the Contractor and Sub-Contractor are also covered during the Defects Liability Period" and extends, where specified, for six months after date of practical completion of the Works.

(07) Clause 37 (d) gives another power of "set-off" to the Employer.

(08) It is not clear if the Sub-Contractors on the Site not under the control of the Contractor will need to be covered.

(09) It is not clear how the Contractor is to be reimbursed for the premium paid for the various insurances. If not specifically given as payable items within the Bills of Quantities, the Contractor may, presumably, include the risks within his rates.

CLAUSE 34: Insurance of Works

(01) The 'conventional' (e.g. ICE Conditions) conditions of contract have expressed in corresponding clause that all losses etc. are covered with the exception of what are known as 'excepted risks'. In the Conditions, the risks to be specifically insured against are listed but the doubt remains if the list of risks is exhaustive. I would prefer an insurance against 'all risks' (less purely commercial risks, of course).

(02) For Clause 34 (a), I will think "loss or damage" will be more accurate compared to "loss or damage": the two are to be read disjunctively, not conjunctively.

(03) The plural for 'aircraft' is also spelt 'aircraft'. I.e. without the 's'.

(04) One notable risk, which is not insured against is the risk of failure of the Works due to an inadequate Engineer's design: and/or those risks as a direct consequence of faulty design. Clause 34 (a) (i) does not cover this as it only refers to "professional fees necessarily incurred in the reinstatement of the Works consequent upon its loss or damage'.

The Contractor, of course, can insure this risk on his own (and include this in his tender sum?. However, whether this is the intention of the Conditions or is merely an omission remains to be seen.

(05) One disadvantage of the approach to this Clause as mentioned in paragraph (01) above is that risks, which can be attributed, for example, to the negligence of the Contractor himself are not covered. Thus, and as illustrations, damage caused to bridge beams by the arm of an excavator or the boom of a crane; damage caused to the bridge beams and to the bridge crossheads due to the failure of the crane during beam launching; failure of the staging/temporary works for bridge construction etc. are all not covered. Whether it is the intended policy for the Contractor to insure against these risks with his own policies is not clear. If, however, it is the policy that the Contractor is to take out separate policies against risks not expressly mentioned to be covered, then the Contractor insure these in his own name and not necessarily in the joint-names of the Employer and Contractor.

(06) It is worth nothing that all "unfixed materials and goods delivered to, placed on or adjacent to the Works" are covered. In this regard, it needs to be borne in mind that in the law of insurance, "loss" has a definite, defined meaning. It can be said that if goods are actually destroyed, they are 'lost' as 'destruction' is not part of the policy but it is submitted that 'loss' will include 'destruction'. However, goods can also be regarded as 'lost' if they have disappeared or stolen. In this regard, the wording of the clause falls much to be desired. See paragraph (07) below.

(07) The Contractor is required to insure against loss and (sic) damage by fire, lightning ….. In this regard, are "all works executed and all fixed materials and good delivered to …." a cause of the "loss and damage" or are these which carry risks and are to be insured against? Common sense will tell that it is the second sense, which is being referred to but this is not plain from a literal reading of the clause. If the latter sense is intended (which it should be so), then insurance coverage is required for both "all works executed" and "all unfixed materials and goods". By itself, it is not explicit that 'Works' (with capital W) are covered.

(08) Attention is drawn to the provision of Sub-clause (b) where it is provided that if an excess clause is provided in the Appendix to the Conditions the Contractor shall bear the amount of such excess. This, however, does not preclude the Contractor from indemnifying himself from such access by other policies. Also to be note is that consequential losses are not covered by the insurance under this clause; see however Clause 43, paragraph (13).

Insurance of property, it needs to be said, prima facie covers that property only in respect of the loss attributable to its own value. In other words, consequential losses are not recoverable unless they are separately insured: see the case of **Maurice v. Goldsborough Mort** (1939) AC 452.

(09) Sub-clause (d) sets out the procedure to be followed upon the occurrence of any loss or damage. This needs to be read with care as from a clear and literal reading of this Sub-clause, the contractor shall, "notwithstanding that settlement of any insurance claim has not been completed, with due diligence restore, replace or repair the same, remove and dispose any debris and proceed with the carrying out and completion of the Works" and this is to take place 'upon the occurrence of any loss or damage".

Two questions surface:

(a) what role will be played by the loss adjuster upon the occurrence of any loss or damage? Usually it will be demanded by the loss adjuster that the affected Works be remained undisturbed pending the investigation into the cause of the loss or damage;

(b) investigation by the Engineer as to the cause of the mishap will necessarily, as in (a) above, stall the reinstatement process for the time being.

(10) Sub-clause (d) is also important in that it also emphasises that the Contractor is only entitled to the insurance money for the reinstatement works and no more! This also brings in the significance of insuring to the 'full value' of the Works. However, it is to be borne in mind that removal of debris is not to be included in the insurance claim.

One point, which demands further thought is this: if the Engineer decides to change the design upon the occurrence of the loss or damage (e.g. to change from the original embankment design of preloading as method of sub-soil improvement to that of piled embankment?, how will this be compensated vis-à-vis the position of the Contractor and the insurer?

In this regard, I suggest that a provision to the effect that the Contractor shall not be liable to insure against the necessity for repair or reconstruction of any work

constructed with materials or workmanship not in accordance with the requirements of the contract unless the Bills of Quantities provide a special item for this insurance.

CLAUSE 35: Workmen's Compensation

CLAUSE 36: Employee's Social Security Act, 1969

(01) Workmen's Compensation Ordinance 1952 is now revised to Workmen's Compensation Act, 1952 and Employees' Social Security Act, 1969 should be spelt as underlined.

(02) With due respect, I question the need to incorporate these two clauses. Alternatively, I think it will be sufficient for the purpose to just retain Clause 35 (a). The rest of the details are as spelt out in the two said Acts and are the statutory obligations to be followed. Further, as in provided in s. 24 of Workmen's Compensation Act, 1952 contracting out of the Act in an employment agreement is null and void.

Further, the obligations of the Employer (in the sense of the said Acts0 are spelt out in the Acts themselves and there is no necessity, in my view, to repeat these; and with possible contradictions between the two.

(03) It needs to be said that Workmen's Compensation Act, 1952 provides "for the payment of compensation to workmen for injury suffered in the cause of their employment" whereas the Employees' Social Security Act, 1969 provides for "certain benefits to employees in case of invalidity ad employment injury" and these could be overlaps between this two forms of accident compensation. Further, it is noted that the definition of "workman" and "employer" as in ss. 2 and 3 of the 1952 Act and that for "employee" and "principal employer" as in s. 2 of the 1969 Act are not identical.

CLAUSE 37: Performance Bond

(01) As given in Sub-clause (a), the bond can take the following forms: cash, banker's draft, banker's guarantee or insurance guarantee.

(02) It is stated in Sub-clause (a) that the purpose of the bond is to ensure due observance and performance of the Contract. Sub-clause (c), however, states that the bond shall be forfeited on two grounds: (i) when Contractor fails to execute the contract; and (ii) Contractor commits a breach of his obligations under the Contract. It is on these two grounds that the next two paragraphs are concerned.

(03) As has been explained earlier, executed or executory refers to the stage of formation of the Contract, this means that no valid contract is entered into! This, it is submitted muddies the picture as at this stage of contract formation, there is no privity between the contracting parties. In this regard, the question of the bond is itself very much in doubt. With the greatest respect, may I suggest that this is an oversight of the draftsman who has used the word "execute" in a non-legal sense to mean "perform".

(04) Technically, if a Contractor submits his programme late, or fails to notify something etc., which is provide in the Conditions, he is in breach of his obligation under the Contract. If this by itself brings to a possible resort to Sub-clause (c), it will be very unwise indeed. I venture to suggest that this is not the true intent of the Conditions.

(05) I suggest that Sub-clause (d) be reworded as follows: "The Performance Bond (or any balance thereof remaining for the credit of the Contractor) shall be released or refunded to the Contractor upon the giving of the Certificate of Making Good Defects for the whole of the Works under Clause 45 hereof". I regard the words deleted from the original clause superfluous.

(06) Attention needs also be drawn to the form of Performance Bond included in the Conditions. Though Sub-clause (a) gives several means of furnishing the bond, the form only refers to Bank Guarantee.

(07) There are other comments, which can be made at the form. But as is observed in Keating on Building Contract 5th Edition at p. 252 that bonds are 'archaic' and "frequently expressed in outmoded language and create obligations whose legal interpretation may be unclear". Similar sentiments are also expressed by other writers. It must be stressed that there must be compatibility between the clear words of the conditions and the language of the Form of Performance Bond itself.

CLAUSE 38: Commencement time and Delays

(01) I will think that it is sufficient to just state in Sub-clause (a) that 'The Contractor shall commence the Works within the period named in the Tender ……", the words "on Site" after "Works" are not deemed to be necessary.

(02) Though the Sub-clause gives some flexibility to the length of period after which, the Contractor is to commence the Works, the form of Tender however fixed this to be 14 days.

(03) It is not stated in the Sub-clause (a) of the maximum time duration between the acceptance of tender and the instruction to commence Works. It is not clear if the statement in the Form of Tender viz. "This shall remain valid and binding

upon us for a period of …. ( ) days from the date of this "Tender" does not fix such a duration. It is submitted that it does not as this statement per se expires its purpose upon acceptance of tender by the Employer which matures into a valid binding contract. Some clear words will need to be introduced to clarify this situation.

(04) I will regard the saving phrase in Sub-clause (a) via "be wholly beyond the Contractor's control" as unnecessary for the phrase "due expedition" already surmounts such possibility.

(05) I will prefer "instruction" to "order in writing" in Sub-clause (a).

(06) Clause 38 (b) (i) is important in that it reaffirms two important principles:

(a) it underscores the duty/obligation of the Employer to give possession of Site – the phrase "the Contractor is to be given possession …."; and

(b) the Employer is not obligated to give the whole of the Site to the Contractor – the Contractor only needs to be given site possession "from time to time and the order in which, such portions shall be made available to him ….".

These two important principles will be further discussed in the following paragraphs.

(07) It needs to be appreciated that even if there is no clause specifying the obligation of the Employer to give site possession, this obligation will necessarily be implied anyway. For example, in **Hounslow LBC v. Twickenham Garden Developments Ltd.** (1970) 3 All ER 326 Megarry J. stated that "The contract necessarily requires the building owner to give the contractor such possession, occupation or use as is necessary to enable him to perform the contract, but whether in any given case the contractor in law has possession must, I think, depend at least as much on what is done as what the contract provides …". Though the decision was based on JCT contract, it is submitted that this holds true here.

(08) Following from paragraphs (06) and (07) above, it follows that a failure of the Employer to fulfill this obligation constitutes a breach of contract which can entitle the Contractor to serve a notice to rescind the contract: see the observation of Chan Min tat FJ in **Tan Hock Chan v. Kho Teck Seng** (1980) 1 MLJ 308. Alternatively, the Contractor can opt for reimbursement of any damages, which he suffers as a consequence of the breach. Sub-clause (b) (i) itself also provides a twin remedy i.e. extension of time for the completion of the Works and, if Contractor incurs expenses, the Engineer shall "certify such sum as in his opinion shall be fair to covert the expense (sic) incurred which sum shall be paid by the Employer."

(09) The drafting of Sub-clause (b) (i) contains one fundamental flaw. The Sub-clause provides that "Save in so far as the Contract may prescribe …. subject to any requirement in the Contract as to the order in which the work shall be executed ….. the Employer will …. Give to the Contractor possession of so much of the Site ….". However, nowhere is it stated in the Conditions that the Contractor must indicate, directly or indirectly, the extent of his site requirement. The sub-clause itself speaks of "in accordance with the programme (if any)" and questions surface as to which programme is being referred to? And the words in brackets i.e. "if any" point out that the submission of a programme is not mandatory - the Conditions do not specify for one to be submitted anyway. The Contractor may refer to "any reasonable proposals". These proposals, however, are relevant "from time to time as the works proceeds" but may not necessary cover pre-commencement situation.

With due respect, I suggest that the wording of this clause be further studied and, if found necessary, amended. It also calls for the inclusion in the Conditions a clause on the submission of a proposed programme a reasonable time after acceptance of tender. Depending on the implication it carries, it may be necessary if the approved programme be made a part of Contract Document.

(10) I feel that Sub-clause (b) (ii) is not necessary as Clause 14 already states that the Contractor shall be deemed to have satisfied himself before submitting his tender "….. the means of communication with and access to the Site, the accommodation he may require …". See commentary to Clause 14, paragraphs (07) and (08). If this clause is to be retained, it may be that the word "special" further adds to the Contractor's burden.

CLAUSE 39: Completion of Works

(01) The most difficult question to be determined in this clause is to ascertain the meaning of "practical completion". It is submitted that since there is provision in the Contract for rectifying defects etc. during a period beyond the certified date of practical completion, the phrase "practical completion" cannot mean full completion with no minor works or defects outstanding. Besides, such a construction is regarded as too harsh.

Case law does not seem to pin down on a test to be used for "practical completion" either. In the case of **Westminister County Council v. J. Jarvis & Sons Ltd.** (1970) 1 All ER 944 in the House of Lords, Viscount Dilhourne said (the contract under consideration was the JCT Form which used this "practical completion" concept):

"This Contract does not define what is meant by 'practically completed'. One would normally say that a task was practically completed when it was almost but not entirely finished: but 'practical completion' suggests that that is not the intended meaning and construction work that has to be done … The defects

liability period is provided in order to enable defects not apparent at the date of practical completion to be remedied. If they had been apparent, no such (practical completion) certificate would have been issued."

There are dissenting views, for example, the case of **P&M Kaye Ltd. v. Hosier & Dickinson Ltd.** (1972) 1 All ER 121 decided that certificate could only be issued after all defects were corrected. It is submitted that **Jarvis** should be the better view, not least is its support in the later case of **H.W. Nevill (Sunblest) Ltd. v. Williams Press & Son Ltd.** (1982) 20 BLR 78, a decision of Newey J.

(02) With "practical completion" judicially defined thus, the phrase "according to the provisions of this Contract and" is not regarded as strictly necessary. "Engineer's satisfaction' is not exactly precise but it underscores the duty of the Engineer to so certify when the Works have been practically completed.

(03) It goes without saying that the date on which the Works are certified to be practically completed as indicated on the "Certificate of Practical completion' is a date of considerable importance. This will be evident when one studies the various clauses of the Conditions that follow, not the least of which is the immediate following clause i.e. Clause 40.

(04) Clause 39 (b) provides that "When the whole of the Works have reached practical completion ….". the underlined word should be 'has'. The same applies to the first paragraph of clause 42.

(05) Questions may be asked as to whether there is any meaningful and real distinction between 'practical' and 'substantial' completion. Ian Duncan Wallace QC in Hudson's Building and Engineering Contracts 10th Edition seems to equate these two terms. It is, indeed, difficult to note the distinctions between these two terms, if any! "Practical completion" however seems to me to relate more to whether there are any apparent defects which need to be rectified (subject to de minimis rule) whereas "substantial completion" relates more to the amount of Works and defects that remains to be done short of literal completion – there is essentially a question of fact. To this distinction, if true, it occurs to me that "practical completion" refers more to building construction whereas "substantial completion" refers more to civil engineering construction: a quick perusal of the standard forms commonly in use seems to suggest this. For example, JCT Form (1980 Edition) uses "practical completion" whereas the ICE Form (6th Edition 1991) uses "substantial completion".

CLAUSE 40: Damages for Non-Completion

(01) this clause provides that the parties can agree in advance the amount of damages payable by the Contractor if he fails to (practically) complete the Works by the "Date of Completion" stated in the Appendix to the Conditions or any extended

date granted under Clause 43. It also carries the direct follow-up of the above point, i.e. a claim for unliquidated damages will not be allowed.

(02) It must at the onset be pointed out that the Malaysian law with respect to liquidated damages is radically different compared to the English common law position and thus due care will have to be put to this point when importing English cases to illustrate Malaysia law on this issue of liquidated damages. See for an authoritative account Visu Sunnadurai's Law of Contract in Malaysia and Singapore: Cases and Commentary Second Edition (1987) pp. 671-672, 697-705. (Visu Sinnadurai, a former professor and dean of University of Malaya's Law Faculty and Law Revision Commissioner is now a High Court Judge).

The relevant law in Malaysia is briefly set out in the following paragraphs, with some contract to English law, which is used to initiate the discussion.

(03) English law makes a clear distinction between a penalty and liquidated damages. The following passage from G.H. Treitel's The Law of Contract Seventh Edition (1987) is instructive:

"A Contract may provide for the payment of a fixed sum on breach. Such a provision may serve the perfectly proper purpose of enabling a party to know in advance what his liability will be; and of avoiding difficult questions of quantification and remoteness. On the other hand the courts are reluctant to allow a party, under such a provision, to recover a sum, which is obviously and considerably greater than his loss. They have therefore divided such provisions into two categories: penalty clauses, which are invalid, and liquidated damages clauses, which will generally be upheld". (at p. 768)

Therefore, as can be seen, whether a clause is a penalty clause or a liquidated amages clause is of considerable importance in English law and the test to distinguish the two is as laid down by Lord Dunedin in the classic case of **Dunlop Pneumatic Tyre v. New Garage & Motor** (1915) AC 79. For an authoritative account of English position, see Treitel, pp. 768 – 775.

(04) Malaysian law on liquidated damages is provided in s. 75 Contracts Act, 1950 which states as follow:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The Contracts Act, in so provides, does away in one clause the need to determine whether a sum stipulated in the contract was intended to be a penalty. As Thompson J. pointed out in **Maniam v. The State of Perak** (1957) MLJ 75: "(s. 75) boldly cuts the most troublesome knot in the later Privy Council case of **Linggi Plantations v. Jegatheson** (1972) 1 MLJ 89 on appeal from Malaysia the rather technical rules of English law relating to liquidated damages and penalties". Under the Contracts Act, the innocent party is only entitled to "reasonable compensation not exceeding the amount so named (in the contract) or, as the case may be, the penalty stipulated for."

(05) It may be asked that if distinction between liquidated damages and penalty is not of any significance, why is there the need to insert a sum so named, in our case, "liquidated and ascertained damages"?. The reason was furnished by Roberts C.J. in **Chung Syn Kheng electrical Co. Bhd. v. Regional Construction Sdn Bhd** (1987) 2 MJL 763 where the learned judge said,

"… the amount provided for liquidated damages will only be enforced in favour of the plaintiff it can be shown that this amount was a genuine pre-estimate of the damage likely to flow from the specified breach. The amount of loss or damage, which has actually occurred must be a major factor in deciding whether the amount provided for was an honest pre-estimate of the likely loss or damage. If the actual loss or damage suffered is very much less than the sum agreed, the court will refuse to enforce the agreement to pay a specified sum by way of liquidated damages."

(06) The mechanics of payment by the Contractor to the Employer for a breach of this clause is as laid down viz. "the Engineer may deduct such damages from any money due to the Contractor". It may be asked as to what the underlined words actually refer to. Presumably money due to the Contractor via interim certificates is covered, so is retention money. A clear reading of this will suggest that the performance bond will also be include if it is paid by cash: see Clause 37 (a). It is questionable if performance bond by a bank guarantee is covered: from a clear reading it should not. But then whether this is the intended mechanism is open to doubt: why should the performance bond be differently treated in this regard?. Further, I would suggest the phrase to be amended to read "money due or becomes due to the Contractor" for reasons which should be clear to all.

(07) The following remains to be said with respect to s.75. The section permits the recovery of liquidated damages "whether or not actual damage or loss is proved to have been caused". This, however, is contradicted by the case of **Wearne Brothers (M) Ltd. v. Jackson** (1966) 2 MLJ 155, where it was held that "The plaintiffs must prove the damages they have suffered, unless the sum named is a genuine pre-estimate": per Abdul Aziz J. Professor Sinnadurai in his book cited earlier seems to incline to this point i.e. following **Wearne Brothers**: see Sinnadurai at pp. 702 – 703.

CLAUSE 41: Sectional Completion

(01) I will suggest that in addition to the "Sections of parts of the Works" which are subject to the Clause, it may be found useful to add "stage of construction" of the Works. This can serve as a means of control for the rate of progress of the Works. For example, on a highway project, it can be added that the whole project must reach information level by a certain date etc.

(02) Though not expressly stated to be so, it is submitted that the word 'completion' in this clause can be taken to mean "practical completion" as in Clause 39 and the same test is to be applied. This is important and is to be distinguished from Clause 42, below.

(03) Clause 39 requires that a "Certificate of Practical Completion" be issued by the Engineer "when the whole of the Works have (sic) reached practical completion ….". The subject matter in Clause 39 is thus "the whole of the Works". It may be asked if a corresponding certificate will need to be issued by the Engineer each section or part of the Works (or if the suggestion is taken, each stage of construction of the Works) when each reaches practical completion?. It is submitted that it will need to be, as it is provided that "…. The provisions of this contract in regard to the Certificate of Practical Completion …. Apply mutates mutandis as if each such section or part was subject to a separate and distinct contract between the Employer and the Contractor". To make it clear and more consistent I suggest the words "under Clause 39" be added after "Certificate of Practical Completion".

(04) I think it will be more accurate to state "…. Different and separate Liquidated and Ascertained Damages are provided for the corresponding section or part of the Works …".

CLAUSE 42: Partial Occupation by Employer

(01) As is evident from clear words of the clause itself, the Employer can only set into operation this clause when two conditions are satisfied:

(a) "any time before the whole of the Works have (sic) reached practical completion"; and

(b) "with the consent of the Contractor".

(02) Condition (a) in paragraph (01) above is thus the main distinguishing feature between Clauses 41 and 42. From a literal reading of Clause 42, the Employer can take profession of and occupy part of the Works irrespective of whether that part has reached practical completion: this is another distinguishing feature of the two clauses.

(03) It is expressly stated that occupation of part before practical completion of the whole can only take place with consent of the Contractor. However, it is not clear in a situation if the Contractor refuses consent. Is it to be implied that the Contractor's consent cannot be unreasonably withheld?. This is important as the talking over and occupational by the Employer can have financial implication. See paragraph (05) below.

(04) Notwithstanding the fact that the part of the Works (the relevant part) taken possession and occupied by the Employer has not reached practical completion, it will be deemed to have been so: see Clause 42 (b). The question which, will then arise is thus: Will a Certificate of Practical Completion need to be issued by the Engineer in this case?. The answer is provided by Clause 42 (a) which says,

"within seven (7) days from the date of which the Employer shall have taken possession of the relevant part the Engineer shall issue a Certificate of Partial Occupation ….."

(05) As have been explained in paragraph (02) above, the Employer can take possession and occupy certain part of the Works even before practical completion is reached. This has important financial implication especially when the contract is essentially a measure and value contract: see Clause 26 (a) to this effect. The question may be asked as to measurement and payment for the uncompleted (relevant) part. If not measured and paid, it is submitted that this can constitute a back-door omission of the relevant part, which can be unfair to the Contractor. However, on the opposite side of the table, it can be argued that why should the Contractor be paid for Works not done?. Sub-clause (a) only provides that the Engineer shall issue a Certificate of Partial Occupation "stating the estimated value of the said relevant part" which "shall be deemed to be the total value of the said relevant part" and it is not clear as to how, in view of the two dilemmas posed above, will the Engineer come to an estimate.

As per Sub-clause (b), the relevant part is deemed to have reached practical completion for the purposes of Clauses 39 and 45. It is also not complicit from these two said clauses on the payment aspect for the uncompleted relevant part. Further, it is difficult to imply one way or another as the clause expressly provides that it operates "notwithstanding anything expressed or <u>implied</u> elsewhere in thus contract"! (emphasis supplied).

(06) Another point worth noting is that the clause definitely does not impose an obligation or the part of the Contractor to complete the Works in parts.

(07) It is submitted that this clause provides an exception to the obligation of the Contractor to complete the Works: see Clause 3 on "Subject to these Conditions of Contract". Clause 42 is one, which is referred to in Clause 3, I suppose.

(08) Is it not stated in Sub-clause 42 (c) as to what certificate is being referred to but presumably can be called Certificate of Making good Defects for the relevant part: see Clause 45 (e).

(09) It must be borne in mind that, in contrast to Clause 16 (d) of Pam/ISM 69 Form, the Contractor's insurance obligation does not cease upon the operation of this clause, neither is it modified. The Contractor "shall insure and keep insured the Works" pursuant to Clause 34. The Contractor, however, will be obliged to notify the insurer of any such occupation by the Employer.

(10) Clause 42 (f) provides that the amount of performance bond remains unchanged and it can only be released or refunded upon the issue of Certificate and it can only be released or refunded upon the issue of Certificate of Making Good Defects. Clause 42 (g) provides the mechanism with respect to retention sum.

CLAUSE 43: Delay and Extension of Time

(01) Without a clause such as this, the Employer/Engineer will not have the power to vary the time of completion of the Works. It also follows that, with respect to the completion of the Works, time is not of the essence. This fact is of importance in understanding the provision of this clause and is thus elaborate below.

(02) S. 56 of Contracts Act deals with the situation if time is and is not of the essence of the contract. It does not, however, provide when time is and is not of the essence and when it is not. In this regard, reference can be made to the case of **Tan Ah Kian v. Haji Hasnan** (1962) MLJ 400 where Gill C.J. identified 3 situations when time will be of the essence:

(a) the parties to the contract expressly stipulate in the contract that it shall be so; or

(b) where it was not originally stated to be of the essence but it was subsequently made so by one party giving reasonable notice to the other who has failed to perform the contract with sufficient promptitude; or

(c) where from the nature of the contract or of its subject matter time must be taken to be of the essence.

There may be a fourth situation; one to be determined by ascertaining the real intention of the contracting parties, see **Yeow Kim Pong Realty Ltd. v. Ng Kim Pong** (1962) MLJ 118.

(03) If it is accepted that time is not of the essence for the completion of the Works, s. 56 (2) Contracts Act will then be operative. The section provides as follows: -

"If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure."

Therefore, failure of the Contractor to complete the Works on time or before the extended time does not entitle the Employer to repudiate the Contract; it only entitles him to a recovery in damages. In this regard, Clause 40 should be read together with Clause 43 here. I venture to suggest that if situation of repeated failures of performance by the Contractor with respect to time for completion of the Works, the Employer can notify the Contractor making time of the essence and if the situation persists, repudiate the contract: see situation (b) identified by Gill C.J. in **Tan Ah Kian v. Haji Hasnan** (cited in paragraph 02) and s. 56 (1) Contracts Act. (N.B. It is to be noted that Contracts Act does not use the word 'damages' but instead uses 'compensation' which means the same).

(04) One notable feature of the clause is that the Contractor is required to notify the Engineer of the causes of the delay "Upon is becoming reasonably apparent that the progress of the Works is delayed". The following points can be inferred;

(a) the Contractor does not 'claim' for an extension of time; he does not even need to state the length of extended time which he will require to complete the Works beyond the specified date;

(b) "causes of delay" will be those chosen from (a) to (k) of the clause I presume (see below);

(c) no time frame is given as to when should the Contractor notify the Engineer of the causes of delay; it is only stated that he shall "forthwith give written notice" which suggests some immediately on the part of the Contractor. This, however, has largely been diluted by the rather flexible opening phrase i.e. "Upon it becoming reasonably apparent that the progress of the Works is delayed …..".

(05) It is stated in paragraph (01) that the clause gives a power to the Engineer to grant time extension. However, it is submitted that the Engineer is also duty bound to do so. In this regard, he is duty bound to both the Employer and the Contractor failing which he will be in breach of the duty. Two aspects of this duty will need to be examined:

(a) when shall he grant the extension of the time extension?

(b) What shall be the quantum of the time extension?

These are briefly examined in the following paragraphs.

(06) A literal reading of the opening sentence of the clause will give the impression that the time extension to be made by Engineer is condition upon the Contractor having given a written notice. This, however, is not borne out by available case law. As stated earlier, the Engineer is duty bound to the Employer and the Contractor in this respect (see paragraph 05 above) and it is submitted that the non-mandatory requirement of the Contractor to serve notice is a follow-up of this point. The judgment of Vinelott J. in **London Borough of Merton v. Stanley Hugh Leach Ltd.** is in pari-materia with our Clause 43 amply illustrates the operation of this clause.

(07) It is therefore a duty of the Engineer to estimate the time beyond the scheduled (or earlier extended) completion date "as soon as to the consequence of the Contractor failing to serve the requisite notice. Again, the **Stanley Hugh Leach** case (cited above in paragraph 06) is illustrative: the failure by the Contractor to serve notice when it is "reasonably apparent that the progress of the Work is delayed" is a breach of Contract and the Engineer, in arriving at the estimate of time extension, can take such breach into consideration.

It needs to be said that, following the reasoning above, if the Engineer fails to give timely an extended time for the completion of the Works, the Contractor can accordingly take it to be the case that the time for completion becomes "at large" and thus he is only obliged to complete the Works "within reasonable time": see **Miller v. London County Council** (1934) 50 TLR 479. The liquidated damages clause accordingly becomes inoperative.

(08) The clause follows all of the contract forms I know by not stating any specific methodology of determining the amount of time extension to be awarded. In this clause, the Engineer needs only to make a time extension, which is "fair and reasonable" thus allowing the Engineer to exercise his discretion, judgment and experience. Granted that the determination of time extension is by its nature not a very deterministic and exact exercise this may be desirable. However, I still do feel that the Engineer will need a pre-approved construction programme from which he can make a stud of rate of production, critical path, methodology of Works execution etc. Accordingly, I suggest that provision to this effect be added to the Conditions.

(09) The clause lists 11 causes of delay and it can be said quite safely that list is exhaustive. It is, I believe, accepted as law that the extension of time clause is to be construed and interpreted strictly: see the case of **Perak Construction (Liverpool) Ltd v. McKinney Foundations Ltd.** (1970) 1 BLR 11. Therefore, delay arisen due to other grounds not listed will not be regarded as a ground for time extension; this indirectly assumes that the risks are to be borne by the Contractor!. It is for this reason that the causes of delay as listed in the clause are examined in the following paragraphs. All the causes of delay in (a) – (k) are to be read disjunctively.

Force Majeure

(10) This term is often equated with 'acts of God' but it is submitted that it encompasses a wider ambit; force majeure includes, other than natural calamities (events which are acts of God), man-made events such as wars, strikes etc. The key ingredient is that the event complained of must be beyond the control of person alleging it: see the case of **Lebeaupin v. Crispin** (1920) 2 KB 714.

Exceptionally Inclement Weather

(11) The key word of this phrase is 'exceptionally'. The inclusion of this key word distinguishes the weather supposedly experienced at a particular time on site to depart substantially from the normal pattern of weather at corresponding time. Therefore, and as illustration, to cite as a cause of project delay due to normal monsoon weather is not regarded as a valid ground.

It must be stressed that exceptionally inclement weather per se is not a good ground for time extension. It must be shown that works progress has actually suffered thus incurring delay. For example, if exceptionally wet weather is experience at a time when only internal plastering, wiring job is being done, the job progress should not be affected and thus no valid ground for time extension is established.

Directions Given by Engineer

(12) The key phrase here is "consequential upon disputes with neighbouring owners" but the phrase is by no means unambiguous. What constitutes a 'dispute'? Does 'neighbouring owners' refer to owners of land adjacent to right-of-way. It must be borne in mind that the Contractor's disputes per se with the neighbouring land owners do not constitute valid ground: the delay must have been due to "directions given by the Engineer consequential upon disputes with neighbouring owners".

CLAUSE 34: Contingencies

(13) I presume the contingencies referred to are those as listed in Clause 34 (a) of the Conditions and the proviso as given in the brackets thus have limited application; it is intended for possible man-induced contingencies only. It is because of this ground that a separate insurance on the consequential loss as a result of those contingencies may not be too necessary. However, it is still to be noted that, as per Clause 44 of the Conditions, loss and expense incurred due to an extension of time granted pursuant to this ground is not claimable.

Engineer's Instructions under Clause 5

(14) The list of "Engineer's instructions" are as given in Sub-clause 5 (a). However, the proviso of this Clause 43 (e) has to be borne in mind in the sense that not all instructions issued by the Engineer pursuant to Clause 5, which cause delay are valid grounds for time extension. One interesting point to note under Clause 44 is that loss and expense incurred as a result of extension of time granted pursuant to Clause 43 (c), (f), (g) or 9i) is claimable, and Clause 44 expressly states no other ground will be allowed in this regard. This however, has to be read with Clause 5 (d) which expressly allows this?!. Further, it has to be noted that for a variation issued via Clause 5 (a) (i) which, has caused delay to the Contractor, an extension of time can be granted but loss and expense suffered as a result is not compensable.

(15) It is submitted that Clause 5 (a) (ix) considerably opens the scope for extension of time but this is restricted by the proviso in Clause 43 (e) itself.

Delay in Issue of Instructions

(16) The main uncertainty with respect to this sub-clause is the meaning of the phrase "in due time". This ground should be distinguished from the ground as given in (e) as it has only concerned with delay incurred due to the issue of instruction whereas ground (e) is concerned with the consequences/execution of the Engineer's instruction itself.

(17) It is not clear if the phrase 'he shall have specifically applied in writing" refers to the nomination of sub-contractors only or does it also apply to instructions, drawings etc. issued by the Engineer. If it refers to all the categories of 'instructions' as listed which I can see no reason why it should not, then it is submitted that the notice must not be "unreasonably distant from nor unreasonably close to" the date which he is supposed to receive the said instruction. What is "unreasonably distant" or "unreasonably close" is of course a matter of fact, not law.

Delay in Granting Site Possession

(18) It is submitted that this part of the clause is to be read in conjunction with Clause 38.

Strikes etc.

(19) Three actions are covered in this sub-clause: (a) "any action due to local combination of workmen"; (b) "strikes" and (c) "lookout affecting any of the trades employed upon the Works".

(20) It has not been judicially determined as far as I am aware as to what actually constitute "any action due to local combination of workmen" and how is it

different from "strikes". It may refer to such actions as go-slow; work to rule etc. but there are by us means certain to be categorized as "action due to local combination of workmen".

(21) "Strike" of workmen can simply refer to refusal to perform their duties. However, it must be appreciated that strikes per se cannot constitute a valid ground for time extension, for example strike by workers due to non-payment act etc. of the Contractor.

(22) It is not clear as to what constitutes "lookout affecting any of the trades employed upon the Works" but may be it is possible to distinguish from "strike" in the sense that "strike" refers to industrial action of the workers employed upon the Site whereas "lookout affecting any of the trades employed upon the Works" involves workers not directly employed on the Works but whose works have a bearing on the progress of the Works such as transport workers (cement, reinforcement bars) etc.

Artisans etc. Employed by the Employer

(23) Clause 31 empowers the Employer to engage artisans or tradesmen to execute works not forming part of the Contract; ground (i) must thus be read with this clause in mind. This ground should not be read literally and delay per se by the artisans or tradesman etc. should not constitute ground for time extension if such delay has no bearing to be contract Works.

Inability to Secure Goods and/or Materials

(24) It is submitted that this clause has to be read with Clause 14; see paragraph 906) of that clause. I personally feel that this clause is unnecessary as clause 14 already details the Contractor's obligation in this regard and to negative this obligation under Clause 14, force majeure can be relied upon which is by itself already a valid ground for time extension.

Delay on the Part of Nominated Sub-contractors

(25) One notable point of this clause is that the delay incurred by the Nominated Sub-contractors must be one of the, or a combination of, the possible causes of delay as stated in (a) to (j) inclusive. See for further discussion the commentary of Clause 29, paragraphs (08) and (10).

(26) The drafting committee has adopted the approach that all valid causes for a grant of time extension have been listed down in one single clause. Duplications do occur e.g. Clause 38 (b) and inconsistencies and ambiguities exist e.g. Sub-clause (f).

On my part, I will very much prefer the approach in IEC/FIDIC, which adopts what I regard as a two stages approach. Clause 44 of ICE/FIDIC is what are would term an "empowering" or "enabling" clause. It is the clause which empowers/enables the Engineer to grant extension of time; and also impass a duty upon him to do so. The Engineer however, can only exercise his power granted under Clause 44 upon the occurrence of a delaying event which is recognised as a valid ground: and this is scattered throughout the Conditions in various clauses (called "cognizing clauses") which take cognisance of the ground for time extension. I will think this approach is neater ad more systematic. I will think venture further to suggest that a claim for "loss and expense" be similarly structured in the Conditions for future revision.

(27) It will already be noted that Clause 43 is a time extension clause, it does not contain any provision for the reimbursement in financial terms ("loss and expense") upon the occurrence of a valid delaying event. Such a provision is provided for in Clause 44.

CLAUSE 44: Loss and Expense Caused by Delays

(01) it is not defined anywhere in the Conditions what does 'loss and expense" include. Professor Michael Furmston attributes it to that which is recoverable under common law under the first limb of **Hadley v. Baxendale** (1854) 9 LR Ex 341: see seminar notes for "Claims in Building and Engineering Contracts" by Prof. M. Furmston held in Kuala Lumpur on 5 July 1991, p. 42.

(02) It has to be remembered that this clause is only applicable to loss and expense due to extension of time granted pursuant to ground (c), (f), (g) or (i) of Clause 43. Claim for loss and expense based on other grounds must be based on other clauses e.g. Clause 5 (d). Clause 44 is thus very much tied to Clause 43, see paragraph (27) of commentary to Clause 43. A consequence of this is that time extension is central to the reimbursement of loss and expense incurred by the Contractor. Therefore, words such as ' ….. regular progress of the Works … has been materially affected ….' Reinforces this link.

(03) The clause also gives the procedural steps of the claim: (a) give 30-day notice of the occurrence of such event or circumstance; and (b) give an estimate of the amount of the loss and expense incurred.

It is (b) which will put contractors in a fix. Firstly, it is possible that the event or occurrence may be continuing beyond a 30-day period. Secondly, and even more perverse, since it is the Engineer who will determine the extension of time to be granted, and the loss and expense incurred will most probably be linked to the duration of extension granted, how are the contractors expected to come up with a fair estimate of loss and expense actually incurred is anybody's guess. The 30-day notice period, it is submitted, further complicates thing as the

Engineer, under Clause 43, is only required to act "as soon as he is able to estimate the length of delay".

CLAUSE 45: Defects After Completion

(01) It is to be noted that not all defects, imperfections etc., which may appear during the Defects Liability Period will have to be made good by the Contractor. The Contractor's liability Period will have to be made good by the Contractor. The Contractor's liability only extends to those "which are due to materials or goods or workmanship not in accordance with this Contract." It is submitted that the underlined words define the limits of the Contractor's liability under this clause.

(02) It is further to be noted that the Contractor's liability in this regard is not automatic: it has to be prompted "by the Engineer in a written instruction to the Contractor".

(03) The Defects Liability Period, it is submitted, is the period within which contractual liability holds. The duration of which is one, which is defined in the Conditions. It needs to be pointed out, however, that the Contractor can be held liable within six years of the occurrence of the damage: see s. 6 Limitation Act 1953. The limitation period runs irrespective of whether the Employer knows of the damage; in the case of latent damage which only surfaces or which comes to the actual knowledge of the Employer, limitation period runs from the time when the damage ought to have occurred: **Pirelli General Cable Works v. Faber (Oscar) and Partners** (1983) 1 All ER 65.

(04) It may be asked as to the Contractor's liability to those defects which may appear during the Defects Liability Period but which are not due to "materials or goods or workmanship not in accordance with this Contract". Is the Contractor under an obligation to make good these defects?. It is submitted that the Contractor is contractually not liable to make good these defects but will have to anyway. It has already been pointed out in paragraph (01), above that Sub-clause (a) defines the scope of the Contractor's liability in this regard. However, Sub-clause (b) provides that, "Notwithstanding sub-clause (a) above, any defect, imperfection … which may appear during Defects Liability Period to be made good by the Contractor shall be specified by the Engineer in the Schedule of Defects …." (emphasis supplied). What muddies the picture here is that, the sub-clause further provides that the defects "shall be made good by the Contractor at its (sic) costs …'. If this means that the defects, which are not in breach of Contract are to be remedied at Contractor's costs, it is submitted that this is in conflict with sub-clause (a). In this regard, these two sub-clauses (a) and (b) will need to be re-drafted.

(05) Sub-clause (b) provides the latest day, which the Engineer can issue the Schedule of Defects i.e. 14 days after the expiration of the Defects Liability Period.

(06) It is usual in the Conditions of Contract to include a sum to be retained (retention sum) which is used as a security for performance during the Defects Liability Period, such a sum retained is provided for under Clause 47 (e) of the Conditions. It is thus a surprise that Sub-clauses (c) and (d) empower the Engineer to recover from Performance Bond any sum consequent to the breach of Contractor under this clause.

(07) With respect to Sub-clause (e), it seems to me that the date named in the "Certificate of making Good Defects" need not necessarily coincides with the date of the expiry of Defects Liability Period. The date as specified is important as it is the date which full refund of the specified is important as it is the date which full refund of the retention sum to the Contractor is to be effected: see Clause 47 (f) (iii).

(08) I suggest that, to be consistent, the phrase "defects; imperfections shrinkages or any other faults" be used throughout this clause, all the nouns being used in their plural forms.

CLAUSE 46: Unfulfilled Obligations

(01) this clause underscores the fact that, notwithstanding the issue of The Certificate of Making Good Defects, there is still continuation of the Employer's and the Contractor's liability and it only extends to those obligations "incurred under the provision of the Contract prior to the issue of the said certificate". The clause effectively says that the Contract remains in force and the parties are not to be regarded as discharged from the contract. This may be important e.g. with respect to Clause 55.

CLAUSE 47: Payment to Contractor and Interim Certificates

(01) Sub-clause (a) defines the duties of both the Engineer and the Contractor vis-à-vis what is commonly called monthly progress payment in the construction industry. It is noted that the Engineer shall (i.e. is under a duty) to make a valuation condition upon

(a) total value claimed has reached the specified sum; or for subsequent claims, total value in each subsequent valuation shall not less than sum so specified in the Appendix to the Conditions;

(b) a claim being made by the Contractor.

(02) A plain reading of Sub-clause (c) will lead to the impression that the sum to be certified for each interim certificate comprises (a) "estimated total value of work (sic) properly executed'; and (b) 75 percent of materials and goods delivered to or adjacent to the Works. However, this sum is subjected to deduction e.g. retention sum under Sub-clause (e); liquidated damaged under Clause 40,

making good defects under Clauses 45 (c) and (d) and others. It is submitted that the words "less any installment previously paid under this Condition" infers that cumulative sums are to be used; the word Condition (as underlined) should preferably be amended to clause.

(03) As said, the major component of the interim certificate is the "estimated total value of the work (sic) properly executed". This begs further questions. Are the items in the Bills of Quantities such as preliminaries (e.g. insurance premium, Contractor's Lump Sum contingency etc.) be excluded as they cannot be regarded as "work". Obviously they are not to be and on this, may be the wording of the clause will need to be amended. Further, it does not imply that as long as work is done, Contractor is entitled to payment for the work must be "properly executed". 'Works' should be used instead of 'work'.

(04) Not all materials and goods brought to or adjacent to the Works are payable per se, the qualification being the materials and goods "are reasonably and properly required for the Works and not prematurely delivered and that the Contractor must take steps to protect them against "weather damage or deterioration". Note that the goods and materials need not to be on 'Site', by being adjacent to the Works would suffice. Pursuant to Clause 10, the goods and materials become the property of the Employer upon payment.

(05) Sub-clause (a) prescribes the period after the issue of the interim certificate when the Contractor will need to be paid. It is submitted that time is of the essence here.

(06) With respect, I dislike the cavalier attitude in the use if the words 'will' in Sub-clause (d) and 'may' in Sub-clause (e).

(07) Sub-clause (e) and (f) contain provision with respect to retention fund. It needs to be appreciated that the sole purpose of the retention fund. It needs to be appreciated that the sole purpose of the retention fund is to protect the interests of the Employer and is to be used mainly as a preventive measure against defective works by the Contractor. It has sometimes been said that the retention fund is also to be used as a safeguard against non-performance by the Contractor though why it should be so when there exists a performance bond which, serves this purpose. In the Conditions, half of the sum retained is to be returned on the issue of the Certificate of Making Good Defects. Sub-clauses (f) (ii) and (iii) serve to underscore the dual purpose of the retention fund i.e. as the Employer's safeguard against non-performance and against defective works. This is to be compared with Clause 37 (d), which provides that the Performance Bond is to be released also upon the issue of the Certificate of Making Good Defects.

There thus seems to be a double protection for the Employer here in the form of retention fund and also the Performance Bond, whether this is the intended purpose, or if it is the intended purpose is it desirable is a contentious point. It is

my personal view that the retention fund can be said to represent a serious loss of liquidity on the part of the Contractor and may be this provision needs to be looked into from this view.

(08) Sub-clause (f) (i0 is an interesting clause. It provides that the Employer's interest with respect to the retention fund "shall be fiduciary as trustee for the Contractor (but without obligation to invest)". If this trustee-beneficiary relationship is established, the main purpose here is that in the even of the Employer's (i.e. trustee's) bankruptcy, the retention sum will not be available to his (judgment) creditors: see **Carreras Rothmans v. Freeman Mathews Theatre** (1985) 1 All ER 155 and **Barclays Bank v. Quistclose Investment** (1968) 3 All ER 651. See also the interesting discussion by Professor Vincent Powell-Smith in The Malaysian Standard Form of Building Contract pp. 148-149.

(09) It remains to be said on the legal status of the interim certificate. Interim certificates, by their nature, merely give an approximate valuation of the Works done and materials and goods delivered less any necessary deductions. Works so certified to be 'paid' are not to be regarded as constituting final acceptance by the Engineer. It is trite that the interim certificates are a condition precedent to payment: **Ling Heng Toh Co. v. Borneo Development Corporation Sdn Bhd** (1973) 1 MLJ 23 and they are to be honoured by the Employer when presented for payment. However, if The Employer can raise valid objections, payment can be deferred until resolution of the matter, probably great advantage of the Employer, bearing in mind that interim certificates are issued at monthly intervals).

CLAUSE 48: Final Account Certificate

(01) This clause sets out the procedural details to be followed for the issue of the Final Account Certificate. It is regarded as good practice that a timetable of sort is given for the issue of such a certificate as in actual practice, the Engineer will delay issuing such a certificate for as long a time as possible: See Sub-clause (b).

(02) It is noted that the Contractor will still need to "submit full particulars of all claims made by him under Clause 5 (d) and/or 44 …", the preparation and issue of the Final Account Certificate are the jobs of the Engineer. The Contractor will need to submit these details within three (3) months after practical completion of Works. It is not clear for claims of expense made under other clauses e.g. Clause 8 (b): Do they need to be submitted?.

(03) Sub-clause (a) also provides that the claims can only be included in the Contractor has given notice of claim in writing within the stipulated time or times in the said provisions". This seems to impose a time bar on the serving of notice the effectiveness of which, I do very much doubt. See s. 29 Contracts Act, 1950.

(04) One important point to note is that, upon the issue of the Final Account Certificate, the Engineer is functus-officio and hence he will no longer have any powers under the contract.

CLAUSE 49: Effect of Engineer's Certificates

(01) This clause in effect attempts to erode the finality of all certificates, presumably including but not limiting to interim certificates, Certificate of Practical Completion, Certificate of Making good Defects, Final Account Certificates etc. It expressly provides that "No certificate of The Engineer ….. shall be considered as conclusive evidence as to sufficiency of any work …. No certificate of the Engineer shall be final and binding ….".

With respect to interim certificates, this might be the case. However, the position is a lot uncertain with respect to all other Certificates. B.T.H. Lee J. in **Shen Yuan Pai v. Dato Wee Hood Teck & Ors** (1976) 1 MLJ 16 approved the following statement from Halsbury's Laws of England Volume 4, 4th Edition, p. 616 at paragraph 1209:

"Conclusiveness of a final certificate. Except in cases where there is an arbitration clause entitling arbitrator to review the decisions of the architect as to the amount due or on to whether the works are in accordance with the contract, or whether the architect is disqualified from certifying or where the certificate may otherwise be dispensed with, the final certificate will be conclusive."

See also the judgment of the House of Lords in **P&M Kaye Ltd. v. Dickinson Ltd** (1972) 2 All ER 121, which was approved and followed in **Shen Yuan Pai.**

As intention to the contrary on the finality of the certificates is expressly provided, it is submitted that may be the **Shen Yuan Pai** case is not applicable here. The second sentence of the clause is not by itself a controversial one; it is the first sentence of the clause that draws the uncertainty.

(02) I personally dislike the concept of the non-finality of the certificates issued by the Engineer. As stated by I.N. Duncan-Wallace in Hudson's building and Engineering Contracts p. 479, "a certificate is the expression in a definite from form of the exercise of judgment, opinion or skill of the engineer ….. in relation to some matter provided for by the terms of the contract." If the Engineer so finds that the contractor's obligations are not fulfilled, he can, acting honestly, refuse to issue any relevant certificates. The policy of having non-finality of certificates lends a lot of uncertainty to the administration of the contract itself and the contractor will be left to gauge if whatever he has done is 'final' enough. With respect, it also gives the Engineer a double-shot and to conceal any possible negligence certification on his part.

(03) **Shen Yuan Pai** is the authority for the proposition that the Engineer has discretion to decide the form of the certificate as he thinks fit.

CLAUSE 50: Deduction from Money Due to Contractor

(01) It is not clear to me as to why this clause is deemed necessary as there are several clauses, which set out the same power of the Employer and/or Engineer e.g. Clauses 40, 45 (c) and (d) Clause 48 (c) and others.

(02) The second paragraph presumably reinforces the idea that any set-off or deduction from any money owing to the Contractor can be made via a reduced sum certified in the interim certificates.

CLAUSE 51: Termination of Contractor's Employment

(01) Clause 51 (a) lists the grounds, which upon their default by the Contractor, will enable the Employer to terminate the contract. The phrase "without prejudice to any other right or remedy" suggests that the Employer may pursue other remedies such as a claim for damages upon termination of the contract. The grounds of default, which may trigger the determination of the contract are elaborated in the following paragraphs.

Sub-clause 51 (a) (i): Suspension of Works

(02) The key phrase to note here is that the suspension must be "without reasonable cause" and it must encompass "the whole of the Works". For example, the Employer cannot trigger the determination of the contract on this ground if the suspension only relates to a portion of the Works: ground (ii) may be the one relevant here (see paragraph (03) below). The phrase "without reasonable cause" is rather fluid and elastic and is more a question of fact.

Sub-clause 51 (a) (ii): Failure to Proceed Regularly and Diligently

(03) This should be read in part with Clause 38 (a). However, it is submitted that precise proof of a failure on the part of the Contractor proceed "regularly and diligently' is not easy to establish and elaborate records and documentation may be necessary if an attempt is to be effected.

Sub-clause 51 (a) (iii): Failure to Execute the Works or Neglects his Obligation

(04) This essentially is a failure of performance on the part of the Contractor. Failure to carry out obligation under the Contract, of which all other listed grounds are but examples, is itself a breach of contract. This sub-clause thus merely casts

the net wider. However, it needs to be borne in mind that failure per se to carry out the Contactor's obligations will not necessarily lead to a valid ground for contract determination; it will still depend on the nature of the breach and the obligations, which are breached. See generally commentary on Clause 1,paragraph (09). For valid determination, the obligation breached must be one, which goes to the root of the Contract. I respectfully submit that this sub-clause be deleted as (a) it is too wide but (b) its effect can be achieved, and may be curtailed, by recourse to common law.

Sub-clause 51 (a) (iv): Failure to Remove or Replace Defective Work

(05) This can be regarded as an extension of Clause 5 (b) on compliance with Engineer's instructions and Clause 9 (a) on the quality of materials and workmanship. The phrase "persistently neglects" which is also used in (iii), will suggest that a single occurrence of such a breach may not be sufficient to justify the determination of the Contract.

Sub-clause 51 (a) (v): Failure to Comply with Clause 37

(06) This is the failure with respect to the execution of performance bond.

(07) It has to be said that breach of grounds (i) – (v) as outlined above does not forthwith entitle the Employer to determine the Contract, the procedural steps necessarily as a condition precedent for such a step is provided for in the concluding sentence of this Sub-clause (a). It is submitted that the words in the bracket of the concluding paragraph i.e. "whether previously repeated or not" are not compatible with the phrase "persistently neglects" in Sub-clause (a) (iii) and (iv) above.

(08) Sub-clause (b) presents a more serious state of affairs of the Contractor when enables to Employer to terminate the contract without first the need to serve notice as is the requirement under Sub-clause (a). It involves the financial status of the Contractor.

(09) It is not defined in the Conditions as to what constitutes an act of bankruptcy in Sub-clause (b) (ii) but I suppose this can be equated to s. 3 Bankruptcy Act 1967 (Revised 1988).

(10) In Sub-clause (b) (ii), the phrase "becomes insolvent" must be distinguished from a state of bankruptcy. "Insolvency" describes a person's state for of affair and may be defined as his inability to meet his debts as and when they become due whereas "bankruptcy" describes a legal recognition of that state of affairs. An insolvent person is only a bankrupt when he is so adjudged by this court. When a person files in court a declaration of his insolvency, this can be seen as commission of an act of bankruptcy: see s. 3 (i) (f) Bankruptcy Act 1967.

(11) If the Contractor "makes arrangement with creditors", this can also amount to committing an act of bankruptcy under s. 3 (b) Bankruptcy Act 1967. Broadly, therefore Clause 51 (b) (ii) can be said to be specific with respect to the 'acts of bankruptcy', which are generally included in sub-clause (b) (i).

(12) The provisions of Sub-clauses (b) (iii) and (iv) are governed by Parts X and VIII of Companies Act 1965 respectively.

(13) Sub-clause (c) describes in some details the steps to be taken upon the termination of the Contract. However, it must be pointed out that thus sub-clause deals with the Contractor when he has not been adjudged a bankrupt. After the Contractor has been adjudged a bankrupt, the situation will be more complex as various other parties such as the Official Assignee will step into the picture. Further, the doctrine of relation back as provided in s. 47 Bankruptcy Act 1967 will need to be death with provisions of this sub-clause will now be examined.

Sub-clause 51 (c) (i)

(14) This sub-clause provides that upon termination of the Contract, the Employer shall be entitled to response the Site. It is submitted that this is an attempt to circumvent the unfortunate decision of Megarry J. In **London Borough of Hounslow v. Twickenham Garden Developments Ltd.** (1970) 3 All ER 376 where the learned judge, relying on the concept of irrevocable contractual licence, held that the Contractor need not give up possession of the site upon the determination of the Contract. It is submitted that the reasoning of Megarry J. with respect to the concept of contractual licence may not be followed in Malaysia in view of our coifed National Land Code and the torrens system of our land law (in contrast with the registration system of English land law).

(15) It is further provided that the Contractor shall not remove "all temporary buildings, plant, tools, equipment, goods and unfixed materials belonging to him" from the Site. This aspect of the sub-clause will need to be read in conjunction with other clauses of Conditions. Clause 5 (a) provides that no plant temporary works and materials are to be removed without the consent of the Engineer in writing whereas Clause 10 provides the same for unfixed materials. Therefore, what are actually significant here are "temporary buildings", "tools" and "equipment".

(16) It must however be borne in mind that "unfixed materials" if the value of which, has been included in the interim certificate no longer "belong" to the Contractor. The phrase 'belonging to him" is necessary as there is no vesting clause in the Conditions vesting the property of plant etc. in the Employer upon them having been brought to the Site.

Sub-clause 51 (c) (ii)

(17) This sub-clause enables the Employer to either complete the Works himself or to engage other contractors to complete the Works himself or to engage other contractors to complete the Works upon determination of the Contract. It also enables the Employer or the contractors so engaged to utilize whatever are left behind by the Contractor: See Sub-clause (c) (i) above.

Sub-clause 51 (c) (iii)

(18) Generally speaking, only the benefits of any agreement can be validly assigned. It is submitted that the sub-clause is inserted to avoid the complications arisen as a result of the Contractor's insolvency. It is however limited to agreement for the supply of materials or goods or labour "for the execution of any work for the purposes of this contract".

Sub-clause 51 (c) (iv)

(19) It is not thought necessary to comment on this as this sub-clause is self-evident.

Sub-clause 51 (c) (v)

(20) It is not clear as to what does "any loss and/or damage encompass but it seems that this is left to the Engineer who will make "reasonably accurate assessment of the ultimate cost to the Employer of completing the Works following the termination of the Contractor's employment". This will be stated by the Engineer in a certificate to be prepared by him. The details to be included in this certificate is spelt out in this clause.

(21) It is expressly provided that the certificate to be produced by the Engineer shall be "binding and conclusive" on the Contractor as to the loss and/or damage so certified. Question may ask as to the effects of the words "binding and conclusive". In this regard, it is submitted that the judgment of B.T.H. Lee j. in **Shen Yan Pai** (see Clause 49, paragraph (01) be studied.

Sub-clause 51 (c) (vi)

(22) I personally do not see if there is a drastic difference between completion of the Works by the Employer himself and that by other contractors so as to merit a separate mention in the form of this sub-clause. At any rate, this sub-clause is thought necessary as if the Employer were to complete Works himself, his financial entitlement will be included within the loss and/or damage to be determined by the Engineer pursuant to Sub-clause (c) (v) above.

(23) The clause lists in some details determination of the Contract but it should not be overlooked that determination of the contract as a result of a breach which, goes to the root of the contract is also available under Contracts Act 1950.

CLAUSE 52: Default of Employer

(01) This clause give 3 grounds in which, the Contractor can terminate the Contract. Notwithstanding this, it is submitted that if a breach of the Conditions of the contract by the Employer which, goes to its root, the Contractor is still entitled to initiate steps to terminate the contract even if the breach does not lie within one of those grounds listed in Sub-clause 52 (b).

The grounds are examined in the following paragraphs.

Sub-clause 52 (a) (i)

(02) It is to be noted that the Contractor can only operate this sub-clause thirty days after the amount under any certificate is due and not immediately after the amount becomes due. In a provision such as this, it is submitted that time is of the essence here. As is correctly observed by Stephenson L.J. in **F.C. Minter Ltd. v. Welsh Health Technical Services Organisation** (1980) 13 BLR 1:

> "… in the building and construction industry the 'cash-flow' is vital to the contractor and delay in paying him for the work he does naturally results in the ordinary course of things in being short of working capital ..."

Therefore, the Employer is bound to promptly pay to the Contractor the certified amount shown in the certificates the failure of which, result in breach of contract which, goes to its root which, can lead to its termination: see for example the case of **Ban Hong Joo Mines Ltd. v. Chen & Yap Ltd.** (1969) 2 MLJ 83 where the Employer's unjustified refusal to pay the Contractor was held to be a repudiatory breach. However, this case must be contrasted with **Yong Mok Hin v. United Malay States Sugar Industries Ltd** (1966) 2 MLJ 286 where Raja Azlan Shah J. (as His Highness then was) held that the mere non-payment of progress payment did not permit the Contractor repudiating the contract.

With these two contrasting decisions, it is submitted that the inclusion in the Conditions of this sub-clause removes the uncertainty and the Contractor can validly repudiate the Contract if the stipulated time frame for the Employer to make payment elapses and no payment is made.

Sub-clause 51 (a) (ii)

(03) It is trite law that the certification and issue of certificate are duties of the Engineer and in execution and issue of certificate are duties of the Engineer and in execution of these duties the Engineer is acting on a quasi-judicial manner. The Employer must not interfere in the independent role of the Engineer in this respect: see also the commentary to Clause 2, paragraph (01). However, it is observed that in the absence of such a clause, all that the Contractor can recover

is damages. I respectfully concur with the following passage from Hudson (at p. 458):

"Given the quasi-arbitral nature of the certifier's function, it would seem that there must be an implied term that both parties will do nothing to prevent a true and unfettered exercise of his powers when certifying. Consequently, action taken by the employer with a view to influencing the certifier in the exercise of his powers will mean that damages equivalent to the recovered despite any certificate or the absence of one." (footnote omitted).

See also Hudson at pp. 504-505.

Sub-clause 51 (a) (iii)

(04) It is not thought necessary to elaborate this sub-clause as its meaning should be evident from its wordings.

(05) The purpose of Sub-clause 52 (b) is, I presume, to allow a tactical play by the Contractor to forestall any move by the Employer's creditors to obtain an injunction (Mareva injunction) to prevent any removal of constructional plant from Site (a property of the Employer). See however the case of **Galaxia Maritime v. Mineralimportexport** (1982) 1 All ER 796 where such a similar Mareva injunction was lifted.

(06) The "Clause 52" referred to in Sub-clause (c) should have been Clause 51 and the effect of this sub-clause is that Clause 51 (c) (v) applies mutates mutandis to the Employer on the termination of the Contract. It is to be noted that not the whole of Clause 51 applies to the Employer as it will apply to the Contractor in like circumstances. Sub-clause (c) (v) is the only relevant one as it alone deals with payment.

CLAUSE 53: Effect of War or Earthquake

(01) 'War' and 'earthquake' are both examples of force majeure and are thus valid grounds for time extension: Clause 43 (a). However, if the existence of this force majeure "has rendered the fulfillment of the Contract impossible" then this clause will operate.

(02) This clause does not operate to enable either of the contracting parties to terminate the contract but "any question respecting continuance, suspension or termination of this Contract shall be settled by mutual agreement."

(03) "Clause 56" referred to in this clause should have been "Clause 55".

CLAUSE 54: Fluctuation of Prices

(01) I presume the intention of this clause is to announce that the contract is not a variation of price contract and any cost escalation will not lead to any increase in contract sum with similar effect for any opposite movement of prices. In this regard, the phrase "cost prevailing at the date of the tender" is regarded as unnecessary. It is better, to avoid possible ambiguity, to state the intention in absolute terms. A different situation applies if provision for variation of prices is included in the special provision for variation of prices is included in the special provision to the Conditions.

CLAUSE 55: Arbitration

(01) This clause provides for the settlement of 'dispute' or 'difference' between the Contractor and the Employer/Engineer. In line with the general modern trend, this clause is one, which in effect constitutes an agreement to refer 'dispute' or 'difference' to arbitration. The clause (the arbitration agreement) is wide both of its application and the arbitrator's jurisdiction.

(02) In may be argued that upon termination of the Contract the Conditions will no longer apply and hence there will then be no "arbitration agreement" to enable a dispute / difference to be referred. This however is not the case as the words in the brackets have been drafted to cater for this eventually: see also the case of **Heyman v. Darwins** (1942) AC 356.

(03) The type of dispute / difference which, can be referred to arbitration is given in Sub-clause (a) (i) – (iii). As can be seen, the scope is wide and it will be difficult to conjure any situation, which lies outside its ambit. For example, a recent English Court of Appeal case decides that almost all disputes arisen out of or in connection with a contract can be decided by arbitrators: **Ashville Investments Ltd. v. Elmer Contractors Ltd.** (1988) 2 All ER 577.

(04) A reference to arbitration, however, must only commence after the appeal mechanism within the 'arbitration agreement' itself has been exhausted. In our case, a decision, or a failure to give a decision, from the Engineer is a condition precedent to a reference to arbitration. This is provided for in Sub-clauses (b) and (c). The time duration for the Engineer to act is also given. Sub-clauses (b) and (g) highlight that the actual arbitration process can only commence after completion of Works, or when the contract has been terminated or abandoned. It is disadvantage as his interests may be dilute with the passage of time even if an award is finally given in his favour, it may amount to no more than an archaic victory. It is submitted that may be the Conditions can give recognition to some common disputes, which by their nature need to be settled quickly; for example the alleged improper withholding or certification of any certificate. In this regard, the approach of PAM contract is to be preferred.

(05) It is provided that a reference to arbitration can only be initiated after the Engineer has give a decision. From practice, it comes as no surprise that more often than not the decision will be one to the disadvantage of the Contractor – with due respect to the integrity of the Engineer. This, coupled with the opinion expressed in paragraph (04) above, may be viewed as allocating too much risk onto the Contractor. At best, it has been said that this pre-condition is an irritating necessity, which all parties can do and be comfortable without it. I suggest for its removal, may be a form of mediation and conciliation can be introduced in its place.

(06) As has been commented on earlier (see Clause 49), the arbitrator is empowered to review ay certificate issued by the Engineer. Sub-clause (b) reinforces this. Clause 49 provides that "no certificate shall be final and binding in any dispute between the Employer and the Contractor if the dispute is brought whether before an arbitrator or in the courts". However, it is doubtful if the ambiguous words in Clause 49 can include the certificate issued pursuant to Clause 51 (v) as this certificate is expressed to be "binding and conclusive on the Contractor".

(07) The Conditions have wisely stipulated that the IEM Rules for Arbitration are to be used for the arbitration proceedings, rather than leaving these to the discretion of the arbitrator, or to be decided as a preliminary procedure prior to hearing proper of the arbitration.

(08) Clause (i), reinforced by s. 17 of Arbitration Act 1952, effects that the arbitrator's awards are final and binding on the parties. This, however, does not mean that the losing party to an arbitration has no further discourse; he can apply to the High Court to set aside the arbitrator's award: see s. 22-26 Arbitration Act 1952. An award can be set aside on a number if grounds; see for example **Ong Guan Teck and Ors v. Hijjas** (1982) 1 MLJ 105.

CLAUSE 56: Governing Laws

(01) The laws of Malaysia are said to be the governing laws for this contract. However, it is submitted that if laws other than Malaysian law are so specified, this by itself would not oust the jurisdiction of Malaysian courts: see **Elf Petroleum v. Winelf Petroleum** (1986) 1 MLJ and also, for example, s. 23 Courts of Judicature Act 1064.

(02) For the effects of amendments of laws, which necessitate variation to the Works, see Clause 11 (d).

CLAUSE 57: Stamp Duty

(01) No comment is thought necessary.