SUSPENSION AND TERMINATION OF CONSTRUCTION CONTRACTS

BY

Ir. OON CHEE KHENG
BE(Civil), LLB (Hons), MBA,
CLP, F.I.E.M., P.Eng (M)
Advocate and Solicitor
ckoon1@tm.net.my

A paper presented at* INTERNATIONAL CONFERENCE ON CONSTRUCTION LAW & ARBITRATION *jointly organised by Kuala Lumpur Regional Centre for Arbitration and The Malaysian Institute of Arbitrators on 26 – 28 April 2005 at Nikko Hotel, Kuala Lumpur.

1.0 INTRODUCTION

1.1 It is not known to this writer why these two topics are discussed within a single session of this conference; though related in some aspects, they are nevertheless two separate and distinct topics.

1.2 This paper thus attempts to discuss these two topics separately and will only briefly discuss them jointly when the suspension of performance by one party leads the other party to unilaterally discharge the contract. The legal principles governing the suspension of performance, and also the termination, of the contract, and the legal consequences arising therefrom, including possible remedies, will also form the subject of this paper. References will also be made to some standard forms of contract as illustrations and for analysis.

1.3 The use of the relevant terms will first need to be set right. It will be noted that the phrase used above is "suspension of performance" rather than the more "usual" phrase of "suspension of contract" for that is properly the legally correct phrase. When construction industry personnel speak of "suspension of contract" or "suspension of works", they do not mean that the *whole* contract is suspended and the contract ceases to bind both parties during the period of the suspension. What they actually mean is that the performance of the obligations of the contract, in part or in whole, is temporary put on hold. This paper will go along with the usual construction industry personnel's use of the term.

1.4 Termination of the contract suffers from the same confusion with the use of various terms, each admittedly may carry different meaning and lead to different legal consequences. Rescission, repudiation, frustration, forfeiture, determination and of course termination itself are some of them.

1.5 Here lies a fundamental difference between suspension and termination. Whereas suspension of contract does not permanently discharge the parties from the contract, termination does and once issued, cannot be retracted unless the party who is at the receiving end of the termination agrees to the withdrawal of the termination.

1.6 It may be said that there are no special legal principles governing suspension and termination of construction contracts save for the general principles of contract law. In *Cehave NV* v. *Bremer Handelsgesellschaft mbH, The Hansa Nord*[1] Roskill LJ (as His Lordship then was) said,

> "It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law."[2]

Construction contracts being what they are, and with the prevalent use of standard contract forms, it is thus no surprise that much of the law on suspension and termination will also lie in a construction of the relevant provisions of the standard contract forms.

PART A: SUSPENSION

2.0 SUSPENSION: GENERAL PRINCIPLES

2.1 Suspension of performance of the obligations under a contract is generally a *right* conferred by the contract itself, neither party to the contract has a common law right to suspend the performance of its obligations under the contract. It also implies that in the absence of a contractual provision to the effect, the Employer[3] similarly has no power to instruct for the suspension of the contract and the Contractor cannot unilaterally suspend works.[4] Even though there are persuasive academic writings that urge the recognition of such a right in the absence of any contractual provision, it has still not found much resonance in the common law courts.[5]

2.2 All too often, one hears of contractors "stopping work" on the ground that they have not been paid. To this the proper advice to be given is: DON'T! If the

---

1 [1976] QB 44 (CA).

2 *Ibid*., at p. 71. See also Stephen Furst QC and Vivian Remsey QC (eds.), *Keating on Building Contracts*, 7th Edition (2001) (hereinafter as "*Keating*") at p. 1 para 1-02.

3 Or through his agent, the Engineer, the Architect or the S.O. as the case may be.

4 See *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd & Ors* [1992] 1 QB 656 (CA) *per* Staughton LJ at p. 666. The decision was affirmed on appeal but the opinion of Lord Mustill who delivered the judgment in the House of Lords [1993] 1 All ER 644 (HL) did not touch on this point.

5 See, for example, J. W. Carter, *Suspending Contract Performance for Breach* in Jack Beatson and Daniel Friedmann (eds.), *Good Faith and Fault in Contract Law* (1997), pp. 485 – 522 who advocates the recognition of such a right to suspend performance for some forms of breach. The learned author concludes that "We should therefore accept, as a general rule, that a plaintiff's duty to perform is subject to the qualification that there is no serious breach or repudiation by the defendant." (at p. 521)

Employer does not make progress payments, this *per se* does not confer onto the Contractor a right to suspend the work.[6] It does seem that two wrongs do not make a right.

2.3 A contractor who is in this unfortunate position should elect to terminate the contract with the Employer by invoking the relevant contractual provision[7] (if there is one). In the absence of any contractual provision for the Contractor to terminate the contract, the Contractor will have to demonstrate that the non-payment of progress payments is a serious and fundamental breach of the contract for the termination to be held valid.[8] It is appreciated that this is not an easy course for a contractor to adopt in view of the serious nature and implication of the termination process itself, not to mention the ensuing consequences.

2.4 What if, then, it is the Contractor who fails to perform and has suspended the execution of the works? In *Canterbury Pipe Line Ltd* v. *Christchurch Drainage Board*[9] the New Zealand Court of Appeal considered the question whether, in the absence of any contractual provision for suspension, a contractor could validly suspend execution of the works on the ground that the engineer had declined to issue certificates of payment. The Court of Appeal decided that there could be no such *general* right.[10]

2.5 What constitutes suspension, in particular the suspension by the Contractor of the execution of the works? Further, it may be contended by the Contractor that he has not suspended the execution of the works, if at all there is only some temporary slowing down of the works? In such a situation, what are the criteria to judge if there is indeed suspension of the works by the Contractor thus constituting a repudiatory breach? Some of these questions are answered by Ormrod LJ in *J. M. Hill & Sons Ltd* v. *London Borough of Camden*[11]. It therefore seems that the suspension must entail some actual activities which can be equated to temporary cessation of works, merely removal of part of the plant and materials *per se* does not constitute suspension.

3.0 SUSPENSION: EXCEPTIONS TO THE GENERAL PRINCIPLES?

3.1 To the extent that there is no general right to suspend the execution of the works following the general principle of contract law, the writer will readily concur. What follow below however is an attempt to argue and suggest that there are exceptions to this general principle of law.

---

6 See *Kah Seng Construction Sdn Bhd* v. *Selsin Development Sdn Bhd* [1997] 1 CLJ 448 (HC), [1996] 359 MLJU 1 (HC). See also *Keating* at pp. 194 – 195.

7 For example, Clause 45 of CIDB Standard Form of Building Contract for Building Works (2000 Edition) (hereinafter as "CIDB Building Form"); Clause 26 of PAM Standard Form of Building Contract (1998) (hereinafter as "PAM '98 Form").

8 See, for example, *Ban Hong Joo Mines Ltd* v. *Chen & Yap Ltd* [1969] MLJ 83 (FC). This is also conclusion of Low Hop Bin J in *Kah Seng Construction.*

9 [1979] 2 NZLR 347 (CA, NZ) *per* Cooke and Woodhouse JJ at p. 352.

10 *Ibid*., at p. 356. See in particular the analysis of Cooke and Woodhouse JJ at pp. 350 – 356.

11 18 BLR 31 at p. 47 (CA). Also see the judgment of Lawton LJ at pp. 39 – 40.

3.2 It is a well-established principle of law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by him.[12] Indeed a common sense approach will suggest that as well. To this end, it is submitted that the general principle discussed above can and should be qualified.

3.3 McMullin J's judgment in *Canterbury Pipe Line Ltd* v. *Christchurch Drainage Board* tacitly recognises this. His Lordship opined:

> "Although I have been unable to find any case where the wrongful withholding of a progress payment has been held to be a breach of the rule that a party to contract shall not profit by his own wrong and, to that extent the judgment may *break new ground*, there would be *no difference in principle* between an employer who keeps a contractor out of his land …, or fails to supply the requisite plans … and an employer who keeps his contractor *out of payment for work already done*, declares his intention to *keep him out of payments* in the future, … and *requires him to* ***continue with the work***."[13]

3.4 A careful reading of the judgment of May LJ in *Lubenham Fidelities and Investments Ltd* v. *South Pembrokeshire DC*[14] lends credence to this as the question asked by His Lordship in his judgment seems to suggest:

> "We are quite satisfied that there was no legal basis on which the suspension of work could be justified in this case. *Nevertheless* was there a sufficient link between the issue of the defective certificates and the prolonged suspension of work to support the contention that the issue of the certificates "caused" the suspension? In answering this question it is necessary to look at all the surrounding circumstances …"[15]

If it has been an *absolute* principle that there is no right at all to suspend the execution of works in *all* circumstances, the question asked by May LJ above will be superfluous; there would have been no such necessity to ask the question, and to analyse "all the surrounding circumstances" to arrive at a decision one way or another!

3.5 It will not be out of place to import the concepts of condition precedent and implied terms here. Construction projects are commercial enterprises. The Employer has invested in them with a view to future returns and the Contractor has constructed them with similar objectives. No contractor would enter into a

---

12 See for example *Roberts* v. *Bury Improvement Commissioners* (1870) LR 5 CP 310.

13 *Canterbury Pipe Line Ltd* v. *Christchurch Drainage Board* [1979] 2 NZLR 347 (CA, NZ) *per* McMullin J at p. 371 (emphasis supplied). See also Tomas Kennedy-Grant, *Construction Law in New Zealand* 1st Edition (2003 Reprint) at p. 439.

14 33 BLR 39.

15 *Ibid*., at p. 70 (emphasis supplied). His Lordship however held that the chain of causation leading to suspension was broken and the suspension was thus as a consequence invalid.

contract and work with a realisation that money which otherwise should have been paid can be *wrongfully* withheld in *all* circumstances. There must thus be a limit when in certain circumstances the Contractor should be entitled to suspend the execution of the works pending the realisation of what can be argued to be a condition precedent. In other words, there should be a general condition precedent that there must not be any *wrongful* withholding of payment for the Contractor to *continue* to expend his financial and other resources to work. If the withholding of payment is held to be invalid and unlawful and yet the Contractor is at the same time held to have unlawfully suspended the works, this is tantamount to condoning if not (at times) encouraging the conduct of an unlawful act by the Employer. It may be said that this is an extension, and indeed a modification, of the "Prevention Principle".[16]

3.6 It is suggested that this makes good commercial sense: it benefits both parties. Two parties can use the opportunity to take stock of their position, not necessarily contractual but could be financial or technical, as to what goes next. In business sense, talking about termination outright is a serious and drastic matter, and not one course of action to be taken lightly. The suspension can be a preliminary step towards further negotiation and a consideration if termination is a viable option.[17]

3.7 It is not denied that what has been argued above may be legal heresy. But it is submitted that the argument makes ample sense, both legal and commercial. It is hoped that the judiciary in the common law world can one day reconsider and reaffirm this position.[18]

3.8 Reference may be made to PAM '98 Form, Clause 25.1 (i) of which provides as follows:

> "The Employer may determine the Contract without prejudice to any other rights and remedies which he may possess if the Contractor makes default in one or more of the following instances:
>
> (i) *without reasonable cause* wholly suspends the carrying out of the Works before completion thereof …" (italics supplied)

---

16 It was held in *William Cory & Son Ltd* v. *City of London Corporation* [1951] 2 KB 476 (CA) at p. 484 that "a term is necessarily implied in any contract that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of a breach."

17 I. N. Duncan Wallace, however, opines that the right to suspension by the Contractor would "enable contractors to exert powerful tactical pressures on owners in pursuit of possibly unwarranted and inflated claims …", see I. N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th Edition (1995) (hereinafter as "*Hudson*"), Volume 1 at p. 625.

18 It is suggested that such a position is recognized in the United States: see *Canterbury Pipe Line Ltd* v. *Christchurch Drainage Board* [1979] 2 NZLR 347 *per* Cooke and Woodhouse JJ at pp. 353 – 354. It may be said the international trend is pointing to this position: see for example Article 7.3.4 of UNIDROIT Principles for International Commercial Contracts which provides that an aggrieved party may suspend his performance when he "reasonably believes that there will be a fundamental non-performance by the other party." See also section 112 Housing Grants, Construction and Regeneration Act 1996 (UK) which gives the contractor a statutory right to suspend performance in the absence of payment in certain circumstances.

It can therefore be seen that the Employer's right to determine the Contract on the ground of (wholly) suspension of the execution of the Works by the Contractor is subject to the absence of any "reasonable cause".[19] Putting it in another way, it can be said that the Contractor can suspend the execution of the Works without the risk of his employment under the contract being determined if there is "reasonable cause". It is suggested that what constitutes "reasonable cause" should be construed objectively having considered, to use the phrase of May LJ in *Lubenham*, "all the surrounding circumstances".

4.0 CONTRACTUAL PROVISIONS

4.1 It has been the case that the recently published standard forms of contract have provided for the Contractor to suspend the execution of the works if the Employer has withheld payment. One good example is Clause 42.10 of the CIDB Building Form.

4.2 This suspension mechanism is, it is submitted, a double-edged sword for the Contractor for, in one hand, it gives a 'relief' of sort for the Contractor, and, in the other hand, it effectively 'cures' an otherwise breach of contract by the Employer. It has been aptly said by no less than an eminent authority in the person of Lord Denning MR: "There must be 'cashflow' in the building trade. It is the very lifeblood of the enterprise."[20] This underscores the importance of cashflow to the Contractor. The period which the payment of interest by the Employer can "cure" the non-payment breach must still be specified in the suspension provisions of the contract.

4.3 What has been discussed so far centres on the suspension by the Contractor on (payment) breach by the Employer. However, it is also possible, and indeed advisable, that provisions be included in the contract to the effect that the works can be instructed to be suspended on the occurrence of other specified events; in such events there may not usually be any breach of contract by the Employer. Generally, such suspension clause should cover the following matters:[21]

(a) who is authorised to issue the suspension order;
(b) the procedural requirements necessary to effect a valid suspension;
(c) instances when the contracts administrator is empowered, or duty bound, to issue the suspension order; and
(d) matters arising consequent to the suspension: 'Cost' or 'loss and expense' entitlement of the Contractor; the granting of extension of time; protection

---

[19] This clause is in *pari materia* with PAM/ISM 1969 Standard Building Form Clause 25(1)(a). However the draftsman of the PAM '98 Form has added a definition of sort for "reasonable cause" which is not found in PAM/ISM 1969 Form and which it is suggested has very much narrowed the true meaning of the phrase.

[20] *Modern Engineering (Bristol)* v. *Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162 (CA) at p. 167. It may be pointed out that though the decision of Lord Denning MR was overturned on appeal to the House of Lords [1974] A.C. 689 (HL), the Law Lords (except for Viscount Dilhorne who quoted the relevant passage) did not in their opinions touch on this *dictum* of the Master of the Rolls.

[21] See, for example, CIDB Building Form Clause 19.

necessary for the works suspended; option of termination if the suspension is prolonged beyond a certain period (if the works suspended covers the whole of the works to be suspended; or substantially the whole of the works) or option of treating certain part of the works of being deleted from the contract (if the works suspended is a small fraction of the whole of the works).

4.4 It is generally silent, but it may be submitted that the following principles shall prevail in the construction of a suspension clause such as that discussed in the preceding paragraph:

(a) the contracts administrator who is authorised to instruct for suspension of works must act honestly and fairly even if he may be so instructing as an agent of the Employer;

(b) the prolonged suspension of works, or part of the works, cannot be used as a mechanism to effect the termination of the contract, or the omission of that part of the works with the purpose of passing the same on to another contractor; and

(c) a prolonged suspension of works may be argued to constitute a frustration of the works as the works are physically and contractually incapable of being performed.

4.5 Before leaving the topic of suspension, it may be suggested that there should be such a right for the Contractor to suspend the continued execution of the works in the absence of a properly issued instruction when, for example, the continued execution of the works will lead to safety considerations, both for the works and for the workers. This can happen when, for example, a request to the properly authorised officer for an instruction to suspend the works is not forthcoming and the continued execution of the works may lead to undesirable consequences due to, say, inadequate design. This type of suspension, or what may be referred to as "constructive suspension" should be the exception to the rules discussed above.

PART B: TERMINATION

5.0 TERMINATION: COMMON LAW

5.1 It is trite law that in circumstances an aggrieved party under a contract will be conferred a right to terminate the contract in the absence of an expressed contractual provision. These circumstances include breach of contract by the other party, repudiation and frustration, and the following paragraphs will further discuss on this issue.[22] The distinction will be important for different remedies for the aggrieved party will flow from different circumstances.

[22] Rescission will not be discussed in this paper because it is fundamentally different from termination. In rescission, the contract is brought to an end *ab initio* whereas in termination, the contract is brought to an end *in futuro*; in the former case, no cause of action accrues and the only compensation seems to

Termination for Breach

5.2 The first question as to what constitutes breach of contract will first need to be addressed. Generally and simply, a breach of contract occurs, or is caused, when a party to the contract fails to perform his obligation in accordance with the provisions of the contract. It may be said that the performance of contractual obligation can be said to be 'strict' in this sense for what constitutes breach of contract in the context of termination is on this premise alone, i.e. non-compliance with the provisions of the contract: whether the defaulting party is blameworthy, negligence or was influenced by factors beyond his control is strictly irrelevant.

5.3 A breach of contract may be a partial or complete failure to perform, delayed performance, faulty or inadequate performance.

5.4 Common law, however, does not confer a party to the contract a right to terminate in respect of *all* breaches of contract. Had it been the case, the smooth implementation of the contract will be impossible and a conducive commercial environment will be unattainable with various frivolous terminations of contracts. This begs the question: when is there a right to terminate for breach?

5.5 The common law only recognises a valid right to terminate a contract in respect of those breaches of the provisions of contract which, to use the usual phrase, "goes to the root of the contract" or which constitutes what is called a "fundamental breach". Therefore, common law has developed a tripartite classification of contractual terms into conditions, intermediate or innominate and warranties. There shall be a common law right to terminate a contract in respect of those breaches of the provisions of the contract which are classified as conditions. If the breaches only involve those terms which are classified as warranties, no right to terminate the contract accrues; instead the aggrieved party is only entitled to damages or compensation as the only remedy. If the term classified as an intermediate or innominate is breached, the right to terminate is not automatic but will be dependent on the gravity of the breach and its consequences.[23] Though there are some academic and judicial criticisms, and this tripartite classification of terms may be said to be artificial and circular, it is nevertheless generally accepted in the common law world.[24]

5.6 Construction contracts usually comprise a document known as the Conditions of Contract and it is submitted this *per se* will not render the provisions of the

---

be restitutionary (*quantum meruit*) and in the latter case, rights and obligations prior to the discharge of the contract are *not* as a consequence discharged. Rescission is usually available to aggrieved party of vitiating factors of contract, for example, duress and undue influence, misrepresentation, etc.

23 *Hongkong Fir Shipping Co Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA); *Bunge Corporation* v. *Tradax Export SA* [1981] 1 WLR 711 (CA).

24 For example in England, see *Hongkong Fir* and *Bunge Corporation* cited above; in Malaysia *Abdul Razak bin Datuk Abu Samah* v. *Shah Alam Properties Sdn Bhd & Anor Appeal* [1999] 2 MLJ 500 (CA); in Australia *Ankar Pty Ltd* v. *National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 (HC, Aust). See also the detailed analysis of Gopal Sri Ram JCA on this subject in *Ching Yik Development Sdn Bhd* v. *Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 (CA) at p. 684.

Conditions of Contract 'conditions' within the meaning of the tripartite classification of terms discussed above; the use of the term 'condition' in the contract is thus not conclusive.[25]

5.7 Some cases may be cited to illustrate the operation of this doctrine. In *Attorney General of Singapore* v. *Wong Wai Cheng t/a Union Contractors*,[26] the Singapore Court of Appeal held that delayed site possession by up to thirty months when the contract period is only twenty-four months was not a fundamental breach of contract by the Employer. In *Ban Hong Joo Mines Ltd* v. *Chen & Yap Ltd*,[27] it was held that the Employer failure to pay was a fundamental breach which entitles the other party to terminate the contract. A comparison can however be made with *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd*[28] where Raja Azlan Shah J (as His Royal Highness then was) held this to the otherwise.

5.8 Upon the termination of the contract, the aggrieved party may then claim damages pursuant to the common law principles of *Hadley* v. *Baxendale*[29] which are also the principles inherent in section 74 Contracts Act 1950.[30]

Termination for Repudiation

5.9 Repudiation is concerned with the clear unwillingness or inability of one party, through conduct or words, to continue to perform his obligations under a contract. It must be stressed that the unwillingness or the inability must relate to the whole of the contract[31] or to a "fundamental" term of the contract[32].

5.10 It will be immediately recognised that there will be considerable overlap between repudiation and the other rights to terminate a contract. For example, a fundamental breach of the contract may also constitute repudiation. Academic writers and judges have not made the law in this area any easier by frequently commuting between these two concepts without making any distinction. The two sub-headings of "Termination for Breach" and "Termination for Repudiation" may well be discussed under a single heading titled "Termination for Repudiatory Breach".[33] It can also be pointed out that there can also be an intended breach[34] of a contract or a fundamental term thereof *before* the time set for the

---

25 See for example, *L Schuler AG* v. *Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL).

26 [1980] 1 MLJ 131 (CA, S'pore).

27 [1969] 2 MLJ 83 (FC).

28 [1966] 2 MLJ 286 (HC). See also *Wong Poh Oi* v. *Getrude Guok & Anor* [1966] 2 MLJ 134.

29 (1854) 156 ER 154 (HL).

30 "Section 74(1) of the Contracts (Malay States) Ordinance 1950 is the statutory enunciation of the rule in *Hadley v. Baxendale*." *per* Ong FJ in *Teoh Kee Keong* v. *Tambun Mining Co Ltd* [1968] 1 MLJ 39 (FC) at p. 40. See also the more recent case of *Malaysian Rubber Development Corp Bhd* v. *Glove Seal Sdn Bhd* [1994] 3 MLJ 569 (SC) at p. 575 *per* Mohamed Dzaiddin SCJ (later CJ).

31 See the important case of *Hochester* v. *De La Tour* 118 ER 922.

32 *Federal Commerce & Navigation Co Ltd* v. *Molena Alpha Ltd* [1979] AC 757 (HL).

33 It is submitted that these two concepts can at most times be "married": for example, the use of the term "repudiatory breach" is now commonplace.

34 What is commonly referred to as "anticipatory breach".

performance of the contract or the term. This does not seem to be a doctrine inherent in the actual breach of a contractual term discussed above. In the words of Lord Denning MR:

> "The word 'repudiation' should be confined to those cases of an *anticipatory* breach, but it is also used in connection with cases of an *actual* breach going to the root of the contract …"[35]

5.11 It must be stressed that repudiation of a contract or a fundamental term thereof does not *per se* terminate a contract; the aggrieved party must *accept* the repudiation. The law in this area is summarised by Lord Reid in the well-known case of *White and Carter (Councils) Ltd* v. *McGregor*[36]:

> "If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept the repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."[37]

The above statement can be compared with section 40 Contracts Act 1950 which provides as follows:

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

5.12 It therefore can be said that the acceptance of a repudiatory breach brings the contract to an end and the innocent party may bring an action (either court or arbitral) to recover damages which he has sustained. The principles of recovery in this case will be similar to that described in para 5.8 above.

Termination on the Grounds of Frustration

5.13 We have been discussing the termination of contract on the premises of one's party breach. Frustration is however independent of any fault and neither party is to assume liability. It must be said that the ambit of this concept of frustration is still subject to much academic debate and the extent that an event occurring will be construed as constituting frustration is still not too clear: is it a question of impossibility or a question of fundamental difference? However, a caution should

---

35 *Cehave NV* v. *Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 (CA) *per* Lord Denning MR at p. 59. The italics are original.

36 [1962] AC 413 (HL).

37 *Ibid*., at p. 427. The choice of the party is essentially the exercise of an election which concept will be explored at a later stage.

first be given here: "Frustration is not to be lightly invoked as the dissolvent of a contract."[38]

5.14 In the oft-quoted words of Lord Reid in *Davis Contractors*, frustration is "the termination of the contract by operation of law on the emergence of a *fundamentally different situation*."[39] His Lordship has also approved the following passage of Asquith LJ in *Sir Lindsay Parkinson & Co Ltd* v. *Works & Public Buildings Commissioners*[40]:

> "In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, …"[41]

5.15 This "fundamentally different" concept must be contrasted with the "impossibility of performance" concept the classic case of which must be *Taylor* v. *Caldwell*[42]:

> "The principle seems to us to be that, in contrast in which the performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[43]

This can be compared with the provisions of sections 57(1) and (2) of Contracts Act 1950 which provides as follows:

> "57(1) An agreement to do an act impossible in itself is void."

> "57(2) A contract to an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

It would be noticed that the provisions of Contracts Act 1950 is such that the *supervening* impossibility will render the contract void, not voidable at the option of one party.

5.16 It may be further elaborated that this impossibility can stem from two different aspects: physical impossibility and legal impossibility. Further, looking from the perspective of when the impossibility arises, the impossibility can be either initial

---

38 *Davis Contractors Ltd* v. *Fareham UDC* [1956] 2 All ER 145 (HL) *per* Lord Radcliffe at p. 159.

39 *Ibid*., *per* Lord Reid at p. 155 (emphasis added). The *Davis Contractors* test was applied in Malaysia in *Ramli Bin Zakaria* v. *Government of Malaysia* [1982] 2 MLJ 257 (FC) *per* Abdul Hamid FJ (as His Lordship then was) at p. 262.

40 [1950] 1 All ER 208 (CA).

41 *Ibid*., *per* Asquith LJ at p. 229.

42 122 ER 309.

43 *Ibid*., at p. 314. See also *Berney* v. *Tronoh Mines Ltd* [1949] MLJ 4 where it was held that the Japanese occupation of the then Malaya had rendered the contract impossible of being performed.

impossibility or supervening impossibility. In construction contracts, it is the supervening impossibility which will be more common.

5.17 The occurrence of an alleged frustrating event must however be treated with caution. It may well be that the event falls within the sphere of the risks to be assumed by one party. In this aspect, it is submitted that this is a matter which follows from a true construction of the contract between the parties and the allocation of risks inherent therein.[44]

5.18 At the happening of a frustrating event, the contract stops from that moment when the frustrating event occurs. It is submitted that the rights and liabilities of the parties *inter-se* prior to the occurrence of the frustration are governed by the principles set out in section 15 of Civil Law Act, 1956.

6.0 TERMINATION BY OPERATION OF TERMINATION CLAUSE

6.1 All standard forms of construction contracts contain clauses which give bilateral rights to the parties to terminate the contract upon the occurrence of specified events.[45] These termination clauses are inserted to provide the terminating party a means to terminate the contract which requires no further proof other than that the event within the purview of the clause has occurred. Further, the clauses may also provide a mechanism to bring the contract to an end and to deal or govern with the rights and liabilities of the parties *inter-se* post-termination.

6.2 From these broad functions of termination clauses, it is submitted that a termination clause will typically comprise the following three parts:

(a) specified events which can invoke the operation of the clause;
(b) procedural requirements; and
(c) consequences of termination.

Generally, a determination clause must be strictly construed.[46] This makes ample sense for the consequences for invoking this clause is serious indeed. The financial consequences, the public outcry especially among the shareholders of listed entities as well as the reaction from the investing public on what they may perceive to have happened especially if the contract sum and anticipated profits are considerable and others will tend to underscore this.

In the following paragraphs, the operation of some determination clauses will be discussed with reference to the mentioned three parts.

---

44 See *Davis Contractors*, *op. cit.*, *per* Lord Reid at pp. 152 – 153.

45 See for example, Clauses 44 and 45 of CIDB Building Form and Clauses 25 and 26 of PAM '98 Form. An exception is the JKR 203 family of forms where the contractual right to terminate is only reserved for the Government.

46 See, for example, *Lintest Builders Ltd* v. *Roberts* 13 BLR 39 (CA). The learned editor of *Hudson* was in agreement with this position in the 10th Edition (1970) at p. 694 but his view was somewhat modified and shifted in the 11th Edition (1995) Volume 2 at pp. 1274 – 1275.

Specified Events

6.3 It may be the purpose of the termination clause to include all potential fundamental or repudiatory breaches of contract as events which can invoke the operation of the clause, or allow the invoking of the clause. As termination clauses would need to be strictly construed, the words used and the proper and valid meanings to be attributed to the words would be of immense importance. It goes without saying that the fundamental or repudiatory breaches would be those of the Employer's or the Contractor's.

6.4 Clause 25.1 of PAM '98 Form provides for the determination of the Contractor's employment under the contract if the Contractor has made defaults in a few specified events some of which are discussed below.[47]

(a) "… without reasonable cause wholly suspend the carrying out of the Works before completion thereof…"[48]

The word "wholly" should be stressed and this is to be compared and contrasted with "partially": nothing less than wholly suspension of the Works will allow the operation of this clause. Further, the suspension of the carrying out of the Works must be one which is without "reasonable" cause.[49]

(b) "… fails to proceed regularly and diligently with the Works."[50]

The phrase "regularly and diligently" is comprehensively discussed by the English Court of Appeal in *West Faulkner Associates* v. *Newham London Borough Council*[51] where Simon Brown LJ after having stated that 'regularly' and 'diligently' should not be separately construed, His Lordship continued,

> "Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work."[52]

---

47 For a detailed discussion, see Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, 2nd Edition, pp. 247 – 251.

48 Clause 25.1.1(i) of PAM '98 Form. See also substantially similar wordings in Clause 51(a)(i) of PWD 203 Form/IEM Conditions of Contract for Works Mainly of Civil Engineering Construction (1989) (hereinafter as "IEM Civil Form") and Clause 44.1(a)(iii) of CIDB Building Form.

49 See discussion in para 3.8 above.

50 Clause 25.1.1(ii) of PAM '98 Form. See also substantially similar wordings in Clause 51(a)(ii) of PWD 203 Form/IEM Civil Form. There is no equivalent and corresponding provision in CIDB Building Form.

51 42 ConLR 144 (CA).

52 *Ibid*., at p. 154.

(c) "… refuses or neglects to comply with a written notice from the Architect requiring him to remove or to remedy defective work, improper materials or goods *and by such refusal or neglect the progress of the Works is materially affected*."[53]

The italicised phrase (which italics are not in the original PAM '98) must be noted.

(d) " … has abandoned the Contract …"[54]

Abandonment of the Contract would evidence by conduct an intention of not wanting to be bound by the Contract and as such this is itself a repudiatory/fundamental breach. By including this as a specified event in the termination clause, this also evidences a policy intention in PAM '98 Form of making a distinction between abandonment of the Contract and "wholly" suspension of the Works. In *Paris Construction Co Ltd* v. *J A V Residences Ltd et al*,[55] the Ontario Supreme Court held that a contract had not been abandoned by mere cessation of work.

(e) "… has persistently refused or failed to comply with a written instruction from the Architect."[56]

The two phrases that need to be considered are "persistently" and "written instruction". It is submitted that two or three refusals or failures would not *per se* be enough to amount to "persistently"; this is of course a matter of fact, not law. "Written instruction" however has to be read with the provisions Clause 2.1 – 2.5 (inclusive) of PAM '98 Form.

6.5 Clause 25.3 of PAM '98 Form further provides that the employment of the Contractor will be "forthwith automatically determined" upon the occurrence of some events some of which are:

(a) the Contractor "becoming bankrupt";
(b) the Contractor making "a composition or arrangement with his creditors";
(c) the Contractor "having a winding up order made"; etc

all of which are instances of the Contractor in dire financial state. Without going into much elaboration on what is admittedly a very difficult topic and the provisions of the clause which call for a detailed knowledge of multi-disciplinary

---

53 Clause 25.1.1(iii) of PAM '98 Form (italics supplied). See also substantially similar wordings in Clause 51(a)(iv) of PWD 203 Form/IEM Civil Form and Clause 44.1(a)(v) of CIDB Building Form but the italicised words are not found in all PWD 203 Form/IEM Civil Form and CIDB Building Form.

54 Clause 25.1.1(v) of PAM '98 Form. No equivalence is available in other standard forms produced in Malaysia.

55 11 CLR 1 (SC, Ontario).

56 Clause 25.1.1(vi) of PAM '98 Form. No corresponding provision in PWD 203 Form but see Clause 44.1(a)(vii) of CIDB Building Form.

areas of law, it is submitted that the efficacy of the clause especially its emphasis on *automatic* and *forthwith* determination is very much in doubt.

6.6 What have been discussed above are specified events allowing the Employer the right of invoking the termination clause. The reverse can also happen: the Contractor can by virtue of termination clause terminate the Contract[57] upon the happening of certain specified events which are the Employer's fundamental/repudiatory breaches.

6.7 Clause 26 of PAM '98 Form provides for this termination of Contract by the Contractor. Some of the specified events are briefly discussed below.

(a) "… the Employer does not pay the Contractor the amount due on any certificate within the Period of Honouring Certificate …"[58]

The provision does not need much elaboration: the detailed and illuminating analysis of Edgar Joseph Jr FCJ in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd* v. *Dr Leela's Medical Centre Sdn Bhd*[59] should be appreciated. The phrase "the amount due on any certificate" was judicially considered by the House of Lords to be the amount due after the deduction of any sums which the Employer was entitled *under the Contract to deduct*.[60]

(b) "… the Employer improperly or fraudulently interferes with or influences, or obstructs the issue of any certificate by the Architect or there is fraudulent collusion between the Employer and the Architect."[61]

As the inherent philosophy of PAM '98 Form is premised on an independent certifier acting as contracts administrator, interference or obstruction with the issue of any certificate is tantamount to the destruction of that premise. It is submitted that interference, influence or obstruction with the issue of certificate *per se* is sufficient:[62] it is questionable if this will need to be "improper" or "fraudulent".[63] Further, it is submitted that the "certificate" here does not necessarily refer to

---

57 As contrast to "determination of employment". Note however that PWD 203 family of forms do not contain any provision for the Contractor to terminate the Contract with the Government.

58 Clause 26.1(i) of PAM '98 Form. See substantially identical but not similar wordings in Clause 45.1(a)(i) of CIDB Building Form and Clause 52(a)(i) of IEM Civil Form. See *Ban Hong Joo Mines Ltd* v. *Chen & Yap Ltd* cited in para 5.7 above.

59 [1995] 2 MLJ 57 (SC).

60 See *Modern Engineering (Bristol)* v. *Gilbert-Ash (Northern)* [1974] AC 689 (HL) at p. 709.

61 Clause 26.1(ii) of PAM '98 Form. See substantially identical but not similar wordings in Clause 45.1(a)(ii) of CIDB Building Form and Clause 52(a)(ii) of IEM Civil Form. See for example, *Hickman* v. *Roberts* [1913] AC 229.

62 There must of course be actual interference in the certification process: see *RB Burden Ltd* v. *Swansea Corporation* [1957] 3 All ER 243 (CA).

63 This requirement of "improperly" or "fraudulently" in PAM '98 Form is not found in PAM/ISM 1969 Form.

Interim Certificate within the meaning of Clause 30.2 of PAM '98 Form, it can refer for example to Certificate of Non-Completion within the meaning of Clause 22.1.

(c) "… the Employer becomes bankrupt or makes a composition or arrangement with his creditor …"[64]

This concerns the situation when it is the Employer who is in dire financial state. The same comment for the corresponding provisions for Employer's determination also applies.

(d) "… the carrying out of the whole of the Works … is suspended for a continuous period of time … by reason of (a) Architect's instruction issued under Clauses (*sic*) 1.2, 11.1 or 21.4; (b) the Contractor not having received in due time necessary instructions, drawing, … (c) delay on the part of the artists, tradesmen … (d) the opening up for inspection …"[65]

The *only* clause in PAM '98 which can be argued to empower the Architect to issue instruction to suspend the execution of the Works is Clause 21.4 on the "postponement" of the Works. The rest i.e. (b), (c) and (d) above may be said to be "constructive suspension" by the Contractor.

6.8 One notable distinction may be observed: in PAM '98 Form, the Contractor is entitled to "*forthwith* determine the employment of *the Contractor* under this contract …"[66] This is to be contrasted with CIDB Building Form and IEM Civil Form where the service of a notice is mandatory prior to taking such a drastic step.

Procedural Requirements

6.9 In PAM '98 Form, effecting "determination of the Contractor's employment under this Contract"[67] by the Employer pursuant to the provisions of Clause 25.2 is a two-stage process. The first stage is this:

> "The *Architect* may then give the Contractor notice by *registered post or recorded recovery* specifying the default subject to that such notice is not given *unreasonably or vexatiously*."[68]

The operative words are those italicised. This first notice ("the Default Notice") is one to be issued by the Architect, not by the Employer. The second

---

64 Clause 26.1(iii) of PAM '98 Form. See substantially identical but not similar wordings in Clause 45.2(a) of CIDB Building Form and Clause 52(a)(iii) of IEM Civil Form.

65 Clause 26.1(iv) of PAM '98 Form.

66 Clause 26.1of PAM '98 Form (italics supplied).

67 This is the phrase used in Clause 25.2 of PAM '98 Form but in Clause 25.1, the phrase used is "The Employer may determine the Contract …"

68 Clause 25.2 of PAM '98 Form (italics supplied).

requirement is that the notice is to be given by registered post or recorded delivery. Question will then be asked: is this requirement to give the Default Notice by registered post or recorded delivery a mandatory requirement?

In *Fajar Menyensing Sdn Bhd* v. *Angsana Sdn Bhd*[69], Nik Hashim J (as His Lordship then was) held that this is a mandatory requirement. With this decision, it is submitted that form has triumphed over substance. Effectively, a party who does not deny that he has received the Default Notice can still challenge the validity of the termination on the ground that the mode of service of notice is not what the contract has prescribed. A refreshing approach, and one that rejects the strict approach in *Fajar Menyensing*, is adopted in the subsequent case of *DMCD Museum Associates Sdn Bhd* v. *Shademaker (M) Sdn Bhd (No. 2)*[70] and the service was held to be valid as long as it was certain that the addressee had actually received it. For reasons of practicality and good commercial sense, the writer's vote is with the more refreshing approach.

It is also a requirement that the Default Notice must not be given "*unreasonably or vexatiously*". The meaning of this phrase has been judicially attempted in *J. M. Hill & Sons Ltd* v. *London Borough of Camden.*[71]

The following points remain to be noted.

(a) There can only be one Default Notice; the Architect is not empowered to issue more than one of such notice.[72]

(b) The Default Notice must specify the specified event(s) which has (have) to be rectified by the Contractor.

(c) In issuing the Default Notice, The Architect must also act fairly and honestly other than satisfying the requirement of not acting "unreasonably and vexatiously".

6.10 The second stage is the notice ("Determination Notice") to be sent out by the Employer upon the failure of the Contractor to rectify the default or defaults specified in the Default Notice, or commission again of a similar default(s) after having earlier rectified it (them). The provisions in Clause 25.2 are as follows:

---

69 [1998] 6 MLJ 80 (HC). See also the Singapore case of *Central Provident Fund Board* v. *Ho Bock Kee* [1981] 2 MLJ 162 (HC) and the New South Wales, Australia case of *Eriksson* v. *Whally* [1971] 1 NSWLR 397. *Fajar Menyensing* also held that the "recorded delivery" requirement is otiose.

70 [1999] 4 MLJ 243 (HC). See also *Ellis Tylin Ltd* v. *Co-Operative Retail Services* [1999] BLR 205 (QBD, TCC).

71 18 BLR 31 at p. 47 (CA) *per* Lawton LJ at pp. 44 – 45; see also the judgment of Ormrod LJ at p. 49 and the judgment of Bingham LJ (as His Lordship then was) in *John Jarvis Ltd* v. *Rockdale Housing Association Ltd* 10 ConLR 51 at pp. 68 – 69 on the meaning of "unreasonably".

72 *Robin Ellis Ltd* v. *Vinexsa International Ltd* [2003] BLR 373 (QBD, TCC), judgment delivered by HHJ Thornton QC on 21.7.2003.

> "… the *Employer* may within ten (10) days after such continuance or repetition by letter sent by *registered post or recorded delivery* forthwith *determine the employment of the Contractor under this Contract*."[73]

Again the operative words are those italicised which have all been discussed earlier. The Determination Notice must have a sensible connection with the Default Notice issued earlier by the Architect.[74]

6.11 It is not proposed to elaborate here the procedural requirements with respect to termination of contract by the Contractor pursuant to Clause 26.1 of PAM '98 as the principles thus far discussed are equally applicable.

6.12 It is submitted that the provisions of PWD family forms of contract and IEM Civil Form (Clauses 51) and CIDB Building Form (Clause 44.1) with respect to termination by the Employer are largely similar though not identical and the principles already discussed are equally applicable. The same will also applies to termination by the Contractor pursuant to Clause 52 of IEM Civil Form and Clause 45 of CIDB Building Form.

Consequences of Termination

6.13 The various standard building and construction forms commonly in use in Malaysia have provided within the termination clauses themselves the remedies of the parties in such eventuality. These may be regarded as a code regulating the parties' rights and obligations *inter-se* after the termination of the contract.

6.14 PAM '98 Form has provides for this *via* Clause 25.4 for Employer's determination and Clause 26.2 for Contractor's determination. The PWD Family of forms have provided for this *via* Clauses 51(c) for Government's determination. IEM Civil Form provides for this *via* Clause 51(c) and Clauses 52(b) and (c) for Employer's and Contractor's determination respectively. In CIDB Building Form, the corresponding clauses are 44.3 and 44.4 for Employer's determination and Clause 45.3 for Contractor's determination. Some general principles can be distilled from a study of these clauses and these would be briefly discussed in the following paragraphs. However, the following statement will be instructive on the general effects of the exercise of an express power to determine:

> "The principal effect of the exercise of a power to determine is that rights of a party in default are suspended (for example until the works have been completed by the employer) and *superseded by a* ***new contractual code***. Thus the contractor may have *no further rights to payment until the employer has completed the work left outstanding* and *may have to permit his materials, plant and equipment to be used by the employer for the purposes of completing the works*. An employer in default may have to

---

73 Clause 25.2 of PAM '98 Form (italics supplied).

74 *Architectural Installation Services Ltd* v. *James Gibbons Windows Ltd* 46 BLR 91 (QBD).

pay the contractor whatever is due and to compensate him for the losses caused by the determination.

Where there is a dispute about the validity of determination and the dispute is to be decided by an arbitrator, *the court will treat the notice of determination as provisionally valid. An injunction will not normally be granted to restrain a forfeiture* as this would be tantamount to ordering specific performance."[75]

6.15 Irrespective of whether the determination is valid or otherwise (and this is not an issue to be argued at that stage of the termination of the contract), and regardless of whether the determination is initiated by the Employer or the Contractor, the Contractor would have to vacate the site. A series of commonwealth cases have consistently pointed to this position.[76] Malaysia has followed the commonwealth trend as Abdul Malik J (as His Lordship then was) so held in *Kong Wah Housing Development Sdn Bhd* v. *Desplan Construction Sdn Bhd*.[77]

6.16 The Employer will be allowed to use the temporary buildings, materials, equipment and plant belonging to the Contractor to complete the outstanding works but it must be stressed that this will be credited to the Contractor's account in the finalising of the account. This however has to be treated with care such that this action will not constitute a tort of detinue as the Malaysian decision of *Perbadanan Kemajuan Negeri Selangor* v. *Teo Kai Huat*[78] illustrates.

6.17 The Employer will not be bound to make further payment to the Contractor. A notional final account will have to be established, very frequently by an arbitral tribunal (!), and the parties' respective credits and debits will be assessed and a net surplus or deficit will be arrived at. A rough final account in the case of Employer's determination will look approximately as follows (which it must be stressed by no means is applicable to all situations and is herein simplified):

(a) Value of works completed by the Contractor including variations
(b) Loss and expense and other claims
(c) Retention monies withheld by the Employer
(d) Money from the call of performance bond

---

75 *Halsbury's Laws of England*, 4th Edition (Reissue) Volume 4(3) (2002) para 119. (Italics added, footnotes omitted)

76 For example, in Australia, see *Graham H. Roberts Pty Ltd* v. *Maurbeth Investment Pty Ltd* [1974] 1 NSWLR 93 (SC, NSW); In Hong Kong, *Kwong Fatt Cheung Construction Company & Anr* v. *The Un Long Hop Yick Co Ltd* [1961] HKLR 121 (CA, Hong Kong); in New Zealand, *Mayfield Holdings Limited* v. *Moana Reef Limited* [1973] 1 NZLR 309 (SC, New Zealand); in England, *Tara Civil Engineering Ltd* v. *Moorfield Development Ltd* 46 BLR 72 (QBD); and in Singapore, *Royal Design Studio Pte Ltd* v. *Chang Development Pte Ltd* [1990] SLR 1116 (HC, Singapore). There is however an unfortunate decision of Megarry J (as His Lordship then was) in *London Borough of Hounslow* v. *Twickenham Garden City Development* [1970] 3 All ER 326 (ChD). See Pawancheek Merican, *Construction Contracts: Disputed Possession of Project Site* [1994] 1 MLJ *clxii*.

77 [1991] 3 MLJ 269 (HC).

78 [1982] 2 MLJ 165 (FC).

(e) Refund of liquidated damages if deduction of which is ruled unlawful
(f) Use of materials, plant etc belonging to the Contractor
(g) Total amount due to the Contractor = (a) + (b) + (c) + (d) + (e) + (f)

Less

(h) Extra completion cost
(i) Liquidated and ascertained damages if ruled lawful
(j) Cost of rectification of defects
(k) Increased supervision cost
(l) Amount already paid to the Contractor
(m) Other payments such as insurance premium
(n) Total amount due to the Employer = (h) + (i) + (j) + (k) + (l) + (m)

Amount due by the Employer to the Contractor/from the Contractor to the Employer = (g) – (n)

and this amount will have to be settled by one party to the other, very often by enforcing an arbitral award.

6.18 It must be said that the contracts administrator will have a continuing role after termination as far as the finalisation of account is concerned and this is provided for in the post-termination "contractual code": see, for example, the role of the Architect in this respect in Clause 25.4 (iv) in PAM '98 Form and that of the S.O in Clause 44.4 of CIDB Building Form. It also needs to be stressed that the role of the Architect, the Engineer or the S.O. in this respect is that of a certifier and not that of the agent to the Employer.

7.0 TERMINATION: COMMON LAW VS CONTRATUAL; EQUITABLE DOCTRINES

7.1 The two ways of bringing a construction contract to an end have been discussed above. In enforcing a contractual right to determine a contract, it has been demonstrated that there must be strict compliance with the rules of procedure set down in the contractual provisions themselves; these include notice requirements with regard to mode of service, contents of the notice, timing of notice, circumstances surrounding the issue of the notice and others. All these may lead to a determination being rendered invalid with its disastrous and unintended financial consequences. Termination by common law principles, on the other hand, has its own pitfalls; for example, is a breach by the Employer for non-payment over a period of time a "repudiatory breach"?[79]

7.2 It will thus be tempting to ask; are the expressed contractual rights to determine a contract an addition to the common law rights? Or are they a substitution to them? The answer is given in the case of *Architectural Installation Services Ltd* v. *James*

[79] Compare and contrast *Ban Hong Joo Mines* and *Yong Mok Hin* cited above.

Gibbons Windows Ltd[80] where HHJ Bowsher QC held that common law rights are not excluded and they co-exist with the expressed contractual right of determination. It is noted that termination clause will usually contain the provision "without prejudice to other rights and remedies". Even though there was no such provision in the termination clause under his consideration, HHJ Bowsher QC nevertheless came to the conclusion as he did. The importance of the implication is this: is a termination pursuant to an expressed contractual right is held to be invalid and unlawful, the party who terminates the contract can still fall back on common law right to "rescue" an otherwise invalid and unlawful termination.

7.3 *Architectural Installation Services*, however, was distinguished in the Malaysian case of *Malayan Flour Mills* v. *Raja Lope & Tan Co*[81]. It was held in *Malayan Flour Mills* that a termination notice which was validly issued and, unlike that in *Architectural Installation Services*, which had a sensible connection in content and time, excluded the common law rights to termination. *Architectural Installation Services* is of course not binding on Malaysian courts but the more pertinent question to ask is this, is the *ratio* of *Malayan Flour Mills* sound and legally correct and justifiable?

7.4 It is submitted that by *electing* to exercise the expressed contractual right to terminate a contract rather than by way of common law right, the party is choosing between two contrasting and different contractual rights. This issue of election is, to put it simply, normal contractual issue and is no different from other contractual issue and is governed by the same principles of law. "Election" has been defined as follows:

> "**Election**. When a person is left to his own free will to take or do one thing or another, as pleases. But it is more frequently applied to the choosing between two rights by a person who derives one of them under an instrument in which an intention appears (or is implied by a court of law or equity) that *he should not enjoy both …*"[82]

7.5 This writer thus respectfully submits that *Malayan Flour Mills* is legally sound and justifiable. To put it idiomatically, one cannot have two bites at the cherry. By exercising the right to terminate a contract by way of expressed contractual right, this should extinguish the common law right to terminate the same contract.

7.6 This doctrine of election, it is further submitted, is closely connected with the doctrines of waiver and estoppel. A party who has the contractual right to terminate a contract may find that the right has been extinguished because

---

80 46 BLR 91 (QBD).

81 [1998] 6 MLJ 377 (HC).

82 E. R. Hardy Ivamy (ed), *Mozley & Whiteley's Law Dictionary* 11th Edition (1993) at pp. 92 – 93 (italics added). This is also an equity doctrine based on the maxim, "Equity leans against double portion". Also, "He may not approbate and reprobate." *per* Chitty J in *Re Lord Chesham* (1886) 31 ChD 466 at p. 473.

(a) he has waived his right to do so (the doctrine of waiver); or
(b) it would be inequitable for him by his own action to proceed to terminate the contract (the doctrine of estoppel).

For example, the condoning of a *continuous* (repudiatory) breach with no visible sign of action from one party to terminate the contract within reasonable time will be construed as the party intending to terminate it as having waived his right.[83] Estoppel is another equitable doctrine which can come into play and which may have a bearing on the validity or otherwise on the determination of contract.

8.0 TERMINATION FOR CONVENIENCE[84]

8.1 The only standard form of contract in Malaysia which provides for termination for convenience is CIDB Building Form.[85] As drafted, the clause seems to give the Employer unfettered power to determine the Contract. It is submitted, however, that this exercise of contractual power, like the exercise of all other powers, has its limit, and it cannot be unfettered. It is still a much debatable point if there is such thing as a general duty of good faith in commercial contracts (for which construction contracts are clearly commercial contracts) but the doctrine is evidently of immense importance and is closely linked to the concept of termination for convenience. However, negative the existence of a contractual relationship (which is a very serious matter) upon the unfettered unilateral choice of one party does not seem to accord with the bilateral nature of a contract. Is it against public policy that a contract contains within itself the seed of its own destruction on the choice of only one party to the contract?[86] It may also be asked, if the Contractor has committed breaches of contract for which the contractual termination clause can be invoked, can the Employer still resort to this termination for convenience clause?

8.2 That such a clause is recognised in Malaysia can be seen in the case of *Bains Harding (Malaysia) Sdn Bhd* v. *Arab-Malaysian Merchant Bank Bhd & Others*[87] where the subject of good faith was discussed at length, albeit *obiter*.

8.3 It is submitted there is ample commercial sense in having this provision. For example, an employer, due to internal changes in its own boardroom or financial standing, or due to external changes such as market upheavals and financial crisis, may want to reduce losses and lower its own gearing. The clause would provide a good way out for the employer. For understandable reason, the clause usually provides unilateral right to terminate the contract and this right is usually not provided to the contractor.

---

83 See further *Keating*, pp. 326 – 330.
84 See generally, John Tackaberry QC, *Termination for Convenience* being a paper presented to the Society of Construction Law in London on 9.12.1998 and in Hong Kong on 15.11.2001.
85 See Clause 46 CIDB Building Form.
86 Other questions are posed by John Tackaberry QC in the cited paper, *op. cit.*, pp. 3 – 4.
87 [1996] 1 MLJ 425 (HC).

8.4 The law on this subject is still in a state of flux and an attack on the legality and enforceability of this type of clause can still be mounted. The final words await inputs from the judiciary. If at all, the clause has to be construed strictly and there must not be any abuse of this clause. For example, a parallel comparison can be drawn: it is trite law that work cannot be omitted by exercising the power under the variation clause with the intent that the same work is given to another contractor.[88] Similarly, a contract cannot be extinguished by resorting to this termination for convenience clause with the intent that a new contract for the same work is awarded to another party.

9.0 OTHER FORMS OF TERMINATION

9.1 It is trite law that parties to a contract may by making a new contract under which each of the parties agrees to release the other from the rights and obligations of the original contract thus effectively terminating the original contract. The new contract, like all contracts, will still have to satisfy the usual ingredients for their validity and enforceability. The new contract, of course, may also spell out the rights and liabilities of the parties *inter-se* after the original contract is extinguished, or what may be called "settlements" between the two parties. There are however several pitfalls that the parties have to be wary of.

9.2 The recent case of *Pernas Construction Sdn Bhd* v. *Syarikat Rasabina Sdn Bhd*[89] is instructive. After an order to stop work, the two parties enter into a mutual termination agreement of the subcontract between them. It was however found by the High Court, and upheld by a majority of the Court of Appeal, that the mutual termination agreement was not mutually agreed and was thus invalid. As the mutual termination agreement was invalid, it could be disregarded. Further, the majority of the Court of Appeal also found that the plaintiff was pressured to sign the agreement.

9.3 The lessons are therefore plain. The mutual termination agreement has to encompass the whole contract and it must be obvious on the face of the agreement that it be so. There must also be no economic duress that one party can exploit to escape the new obligations created as a consequence of the new agreement.[90]

9.4 Further, the doctrine of accord and satisfaction may also be employed:

> "[An] accord and satisfaction is the purchase of a release from an obligation … not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."[91]

---

88 See *Carr* v. *JA Berriman Pty Ltd* (1953) 27 ALJR 273 (HC, Aust).
89 [2004] 2 CLJ 707 (CA).
90 See for example, *D & C Builders* v. *Rees* [1965] 3 All ER 837 (CA).
91 *British Russian Gazette & Trade Outlook Ltd* v. *Associated Newspaper Ltd* [1933] 2 KB 616 at pp. 643 – 644.

9.5 A forbearance to sue or the withdrawing of a legal suit may be an adequate consideration for a settlement agreement which discharges the parties to a contract. What is important is that the settlement agreement must discharge all parties from further performance of the contract and it must encompass all terms agreed upon by the parties; either party must leave no terms for further exploitation.

10.0 CONCLUSIONS

10.1 This paper has discussed two aspects of construction contracts which are at times linked. Suspension of works is a course of action usually associated with the contractor but it has been demonstrated that "suspension" is essentially suspension of the performance of obligations under the contract. In the latter sense, "suspension" can be equally applicable to the employer. The consequences flowing from suspension are also discussed.

10.2 Even though a contractor cannot in general suspend the performance of the works upon non-payment by the employer, it has however been argued above that such a right to suspend should be recognised in law. Whether this will be upheld by an enlightened judiciary remains to be seen.

10.3 Termination of contracts is a large topic and justice cannot be fully realised in the confines of this paper. Termination by operation of common law and the exercise of a contractual right to determine are both discussed. Termination of contract by invoking the provision of termination clause (which is the more common of the two) is given more emphasis and the provisions of some standard forms of construction contracts commonly used in Malaysia are discussed. The discussion also touches on some more controversial aspects on the legality of termination and hopefully this can stimulate further discussion and exploration on this topic.

10.4 As the consequences of termination are quite considerable and can be felt for years after the termination is effected, it must naturally be handled with extreme care lest that what is intended is not realised with its consequent financial disaster.