

Legal Awareness In The Construction Industry

LET'S TALK ABOUT PAM 2006 AGAIN



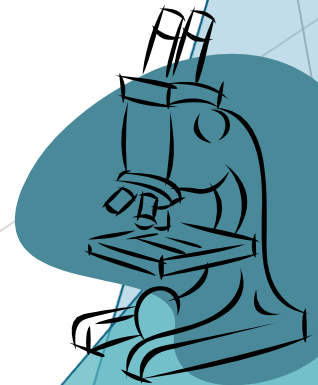
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INTRODUCTION

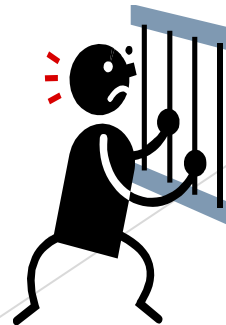
- ▶ This paper is prepared with the intention to :
- ▶ **Explore** the use of common Standard Forms of Contract in our local building industry particularly PAM Forms of Contract
- ▶ **Examine** the development and content of the PAM 2006 Forms of Contract and focusing on the duties of the respective parties
- ▶ **Discussing** the various practical issues and potential causes of disputes when using PAM 2006 Forms from the perspective of a “**Contract Administrator**”



Dispute Again!

- ▶ “Why don’t you judge for yourselves what is right?”
- ▶ As you are going with your adversary to the magistrate, try hard to be reconciled on the way, or your adversary may drag you off to the judge, and the judge turn you over to the officer, and the officer throw you into prison.”
- ▶ “I tell you, you will not get out until you have paid the last penny.”

- Lord Jesus, Luke 12:57-59



Contract Act, 1950 (Act 136) Revised 1974



What is a Contract?

Terms:

1. A Proposal , when accepted becomes a Promise
2. Made between promisor and promisee
3. Consideration?
4. Set of promises become an agreement
5. An agreement enforceable by law is a Contract.

Contract Administration

Contract Act 1950



Part X - Agency

- Section 135 An “**agent**” is a person employed to do any act for another or to represent another in dealing with third party.

Duties of an Agent (Section 164 to 178)

- Depend on the terms of the contract of agency.

Duties of Contract Administrator



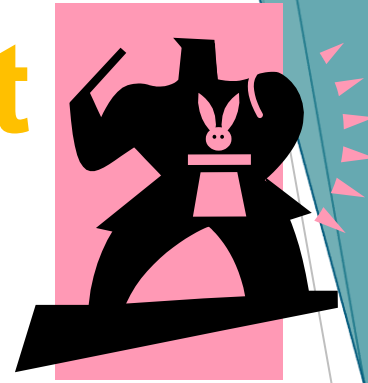
1. Employer's Agent

The Architect and the supporting Consultant team is engaged by the Employer to act as the Employer's agent according to the terms of engagement.

2. Independent Certifier

As independent certifier, the contract administrator must act independently with impartiality and fairness to discharge his professional duties according to the provisions of the Contract in a professional manner. He must acts fairly toward the contractor as an independent consultant.

Duties of Contract Administrator



3. Failure to act as Employer's Agent

The Architect and the supporting consultant team is duty bound to serve the Employer with reasonable skill and ability. They would be liable to the Employer if they are found to have failed in doing so and in breach of their professional obligations to the Employer.

4. Professional Negligence

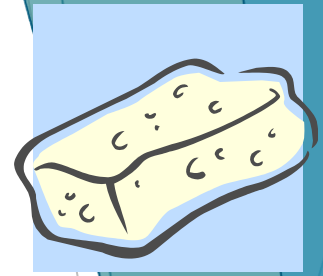
As independent certifier, the contract administrator must exercise his certifying function in good faith and to the best of his independent professional judgment without the influence from the Employer. Negligent in not properly administering the Contract may cause financial losses to the contractor who may seek contractual remedy by way of reference to arbitration or in common law.

Why Use Standard Forms ?

1. Familiarity and Uniformity

- ▶ By comparison, a Standard Forms with standardized conditions familiar to all parties will enable quicker preparation of tender documentation by Consultants, hopefully will shorten the whole tender preparation process.
- ▶ Using a Standard Forms may also accelerate the negotiation process between the parties who are assumed to be “very familiar” with the standard forms with standardized terms.
- ▶ It is also wishfully used as a convenience tool for smoother contract administration at construction stage as the parties particularly contract administrators are expected to be “very familiar” with the standardized provisions.

Why Use Standard Forms ?



▶ 2. Flexibility

- ▶ Nevertheless a standard form of contract can never satisfy all the expectations of all parties including the contract administrator.
- ▶ The Employer is looking for a comprehensive forms that will bind and move the contractor to complete the project at the standard as specified, within the agreed time frame and hopefully at the lowest possible cost according to his limited budget whereby at all time that the contractor should assume all kinds of risks.

Why Use Standard Forms ?

► 2. Flexibility (cont'd)

- But then the Contractor, naturally wishes for an unambiguous forms with very fair provisions to the contractors, defining clearly all the scope and quality of the works with favorable time frame for execution and most importantly smooth release of payments for work done in the quickest manner while the Employer is expected to bear most of the risks.
- While the Contract Administrator and his team would like to carry out their respective duties as effectively as possible without any signs of disputes and hopefully zero surprises until the full completion of the project.

STANDARD FORMS OF CONTRACTS

1. JKR Forms of Contracts 203A

- ▶ Mainly for government projects or use by government linked agencies

2. CIDB Forms of Contracts 2000

- ▶ Available since 2000 but less popular

3. IEM Forms of Contracts

- ▶ Used mostly for engineering works or projects headed by engineers

▶ 4. PAM Forms of Contracts

- ▶ Widely use in the private sectors especially projects headed by architects

▶ 5. Other International Forms of Contracts

- ▶ FIDIC, SIA, etc.

PAM FORMS OF CONTRACTS

▶ PAM/ISM 1969 Forms

- 1st local forms based on UK RIBA 63

▶ PAM 1998 Forms

- comprising PAM 98 (with quantities), PAM 98 (without quantities) and PAM 98 NSC
- launched in 1998 to replace PAM/ISM 69

▶ PAM 2006 Forms

- most current forms, introduced in 2007
- widely use in the private sectors
- comprising PAM2006 (with quantities), PAM2006 (without quantities) and PAM2006 NSC

PAM/ISM 1969 to PAM1998

PAM/ISM 1969 Forms (With Quantities)

3 Articles and **34** Clauses

PAM 1998 Forms (With Quantities)

35 clauses with a new **Clause 35** added to allow for alternative method of dispute resolution through **Mediation**.

There are also noticeable changes in certain Sub-Clauses within the Main Clauses.

This forms, nevertheless was still seen as an upgraded version of the PAM/ISM 1969 as it still retained most of the existing Clauses.

PAM/ISM 1969, PAM1998 and 2006

From PAM 1998 to PAM 2006

Changes in PAM1998 which were still being retained in PAM2006 Articles of Agreement (With Quantities):

- 4 new articles added to define the roles of supporting consultants (Article 4, 5 & 6) and to provide clearer definitions (Article 7)
- However the Employer is now made responsible to appoint succeeding consultants within a specified period (28 days) to ensure continuity.
- In 1998 Forms, such reappointment still have to make through nomination that can be objected by contractor through arbitration.
- In 2006 Forms, this right of objection has been completely removed.

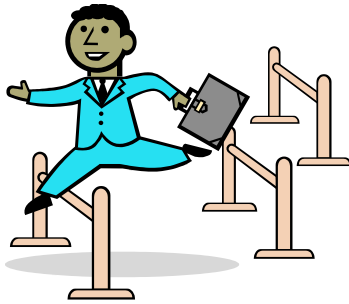
PAM 2006 FORMS OF CONTRACTS

Conditions of Contract (Generally)

1. More procedural in term of notice requirements and time limit compliance by the relevant parties
2. Provide more grounds for possible disputes if not handle properly
3. May increase unnecessary exposure of Consultants being liable for negligence as contract administrator
4. May provide more grounds for both contracting parties to make additional financial claims against each other if they can find the clue

PAM 2006 – Allocation of risks

- ▶ A fair and balanced form of contract will be one that endeavors to allocate risks to the appropriate party who can best manage the risks.
- ▶ Passing more risks unnecessarily to one party namely the contractor may not necessarily benefit the employer !!!
- ▶ If contractors can not assess properly the risks, they will conveniently try to price the item(s) excessively for assuming such risks to cover themselves financially.
- ▶ Or worst, underpriced such risks and this may lead to unnecessary disputes between the contracting parties
- ▶ So, how to decide who should take on certain risk?



Challenges faced by the Contract Administrator

1. As a **"faithful agent"**, to safe guard the Employer's rights and also to provide proper advice to the Employer on fulfilling contractual obligations according to the contract provisions.
2. As an **"Independent certifier"**, to discharge his professional duties by exercising his power accordingly in an timely and impartial manner to comply with the procedural requirement under the contract.

PAM2006 ARTICLES OF AGREEMENT

This is the core section that supposed to spell out the intention of the parties to enter into a contract.

- ▶ Article 1 stated the primary obligation of the Contractor is to “carry out and complete the Works” subject to the Contract. Also see Clause 1.1.
- ▶ Article 2 stated the primary obligation of the Employer is to pay the Contractor at the times and in the manner specified in the Contract. See the relevant Clauses.
- ▶ Article 3 to 6 defined the roles of Architect, Engineers, Quantity Surveyor and “Specialist Consultant”.
- ▶ Article 7 and 8 provide the definitions of the words and expressions used in the Contract Document.

Duties of the Parties under PAM 2006

- ▶ Contract Administrator's duties to act in compliance with the Provisions
- ▶ Employer's Duties to act in compliance with the Provisions
- ▶ Contractor's duties to act in compliance with the Provisions

PAM 2006 Condition of Contract ⁽¹⁾

- ▶ Clause 1.0 – Contractor's Obligation
- ▶ Clause 2.0 – Architect's Instruction (AI)
- ▶ Clause 3.0 – Contract Documents, Programme And As-built Drawing
- ▶ Clause 4.0 – Statutory Obligations, Notices, Fees And Charges
- ▶ Clause 5.0 – Levels And Setting Out Of The Works
- ▶ Clause 6.0 – Materials, Goods and Workmanship To Conform To Description , Testing And Inspection
- ▶ Clause 7.0 – Royalties And Intellectual Property Rights
- ▶ Clause 8.0 – Site Agent
- ▶ Clause 9.0 – Access To The Works
- ▶ Clause 10.0 – Site Staff
- ▶ Clause 11.0 – Variations, Provisional and Prime Cost Sums

PAM 2006 Condition of Contract ⁽²⁾

- ▶ Clause 12.0 – Contract Bills
- ▶ Clause 13.0 – Contract Sum
- ▶ Clause 14.0 – Materials and Goods
- ▶ Clause 15.0 – Practical Completion And Defects Liability
- ▶ Clause 16.0 – Partial Possession By Employer
- ▶ Clause 17.0 – Assignment And Sub-Contracting
- ▶ Clause 18.0 – Injury To Person Or Loss And/Or Damage Of Property and Indemnity To Employer
- ▶ Clause 19.0 – Insurance Against Injury To Person And Loss And/Or Damage Of Property
- ▶ Clause 20.A – Insurance Of New Buildings/Works – By The Contractor
- ▶ Clause 20.B – Insurance Of New Buildings/Works – By The Employer

PAM 2006 Condition of Contract ⁽³⁾

- ▶ Clause 20.C – Insurance Of Existing Buildings Or Extension – By The Employer
- ▶ Clause 21.0 – Date of Commencement, Postponement And Completion Date
- ▶ Clause 22.0 – Damages For Non-Completion
- ▶ Clause 23.0 – Extension Of Time
- ▶ Clause 24.0 – Loss And/Or Expenses Caused By Matters Affecting the Regular Progress Of the Works
- ▶ Clause 25.0 – Determination Of Contractor's Employment By Employer
- ▶ Clause 26.0 – Determination Of Own Employment By Contractor
- ▶ Clause 27.0 – Nominated Sub-Contractors
- ▶ Clause 28.0 – Nominated Suppliers

PAM 2006 Condition of Contract ⁽⁴⁾

- ▶ Clause 29.0 – Works By Craftsmen, Tradesmen Or Other Contractors Employed Or Engaged By Employer
- ▶ Clause 30.0 – **Certificates And Payment**
- ▶ Clause 31.0 – Outbreak Of Hostilities
- ▶ Clause 32.0 – War Damage
- ▶ Clause 33.0 – Antiquities
- ▶ Clause 34.0 – Adjudication And Arbitration
- ▶ Clause 35.0 – Mediation
- ▶ Clause 36.0 – Notice
- ▶ Clause 37.0 – Performance Bond
- ▶ Clause 38.0 – Governing Law

Clause 1.0 Contractor's Obligation

- ▶ Clause 1.1 – Completion of Works in accordance with Contract Documents
- ▶ Contractor shall carry out and complete the “Works” Subject to the “Conditions” and in accordance with the “Contract Documents”. Further emphasizing Article 1.
- ▶ Contractor is not responsible for the suitability and adequacy of the designs except for the design of temporary works
- ▶ Issues? Question of quality and standard. Refer Clause 6.1, 6.2, 6.3, 6.4 & 6.8. See Clause 30.16 (conclusiveness).
- ▶ Quality and standard “as described” in the Contract Documents and not “to the reasonable satisfaction of the Architect” as per PAM98.

Clause 1.2 Temporary Works and Construction Methods

- ▶ Unless specified by the Consultants, the Contractor is responsible for the design of all temporary works.
- ▶ Contractor also fully responsible for his own methods of construction.

Issues: who is the designer?

* Be very careful to ensure that any changes proposed by contractor shall be at his own risk and costs !!!

- ▶ Approval for alternative to original approved method which already formed part of the contract, may constitute as instruction for variation.
- ▶ Ditto for Instruction by consultant to alter method

Clause 1.3 Contractor's Design and responsibility

- ▶ “Duty of care” – to use reasonable skill and care
- ▶ For design and build – “Fit for its purpose”
- ▶ Acceptance by Consultant shall not relieve the Contractor of his responsibilities under the Contract
- ▶ Traditional “Bolam” test v “Rogers” test
- ▶ Bolam v Friern Hospital Management Committee
- ▶ Federal Court case - Foo Fio Na v Dr Soo Fook Mun[2007] refer to:
- ▶ Rogers v Whitaker [1992] Australian case
- ▶ “Ordinary skilled person standard set by the Court”
- ▶ Issues: How about the Copyright of the alternative design for future construction?

Clause 1.4 Discrepancy or divergence between documents

- ▶ Contractor shall use the Contract Documents to plan the Works prior to execution
- ▶ If finds any discrepancy, shall give written notice to the architect in sufficient time before the commencement of the affected work
- ▶ This is to enable the architect to issue written instruction within a period that would not materially delay the progress of the affected work, having regard to the Completion Date.
- ▶ Issue: What is the “standard of duty” to report the discrepancy by Contractor?

Clause 2.0 Architect's Instruction

- ▶ Under PAM 98, no requirement for AI to be in any particular form, as long as it is in “writing”
- ▶ Requirement “to confirm verbal instructions within 7 Days” and will take effect if the architect does not dissent within another 7 Days.
- ▶ Also the requirement to comply with AI within 7 Days
- ▶ But these provisions are not practical for contract administration purpose. WHY?

Clause 2.0 Architect's Instruction

- ▶ Clause 2.1 **Contractor to comply with all AI**, of which the Architect is expressly empowered to issue instructions
- ▶ Clause 2.2 All instructions issued shall be in writing expressly entitled AI.
- ▶ All other written forms including drawings shall be an AI either upon written confirmation from Contractor (CAI) or upon subsequent confirmation by the Architect.
- ▶ To serial numbering each AI/CAI for easy tracking.
- ▶ **Issue: Architect's power to issue any instruction?**

Clause 2.0 Architect's Instruction

- ▶ Clause 2.3 Provisions empowering instructions
- ▶ Upon receipt of a written instruction, the Contractor may request the Architect to specify in writing which provision empowering the issue of such instruction
- ▶ The Architect shall forthwith comply with such request
- ▶ If the contractor thereafter complies without challenge, the instruction shall be deemed to have been given under that specified provision

Clause 2.0 Architect's Instruction

- ▶ Clause 2.4 Failure of contractor to comply with AI
- ▶ Time of compliance can be specified by the Architect but shall not be less than 7 Days from receipt of AI
- ▶ If the Architect require the Contractor to carry out emergency work in order to comply with statutory requirement , then 7 Days requirement will not apply as Clause 4.1 shall take precedence.
- ▶ If Contractor fails to comply, Employer may employ and pay other Person to execute the AI and “set-off” the cost and additional cost with the Contractor. (Clause 30.4)

Clause 2.0 Architect's Instruction

► Some important AI are:

- 1.4 Discrepancy or Divergence between documents,
- 3.4 Further Drawings for details (further? Timing?),
- 3.5 Request Contractor to Revise Works Program,
- 4.3 Confirmation of Inconsistencies with statutory requirements,
- 4.4 Settlement of Fees, levies and charges,
- 5.1 Setting out,
- 6.2 Provision of Vouchers or other evidence,
- 6.3 Inspection and Testing (who to pay the cost ?),
- 6.5 Works not in accordance with the Contract,

Clause 2.0 Architect's Instruction

- ▶ The most important AI are: (Cont'd)
- ▶ 7.2 Infringement of Royalties and intellectual property right,
- ▶ 8.3 Exclusion of person employed by Contractor(who are they?),
- ▶ 11.2 Instruction for variations,
- ▶ 11.3 Issue of variations after CPC,
- ▶ 11.4 AI on PC Sums and Provisional Sums,
- ▶ 12.2 Correction of errors or omissions (Lump Sum Contract),
- ▶ 15.4 Schedules of defects (not later than 14days after DLP),
- ▶ 15.5 Instructions To make good defects (any time before),
- ▶ 16.3 To remove equipment upon partial possession,
- ▶ 21.1 Commencement and Completion (delay),
- ▶ 21.4 Postponement or suspension of Works,

Clause 2.0 Architect's Instruction

- ▶ The most important AI are: (Cont'd)
- ▶ 23.3 **Insufficient Information for EOT application** (28days),
- ▶ 25.4 **Instruction to Contractor to remove temporary building, plant & etc. upon determination of employment,**
- ▶ 25.7 **Records of Works** (within 28days joint recording),
- ▶ 27.1 **Nominated Sub-Contractors** (PC and provisional Sums),
- ▶ 27.4 Action following objection to nomination of NSC ,
- ▶ 27.11 Re-nomination of NSC due to determination of Contractor,
- ▶ 27.12 Ditto due to determination of NSC
- ▶ 28.1 Nominated Supplier
- ▶ 28.4 Action following objection to nomination of NS.

Clause 3.0 Contract Documents, Program & As-built Drawing

▶ Clause 3.1 – Contract Documents

- ▶ Following descending order, i.e. Letter of Award, etc.
- ▶ Therefore, pay more attention to the drafting of Letter of Award.

▶ Clause 3.2 – Custody of tender documents

- ▶ Original shall remain with consultants. WHY?

▶ Clause 3.3. – Copies of documents

- ▶ one original signed copy to Contractor. How many copy?

▶ Clause 3.4 – Further drawings or details

- ▶ Contractor to request in sufficient time to enable the Architect to issue instructions within a period which would not materially delay the progress of the affected works
“having regard to the Completion date”

Clause 3.0 Contract Documents, Programme & As-built Drawing

- ▶ Clause 3.5 – Work Programme
 - ▶ **Standard time period is 21 Days from receipt of LA**
 - ▶ Standard requirement is six (6) copies, unless require more
 - ▶ **Shall provide to the Architect for his information from time to time**
- ▶ Clause 3.6 – Programme not part of Contract
 - ▶ **NOT CONSTITUTE PART OF CONTRACT even physically incorporated into Contract Documents.**
- ▶ Clause 3.7 – Architect's acceptance of programme
 - ▶ **The acceptance by the Architect does not relieve the Contractor from responsibilities under the Contract.**
- ▶ Clause 3.8 – Availability of documents
- ▶ Clause 3.9 – Limitation of use of documents
- ▶ Clause 3.10 – As-built drawings

Clause 4.0 Statutory Obligations, Notices Fees & Charges

- ▶ Clause 4.1 – Statutory requirements
- ▶ Clause 4.2 – Inconsistencies with statutory requirements
 - ▶ Contractor has a “duty to notify in writing” before commencement of the affected works
- ▶ Clause 4.3 – Conforming to statutory obligations
 - ▶ Contractor To proceed as variation if no AI received from Architect within 7 days
- ▶ Clause 4.4 – Fees, levies and charges
 - ▶ If Contractor fails to pay, * Employer may pay and “set-off” Clause 30.4
 - ▶ Issue: Clause 4.3, to proceed or wait?
 - ▶ Discuss “Any changes so necessitated shall be deemed to be a variation required by the Architect”

Clause 5.0 Levels & Setting out

- ▶ Clause 5.1 – Setting out
- ▶ Architect shall provide all drawings and information to enable the Contractor to set out the Works
- ▶ To use licensed surveyor to verify if specified in Contract Bill but Contractor remain liable
- ▶ Contractor to rectify errors at his own costs
- ▶ *With consent from Employer, Architect may accept any wrong setting out subject to an appropriate deduction to be set-off by Employer. (Clause 30.4)
- ▶ Issue: What is the appropriate value of deduction?

Clause 6.0 Materials, Goods and Workmanship

- ▶ 6.1 Standards of works, materials, goods and workmanship
- ▶ 6.2 Provision of vouchers
- ▶ 6.3 Inspection and testing
- ▶ 6.4 Contractor's obligation not relieved
 - ▶ **Refer Clause 30.16 final certificate not conclusive**
- ▶ 6.5 Works not in accordance with the Contract
 - ▶ **a) To remove** from or not bring to site such materials;
b) to demolish and reconstruct ; **c) To rectify** with no cost adjustment; **d) to submit method statement** within 7 days proposal to rectify for acceptance or rejection;
 - ▶ **e) *with consent of Employer**, accept as it is subject to set-off. (Clause 30.4)

Clause 6.0 Materials, Goods and Workmanship

- ▶ 6.6 No compensation for time and cost

- ▶ Compliance with AI under 6.5 offer no compensation

- ▶ 6.7 Failure of Contractor to comply

- ▶ *Employer may employ other to execute and set-off as per Clause 30.4. Option to determine under Clause 25.1(d).

- ▶ 6.8 Warranties in respect of materials and goods

- ▶ Refer clause 30.15 final certificate not conclusive evidence in accordance with the Contract

Clause 10.0 Site Staff

▶ 10.1 Duty of Site Staff

- ▶ Employer to appoint “such number of site staff”
- ▶ From time to time as the Employer deem necessary
- ▶ Shall act as inspectors under the direction of Architect
- ▶ Contractor shall provide “reasonable facilities”

▶ 10.2 Directions given by Site Staff

- ▶ Shall be of no effect unless given in writing and only in regard to a matter expressly authorized by Architect in writing
- ▶ Discuss: “All such directions involving a variation will have no effect unless confirmed by an AI.”

Clause 11.0 Variations, Provisional and Prime Cost Sums

▶ 11.1 Definition of Variation

- ▶ a) addition, omission or substitution of any work
- ▶ b) alteration of kind or standard of any materials and goods
- ▶ c) removal from Site any work executed or materials and goods brought thereon for the purposes of the Works
- ▶ d) any changes to the provisions in the Contract with regards to:
 - ▶ i) any limitation of working hours
 - ▶ ii) working space
 - ▶ iii) access to or utilization of any specific part of the Site
 - ▶ iv) the execution and completion of the work in any specific order
- ▶ Issue: Shall exclude changes intended to rectify any negligence, omission, default and/or breach of contract by Contractor. (Clause 6.5)

Clause 11.0 Variations, Provisional and Prime Cost Sums

- ▶ 11.2 No Variation required by the Architect shall vitiate Contract
 - ▶ **The Architect may issue** an AI ordering a Variation or sanctioning any Variation **made by the Contractor**
 - ▶ “No Variation shall vitiate the Contract”
 - ▶ **Issue:** Pending valuation of the Variations, **the Contractor** shall carry out with due diligence and expedition all Variations so instructed. **WHY?**
- ▶ 11.3 Issue of Variations after Practical Completion new
 - ▶ **“Must be necessitated by”** obligations or compliance with the requirements of any Authority and Service Provider

Clause 11.0 Variations, Provisional and Prime Cost Sums

- ▶ 11.4 AI on p.c. Sums and Provisional Sums
 - ▶ Works under a Provisional Sum can be **carried out by the Contractor as a Variation**,
 - ▶ Or can be converted to a P.C. Sum
 - ▶ Unless the item of work is covered by a P.C. Sum or a Provisional Sum, the Architect cannot issue an instruction to nominate a sub-contractor or a supplier.
 - ▶ **Discuss: Any such instructions for works required to be carried out by any particular sub-contractor or supplier shall be issued to the Contractor as a Variation.**

Clause 11.0 Variations, Provisional and Prime Cost Sums

▶ 11.5 Valuation of Variation and Provisional Sums

- ▶ The Contractor shall provide assistance to the Quantity Surveyor on recording of site information and/or site measurements

▶ 11.6 Valuation Rules

- ▶ a) similar character and condition, Contract rates
- ▶ b) similar character but not similar condition, fair adjustment
- ▶ c) not similar character, fair market rates
- ▶ d) cannot properly measured and valued, based on
 - ▶ - day work rates
 - ▶ - actual costs plus 15%
- ▶ e) Valuation of items omitted follow similar rules as above
- ▶ d) provisional quantities shall be re-measured by Quantity Surveyor

Clause 11.0 Variations, Provisional and Prime Cost Sums

- ▶ 11.7 Additional expenses caused by Variation
- ▶ If un-claimable under any provisions in Clause 1.6, the Contractor may make a claim for any additional expenses actual or likely to be caused by a Variation, #Example
- ▶ **Procedure to follow under this clause:**
- ▶ 11.7a) Contractor to give written notice of intention with initial estimate within 28 days from the date of AI or CAI as a condition precedent to any entitlement of such claim,
- ▶ 11.7b) Within 28 days of completing the Variation, Contractor to send complete particulars of claim.
- ▶ If he fail to do so even within any extended period as may be agreed in writing by the Architect, it shall be deemed that the Contractor has waived his rights to such additional expenses.

Clause 11.0 Variations, Provisional and Prime Cost Sums

- ▶ 11.8 Access to Contractor's books and documents
- ▶ **The Contractor is required** to keep relevant records to substantiate any claims **and make readily available for checking** as and when required by Consultants
- ▶ 11.9 Variations and additional expenses added to Contract Sum
- ▶ As soon as the amount of Variations and/or additional expenses is ascertained, these shall be added to the Contract Sum and can be included in subsequent Interim Certificate.
- ▶ **Discuss: Ascertainment of amount.**

Clause 12.0 Contract Bills

- ▶ 12.1 Measurement of building works
 - ▶ According to current SMM unless stated otherwise
- ▶ 12.2 Correction of errors or omissions
 - ▶ Any error in description, quantity or omission of items shall not vitiate the Contract and shall be corrected by the Consultant.
 - ▶ Issue: The original Clause 12.2. (deleted)
 - ▶ Discuss : "Nothing contained in the Contract Bills shall override, modify or affect in any way whatsoever the application or interpretation of which is contained in these Conditions."

Clause 14.0 Materials and Goods

- ▶ 14.1 Materials and goods not to be removed
- ▶ Once *delivered to site for *incorporation into permanent works, shall not be removed until completion of the Works unless *with prior consent in writing from the Architect
- ▶ 14.2 Materials and goods included in certificates
- ▶ Once the value has been included in certificates and Employer effected payment, *such shall become the property of the Employer
 - ▶ Sales of Goods Act 1957, Section 25(1) – “retention of title”
 - ▶ Compare PAM1998 provisions.

Clause 14.0 Materials and Goods

- ▶ 14.3 Responsibility for materials and goods
 - ▶ Once delivered to site and included in certificates, **the Contractor is responsible for** any loss and/or damage for such materials and goods including supplied by NSC and NS
- ▶ 14.4 Warranty of title of goods and Materials
 - ▶ **The Contractor shall be deemed** to have warranted that he has valid title to such goods and materials delivered to site as he has included such value in his application for payments under Clause 30.1.
 - ▶ If false warranty, **any loss suffered by the Employer shall be made good by the Contractor or shall be set-off under Clause 30.4.**

Clause 15.0 Practical Completion and Defect Liability

▶ 15.1 Practical Completion and Defects Liability

▶ Practically completed when:

▶ 15.1(a)

▶ “In the opinion of the Architect”;

- 1. The Employer can have full use of the Works for their intended purposes;
- 2. May be works and defects of a minor nature still to be executed/rectified;
- 3. Contractor has given a written undertaking to the Architect to make good and complete *within a reasonable time specified by the Architect;

▶ And,

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.1 Practical Completion and Defects Liability
- ▶ 15.1(b)
 - 1. Contractor had complied with other pre-requisite requirements for the issuance of CPC;
 - 2. Must be expressly stated in the Contract Documents
- ▶ Examples: Testing and commissioning of M & E equipment, operation manuals, as-built drawings, etc.

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.2 Certificate of Practical Completion
- ▶ **Contractor to give written notice to the Architect**
- ▶ Architect to decide within 14 days either :
- ▶ “In the opinion of the Architect”:
- ▶ 15.2(a) Not practically completed and give notice stating reasons and copied to NSCs
- ▶ 15.2(b) Practically completed and issue CPC
- ▶ Date of CPC either :
 - ▶ (i) **date of receipt of Contractor's written undertaking to make good minor defects** or (ii) **date of receipt of Contractor's notice if no defects.**

Clause 15.0 Practical Completion and Defect Liability

- ▶ Significance of Certificate of Practical Completion:
- ▶ 1) Signals completion of the Works,
- ▶ 2) Allows Employer to take possession of completed Works,
- ▶ 3) Triggers commencement of DLP & period to complete Final account,
- ▶ 4) Entitles Contractor to receive half of Retention Fund.
- ▶ 5) Marks the end of Contractor's liability to LAD.

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.3 Contractor's failure to comply with undertaking
- ▶ The Employer may without prejudice:
- ▶ (a) grant additional ex-gratia time *to be specified by the Architect,
- ▶ (b) employ and pay other Person to execute the same and set-off under Clause 30.4 the costs including loss and/or expense
- ▶ (c) accept to leave all or any such works and defects of a minor nature subject to appropriate set-off under Clause 30.4.
- ▶ Issue: what is appropriate set-off value?

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.4 Schedule of Defects
- ▶ Schedule shall deliver to Contractor not later than 14 days after expiration of DLP.
- ▶ Contractor shall make good within 28 days (or period agreed in writing by Architect)
- ▶ Failure then either employer can pay other Person and set-off or leave the defects but deduct and set-off
- ▶ As alternative, employer can also recover all costs incurred under common law.
- ▶ Discuss: time period. Mandatory or Directory?

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.5 Instruction to make good Defects
- ▶ Any time during DLP, Architect may issue AI requiring urgent rectification of critical Defects
- ▶ Contractor to make good "within a reasonable time" specified by Architect at Contractor's cost
- ▶ Failure, Employer may employ and pay other Person to rectify and set-off under Clause 30.4

Clause 15.0 Practical Completion and Defect Liability

- ▶ 15.6 Certificate of making good Defects
- ▶ Contractor to give written notice
- ▶ Architect to decide within 14 days either :
- ▶ In the opinion of the Architect:
- ▶ 15.6(a) no defects or already make good and issue CMGD
- ▶ 15.6(b) not make good yet and give notice stating reasons
- ▶ Issue: time period. Mandatory or directory?

Clause 16.0 Partial Possession By Employer

- ▶ 16.1 Possession of Occupied Part with consent
- ▶ Any time before Practical Completion, if Employer wish to take possession and occupy any part of the Works and with Contractor 's consent obtained:-
- ▶ Employer may take possession of Occupied Part:
- ▶ a) within **14days** to issue Certificate of Partial Completion with estimate of approximate total value of occupied part,
- ▶ b) for purpose of 15.4, 15.5 and 16.1(f), **PC deemed occurred and DLP in respect deemed commenced**

Clause 16.0 Partial Possession By Employer

- ▶ 16.1 Possession of Occupied Part with consent
- ▶ c) LAD under 22.1 shall be reduced by ratio,
- ▶ d) upon issue the CPC, within **14days** to issue a certificate to release half the amount of Retention Fund in ratio and reduce limit of retention,
- ▶ e) issue Certificate of making Good Defects of occupied part if achieved in opinion of Architect,
- ▶ f) upon issuance of CMGD, within **14days** issue certificate for release of remaining amount of Retention Fund for Occupied Part.

Clause 16.0 Partial Possession By Employer

- ▶ 16.2 Possession of Occupied Part without consent
- ▶ Any time before Practical Completion, if Employer wish to take possession and occupy any part of the Works and **without Contractor 's consent:-**
- ▶ Employer may take possession of Occupied Part:
 - ▶ a) has been delayed and CNC issued under 22.1,
 - ▶ b) can be effected without any unreasonable disturbance to the progress of the **Contractor's remaining Works**
- ▶ Provisions of 16.1(a) to 16.1(f) shall apply

Clause 16.0 Partial Possession By Employer

- ▶ 16.3 Contractor to remove equipment
- ▶ Upon written instruction of Architect
- ▶ **Contractor** to remove his site facilities, etc. from Occupied Part under 16.1 or 16.2
- ▶ **Timing?**

Clause 17.0 Assignment and Sub-Contracting

▶ 17.1 Assignment by Employer

- ▶ Other than assignment to financial institution, must obtain written consent of Contractor (which shall not be unreasonably delayed or withheld)

▶ 17.2 Assignment by Contractor

- ▶ Other than assignment to financial institution, must obtain written consent of Employer (at sole discretion of Employer)

▶ 17.3 No Sub-contracting

- ▶ Not wholly or substantially sub-contract the Works.
- ▶ Except sub-contract labor only; skilled or semi-skilled

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.1 Commencement and Completion
- ▶ Site possession is given on Date of Commencement.
- ▶ If Employer delay in giving possession, the Architect shall grant EOT under 23.8(f).
- ▶ Provided not exceeded the Period of Delay in Appendix (*default period is 3 continuous months), the Contractor shall not be entitled to determine his own employment.
- ▶ However Contractor may recover any loss and/or expenses incurred under 24.3(b)

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.1 Commencement and Completion
- ▶ If the Period of Delay exceeded the stated period in Appendix, **the Contractor will have the right to treat this** as a repudiation of the Contract by Employer.
- ▶ **The Contractor can also** choose to determine his own employment under 26.1(d)(i) by following the procedure as provided under 26.2, namely:
 - ▶ - 1. **serves** written notice specifying the default;
 - ▶ - 2.If default continue for 14 days then serve further notice within 10 days to determine himself.

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.1 Commencement and Completion
- ▶ Concept of Site possession
- ▶ [only given the license to occupy the site as long and as necessary to enable him to carry out the Works.]
- ▶ - *London Borough of Hounslow v Twickenham Garden Development* 1981
- ▶ - *Kong Wah v Desplan* 1991
- ▶ [The Contractor's right to occupy the site is only as long as his employment and as far as his terms of employment allowed]

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.1 Commencement and Completion
- ▶ Failure to grant the Contractor the necessary entry to or exit from the Site as long as it is related to land under the control of **the Employer**, may also be a ground for an EOT under 23.8(u) and loss and/or expense under 24.3(I).
- ▶ Mobilization period should be spelt out and carefully determine, depend on size and complexity of Works
- ▶ May change the commencement date before the expiry of mobilization period to avoid incurring extra cost.

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.2 Sectional Commencement Dates
- ▶ If different sections of the Site were to be given on different dates, this information must be properly made known so that the Contractor can price and plan ahead accordingly, otherwise consider breach of contract.
- ▶ Sectional Completion can be introduced depend on the requirement of Employer, regardless of hand over date of the Site to the Contractor, whether as a whole or in sections.

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.3 Sectional Completion Dates
- ▶ If Sectional Completion occurs, the Architects shall issue Certificate of Sectional Completion.
- ▶ Provisions regarding CPC and DLP under 15.0, EOT under 23.0, LAD under 22.0 and release of retention Fund under 30.6 shall apply where applicable
- ▶ Always allow for necessary and appropriate changes as if each of the section was a separate contract by itself.

Clause 21.0 Date of Commencement, Postponement and Completion Date

- ▶ 21.4 Postponement or suspension of the Works
- ▶ This is an important clause as it empower the Architect to issue AI to postpone or suspend all or any part of the Works for a continuous period of delay as stated in the Appendix. (Default period 3 months)
- ▶ If the suspension exceeded the stated period, **the Contractor will have the right to determine his own employment under 26.1(d).**
- ▶ During the suspension, Architect is to ensure the validity of full insurance coverage (separate cessation insurance if applicable) either under Contractor (20.A) or Employer (20.B or 20.C)

Clause 22.0 Damages For non-Completion

- ▶ 22.1 Liquidated Damages and Certificate of Non-Completion
- ▶ If the Architect is of the opinion that the Works had been delayed beyond the “Completion Date”, the Architect shall issue a Certificate of Non-Completion.
- ▶ Upon issuance of CNC, **the Employer** shall have the right to recover LD from the Contractor either:
 - ▶ - directly on demand or
 - ▶ - deduct from payment payable or
 - ▶ - if insufficient , to recover from performance bond.
- ▶ **The last resort will be to recover as a debt from the Contractor.**

Clause 22.0 Damages For non-Completion

- ▶ 22.1 Liquidated Damages and Certificate of Non-Completion
- ▶ Now LD shall be calculated to exclude the gazetted holidays at the location of the site.
- ▶ The Architect has the duty to advise on the amount of LD that the Employer is entitled to deduct from any sums payable to the Contractor.
- ▶ The Employer shall inform the Contractor in writing of their intention to impose LD even if the recovery of such sums will not be effected immediately
- ▶ Under 30.17 Employer is also entitled to charge interest upon expiry of stated period from receipt date of the written notification if such sums still remain unpaid.

Clause 22.0 Damages For non-Completion

- ▶ 22.1 Liquidated Damages and Certificate of Non-Completion
- ▶ The construction of this Clause now confirmed the existing practice that it is the responsibility of Employer to recover the LAD from the Contractor, as such imposition of LD shall not be taken into account in the issuance of payment certificates and Final Certificate.
- ▶ Discuss: This Clause also specifically stated that the imposition of LD by the Employer is not subject to the set-off procedures under 30.4 and adjudication.

Clause 22.0 Damages For non-Completion

- ▶ 22.2 Agreed Liquidated Damages amount
- ▶ The term is now officially LD, follow the term used in law cases and most recent form of contracts.
- ▶ “A genuine pre-estimate of loss and/or damage”
- ▶ - *Selvakumar v Thiagarajah* [1995]
- ▶ Federal Court held that there is no distinction between liquidated damages and penalty and that **Section 75 of the Contract Act 1950** put the burden on the party wishing to impose the liquidated damages clause to prove his loss.
- ▶ “What the court needs to determine, in the absence of proof of actual loss, is what is the reasonable compensation, applying good sense and fair play.”

Clause 22.0 Damages For non-Completion

- ▶ **22.3 Certificate of Non-Completion revoked by subsequent Certificate of Extension of Time**
- ▶ Subsequent Certificate of EOT issued under 23.4, 23.9, 23.10 will automatically revoke the CNC.
- ▶ “The Employer must revise the LD amount he is entitled to deduct/retain based on the new Completion Date.”
- ▶ If repayment need to be made, it shall be repaid within the period of Honouring Certificates.
- ▶ The Architect is also empowered to issue further CNC if the Works is still not completed by the new Completion Date.

Clause 23.0 Extension of Time

- ▶ **EOT clauses** are important provisions intended to protect the interest of the Employer, essentially to preserve the right to recover LD in the event that delay was caused by the Employer's default (including his agent i.e. Architect, etc.).
- ▶ Without such clauses, “Architect will have no power to grant EOT” and thus unable to issue relevant AI that may have a direct impact on the progress of Works, otherwise as a result ,time will become “at large”.
- ▶ Then, the Contractor's obligation will be only to complete the Works within a reasonable time and not liable for LD. However he is still liable for general damages under common law if proven so by Employer.

Clause 23.0 Extension of Time

- ▶ EOT clauses based on neutral events that are beyond the control of either party, such as 23.8(a), (b), (c), (d), (n), (p) and (q), may seemed to benefit the Contractor more than the Employer.
- ▶ However based on the concept of risk management, if such grounds are to be deleted, then Contractor will have no choice but to price for possible LD liabilities due to delay caused by such relevant events which may not benefit the Employer after all.
- ▶ Discuss: In the case of delay caused by several concurrent events, the preference for granting of EOT based on neutral event may limit the Contractor's entitlement to claim for loss and/or expense under Clause 24.

Clause 23.0 Extension of Time

- ▶ 23.1 Submission of notice and particulars for extension of time
- ▶ This Clause has expressly stated that submission of written notice of intention within a stated time frame by Contractor is a condition precedent to entitlement of EOT whereby the application process must follow the procedures stated under 23.1(a) and 23.1(b)
- ▶ The Contractor, being the party responsible for the execution of the Works, is therefore obliged to alert the Architect within the stated time frame, if in his opinion that the completion of the Works will be delayed beyond the Completion Date, due to any of the Relevant Events stated in Clause 23.8.

Clause 23.0 Extension of Time

- ▶ 23.1 Submission of notice and particulars for EOT
- ▶ 23.1(a) – written notice of intention with initial estimate of EOT and relevant particulars, given within 28 days from the date of AI, CAI or commencement of the Relevant Event, whichever is earlier.
- ▶ 23.1(b) – final claim for EOT, given within 28 days (or longer approved period) at the end of the cause of delay to enable Architect to do assessment.
- ▶ Failure to do so shall be deemed that the Contractor has assesses that such Relevant Event will not delay the completion of the Works beyond the Completion date.
- ▶ - *Bremer v Vanden*[1978], “without delay”

Clause 23.0 Extension of Time

- ▶ 23.1 Submission of notice and particulars for extension of time
- ▶ – *Gaymark Investment v Walter Construction Group* (1999), “Prevention principle”
- ▶ - *City Inn v Shepherd Construction [2001]*, “Failure to comply with notice condition, regarded as breach of contract”
- ▶ - *Multiplex Construction (UK) Ltd v Honeywell Systems Ltd [2007]*, “try to rely on *Gaymark* principle to argue that LD clause was not valid and time at large due to failure to comply with condition precedent to EOT”
- ▶ Discuss: Clause 23.5 now provide solution to prevent *Gaymark* situation

Clause 23.0 Extension of Time

- ▶ 23.2 Delay by Nominated Sub-Contractor
- ▶ The Contractor shall extend a copy of his application notice with reference to NSC's intention to claim for EOT (within 7 days of receipt of such written notice from NSC) to NSC (PAM 2006 NSC Clause 21)
- ▶ 23.3 Insufficient information
- ▶ The Architect shall respond to Contractor's submission under 23.1(b) within 28 days, inform of any deficiency and may request further particulars within a further 28 days (or such stated period)

Clause 23.0 Extension of Time

- ▶ 23.4 Certificate of Extension of Time
- ▶ The Architect, upon receipt of sufficient particulars, shall decide **within 6 weeks** subject to 23.5, 23.6 and 23.8, either to reject or to issue a Certificate of Extension of Time
- ▶ Check “validity “, “sufficiency” and “relevancy”
- ▶ **Discuss: Interim decision**
- ▶ Effect of : Clause 23.10 that empower the Architect to either review or not to review the extension of time granted within 12 weeks of the date of Practical Completion
- ▶ May issue the decision before or after the Completion Date

Clause 23.0 Extension of Time

- ▶ 23.5 Other consideration for extension of time
- ▶ (a) effect or extent of any works omitted, provided not fixed a earlier completion date;
- ▶ (b) any other Relevant Events which in the Architect's opinion will have an effect on the Contractor's entitlement to an extension of time.
- ▶ Discuss: the effect of this provision.

Clause 23.0 Extension of Time

- ▶ 23.6 Contractor to prevent delay
- ▶ The Contractor shall constantly use his best endeavour to prevent or reduce delay.
- ▶ And to do all that may reasonably be required to the satisfaction of the Architect to prevent and reduce or further delay in the completion of the Works beyond the Completion Date
- ▶ 23.7 Notification to Nominated Sub-Contractor
- ▶ The Architect shall notify every NSC in writing of each decision of the Architect when fixing a later Completion Date.

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (a) “Force Majeure”;
- ▶ (b) exceptionally inclement weather;
- ▶ (c) damages resulting to insurance claim relevant to Clause 20.A, 20.B, or 20.C {not Contractor’s default};
- ▶ (d) civil commotion, strike etc... affecting trades or material supply;
- ▶ (e) not having received in due time necessary AI, etc...
 - ▶ (i) specifically applied in writing “in sufficient time”,
 - ▶ (ii) not due to Contractor’s or NSC’s default

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (f) delay by Employer in giving possession of Site or any section, in accordance with Clause 21.1 and 21.2;
- ▶ (g) compliance with AI under Clauses 1.4, 11.2 & 21.4;
 - ▶ - 1.4 discrepancies in Contract Documents;
 - ▶ - 11.2 instructions requiring a Variation;
 - ▶ - 21.4 instructions postponing or suspending the executing of all or any part of the Works
- ▶ (h) delay on the part of NSC for reasons as per Clauses 21.4(a) to 21.4(w) of PAM2006 Sub-Contract;
 - ▶ - NSC entitle to EOT only if sub-contract works was affected by such reasons and follow procedures

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (i) re-nomination of NSC as set out in Clause 27.11;
- ▶ (j) delay on the part of craftsmen, etc. employed by the Employer to execute works not forming part of Contract or failure to execute such works;
- ▶ (k) delay or failure in the supply of materials and goods which the Employer had agreed to supply;
- ▶ (l) opening up for inspection any work covered up, testing materials/goods or executed works as per Clause 6.3, unless the inspection or test:-
 - ▶ - (i) is provided for in Contract Bills
 - ▶ - (ii) show works, materials/goods not in accordance
 - ▶ - (iii) required due to default of Contractor

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (m) any act of prevention or breach of contract by the Employer; {important to preserve right to LD}
- ▶ (n) war damage under Clause 32.1;
- ▶ (o) compliance with AI with connection with discovery of antiquities under Clause 33.1;
- ▶ (p) compliance with changing requirement of Authority and Service Provider;
- ▶ (q) delay caused by Authority and Service Provider {not due to Contractor/NSC 's default};
- ▶ (r) appointment of replacement Person under Article 3, 4,5 and 6;

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (s) compliance with AI in connection with disputes with neighboring property owners... {not due to Contractor/NSC 's default};
- ▶ (t) delay as a result of execution of works under Provisional Quantities which in the opinion of Architect is not a reasonable forecast....;
- this clause will allow **the Architect** the discretionary power to decide whether the provisional quantity allowed is reasonably accurate at execution time and assess the impact of such deviation to the progress of Works with regard to the Completion Date.

Clause 23.0 Extension of Time

▶ 23.8 Relevant Clauses

- ▶ (u) failure of Employer to give in due time entry to or exit from the Site.....;
- ▶ - the entry to or exit through certain connected or adjoining land must have been defined in Contract Bills and such land/passage must be in the possession or control of the Employer.
- ▶ (v) suspension by the Contractor of his obligations under Clauses 30.7 and 30.8;
- ▶ (w) suspension of the whole or part of the Works by order of an Appropriate Authority {provided not due to Contractor or NSC's default};

Clause 23.0 Extension of Time

- ▶ 23.8 Relevant Clauses
- ▶ (x) any other ground for extension of time expressly stated in the Contract.
- ▶ - this is a “catch-all” Clause to cover any other grounds expressly stated in the Contract other than under this Clause 23.

Clause 23.0 Extension of Time

- ▶ 23.9 Extension of time after the issuance of Certificate of Non-Completion
- ▶ Where a Relevant Event occurs after the issuance of CNC, the Architect shall grant an extension of time. The EOT shall be added to the Completion date of the Works or any section of the Works.
- ▶ - *Balfour Beatty Building Ltd v Chestermount Properties (JCT 1980 Form)*
- ▶ It was held that under JCT 1980 Form, the architect has the power to grant EOT retrospectively for all grounds under Clause 25.3 and any EOT should be on a nett basis to be added to the last Completion Date.

Clause 23.0 Extension of Time

- ▶ 23.10 Architect's review of extension of time after Practical Completion
- ▶ Within 12 weeks after the date of Practical Completion, the Architect may review the existing EOT, and fix a later completion date by reviewing previous decisions or otherwise and also either with or without any notification by the Contractor of such Relevant Event.
- ▶ If the decision affects the amount of LD, the Employer shall repay any surplus to the Contractor within the Period of Honouring Certificates.

Clause 24.0 Loss and/or Expenses caused by matters affecting the regular progress of the Works

- ▶ A claim for Loss and/or expense made under this Clause is a contractual claim, subject to the assessment of the Architect and QS and to be added to the Contract Sum in accordance with Clause 24.4. (Compare Section 74)
- ▶ The claim may be made on similar grounds for EOT but the compensation does not hinge on such EOT.
- ▶ Discuss: The Contractor is only entitled to compensation for delay which are under the responsibility of the Employer and not those caused by neutral events.

Clause 24.0 Loss and/or Expenses

- ▶ 24.1 Loss and/or expense caused by matters affecting the regular progress of the Works
- ▶ Where the regular progress has been or is likely to be materially affected by any matters expressly referred to in Clause 24.3,
- ▶ **And the Contractor** has incurred or is likely to incur loss and/or expense which could not be reimbursed under any other provision in the Contract. **Then,**
- ▶ 24.1(a) **condition precedent to entitlement, Contractor to serve written notice of intention with initial estimate, given** within 28 days from date of AI, CAI or the start of occurrence of the matter, whichever is earlier.
- ▶ **Issue: contract or common law?**

Clause 24.0 Loss and/or Expenses

- ▶ 24.1 Loss and/or expense caused by matters affecting the regular progress of the Works
- ▶ 24.1(b) within 28 days after the matter have ended, Contractor to send complete particulars and all necessary calculation to substantiate his claims. If fails to do so within the stated period, deemed waived his right.
- ▶ - *Hadley v Baxendale (1854)*
- ▶ Section 74 – compensation which naturally arise in the usual course of things from the breach...
- ▶ Increased preliminaries, overheads, loss of profit, loss of productivity, fluctuations and financial charges, etc...

Clause 24.0 Loss and/or Expenses

- ▶ 24.2 Access to Contractor's books and documents
- ▶ **Contractor** shall keep contemporaneous records of all his claims for loss and/or expense and shall submit all particulars to **the Architect**
- ▶ **The Architect and QS** shall have access to the relevant documents under the control of **the Contractor** and upon request should be provided a copy free of charge by **the Contractor**.

Clause 24.0 Loss and/or Expenses

- ▶ 24.3 Matters materially affecting the regular progress of the Works
- ▶ (a) not having received in due time necessary AI, etc...
 - ▶ (i) specifically applied in writing “in sufficient time”, (ii) not due to Contractor’s or NSC’s default.
- ▶ (b) delay by Employer in giving possession of Site or any section, in accordance with Clause 21.1 and 21.2;
- ▶ (c) compliance with AI under Clauses 21.4;
 - ▶ - 21.4 instructions postponing or suspending the executing of all or any part of the Works.
- ▶ (d) delay on the part of craftsmen, etc. employed by the Employer to execute works not forming part of Contract or failure to execute such works;

Clause 24.0 Loss and/or Expenses

- ▶ 24.3 Matters materially affecting the regular progress of the Works
- ▶ (e) delay or failure in the supply of materials and goods which the Employer had agreed to supply;
- ▶ (f) opening up for inspection of any work covered up, testing any materials/goods or executed works as per Clause 6.3, unless the inspection or test:-
 - ▶ - (i) show works, materials/goods not in accordance
 - ▶ - (iii) required as a consequence due to default of Contractor

Clause 24.0 Loss and/or Expenses

- ▶ 24.3 Matters materially affecting the regular progress of the Works
- ▶ (g) any act of prevention or breach of contract by the Employer;
- ▶ (h) delay as a result of a compliance with AI issued in connection with discovery of antiquities under Clause 33.1;
- ▶ (i) appointment of replacement Person under Article 3, 4,5 and 6;
- ▶ (j) compliance with AI in connection with disputes with neighboring property owners...
{not due to Contractor/NSC 's default};

Clause 24.0 Loss and/or Expenses

- ▶ 24.3 Matters materially affecting the regular progress of the Works
- ▶ (k) by reason of the execution of works under Provisional Quantities which in the opinion of Architect is not a reasonable forecast of the quantity;
- ▶ (l) failure of Employer to give in due time entry to or exit from the Site.....;
- ▶ (m) suspension by the Contractor of his obligations under Clauses 30.7 and 30.8; and
- ▶ (n) suspension of the whole or part of the Works by order of an Appropriate Authority {provided is due to negligence or omission of Employer, Architect or Consultant}.

Clause 24.0 Loss and/or Expenses

- ▶ 24.4 Loss and/or expense to be included in certificate
- ▶ Subject to Contractor complying with Clause 24.1, the Architect or QS shall ascertain the amount;
- ▶ Such amount ascertained from time to time shall be added to the Contract Sum;
- ▶ Such amount shall be included in the next Interim Certificate issued after the date of ascertainment

Clause 25.0 Determination of Contractor's Employment by Employer

- ▶ 25.1 Defaults by Contractor
- ▶ The difference between PAM 98 and PAM2006 on this Clause is that now “the employment of Contractor” instead of ‘the Contract’ will be determined.
- ▶ If the Contract is determined, the Contract conditions will cease to apply hence the contracting parties would have to rely on common law to seek remedies.
- ▶ Employer may determine the employment of Contractor if he defaults in any of the following:
- ▶ (a) if without reasonable cause, fails to commence the Works in accordance with the Contract; or

Clause 25.0 Determination by Employer

- ▶ 25.1 Defaults by Contractor
- ▶ (b) if without reasonable cause, “wholly or substantially” suspends the Works before completion;
- ▶ (c) if he fails to proceed regularly and/or diligently with the Works;
- ▶ - *West Faulkner Associates v London Borough of Newham (1994)*
- ▶ - *J Simon: essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of works.*

Clause 25.0 Determination of Contractor's Employment by Employer

- ▶ 25.1 Defaults by Contractor
- ▶ (d) if he persistently refuses or neglect to comply with an AI;
 - ▶ - Much flexible now compared to PAM98 that the AI must relate to “removal or remedy of defective work which has materially affected the progress of works”
- ▶ (e) if he fails to comply with provisions in Clause 17.0;
 - ▶ - any assignment without the written consent of the Employer is a ground for determination.
- ▶ (f) if he has abandoned the Works.

Clause 25.0 Determination

- ▶ 25.2 Procedure for determination
- ▶ - Employer or Architect will issue on behalf as per 25.2 specifying which grounds under 25.1. {cause + clause}
- ▶ - if Contractor shall continue the default for another 14 days from receipt of the notice, the Employer may within 10 days from the expiry of the notice, determine the employment by a further written notice
- ▶ Both notices to be by registered post or delivery by hand
- ▶ Such notice not be given unreasonably or vexatiously

Clause 25.0 Determination by Employer

- ▶ 25.3 Contractor's insolvency
- ▶ - insolvency means unable to pay debts therefore if so confirmed, the employment shall be deemed automatically determined
- ▶ - Employer is advised to notify the Contractor or his receiver or liquidator, in writing in accordance with this Clause

Clause 25.0 Determination by Employer

- ▶ 25.4 Rights and duties of Employer and Contractor
- ▶ a) upon determination, the contractor shall vacate the site and return possession whereby the Employer may employ other Person to complete the Works including rectification of defects. If so required by Employer or Architect on behalf, Contractor shall within 21 days assign the benefit of agreement for the continuation of hire plants/equipment already at site.
- ▶ b) if so required by Employer or Architect, assignment of benefit of agreement of supply of materials/goods and/or for the execution of any work for the purpose of the Contract to the extent that the same is assignable, to be given by the Contractor without payments within 21 days of the date of determination.

Clause 25.0 Determination by Employer

- ▶ 25.4 Rights and duties of Employer and Contractor
- ▶ c) **the contractor shall remove** any unwanted things under his belonging from Site **when instructed**. Failure to do so within a reasonable time, **Employer may without liability remove the same and sell** (except those on hire) and **hold the proceeds to the credit of Contractor only less all costs incurred**;
- ▶ d) **the Contractor shall allow or pay to the Employer** all cost incurred to complete the Works including all loss and/or expense suffered by **the Employer**. **No further payment to the Contractor (except already due)** until completion of Works with settlement in a final account prepared in accordance with Clause 25.6.

Clause 25.0 Determination by Employer

▶ 25.5 Records of Works

- ▶ - the Architect or QS shall give written notice within 28days of the date of inspection on Site to jointly record the extent of Works executed and the materials/goods delivered. The records shall form the basis for the evaluation of value of executed works and materials delivered up to the date of determination.

▶ 25.6 Final Account Upon determination

- ▶ - the Architect or QS shall submit a final account (including completion costs, overdue payments, LD, set-off & loss/expense suffered) within 6 months on completion of works for agreement of Employer and Contractor.

Clause 25.0 Determination by Employer

- ▶ 25.6 Final Account Upon determination
- ▶ a) if undisputed within 3 months, the final account shall be conclusive and deemed agreed by both parties. Any extra costs shall be a debt to Employer which may be recovered from performance Bond if still sufficient,
- ▶ b) if there is a dispute, the disputing party shall serve written notice (with copies to consultants) stating grounds with complete particular within 3 months and consultants shall decide whether to amend or not within the next 3 months. If still disputed, shall refer to Arbitration within 3 months after receipt of revised final account. Otherwise deemed accepted as final.

Clause 25.0 Determination by Employer

- ▶ 25.7 Remedy limited to damages only
- ▶ The contractor shall return the possession of the Site within 14 days from receipt of written notice of determination. Irrespective of the validity of such notice, the remedy for Contractor shall be limited to compensation for damages only.
- ▶ 25.8 Employer 's rights and remedies not prejudiced
- ▶ As an alternative to determination of employment following contractual procedures, the Employer may terminate the Contract under common law if the default and conduct of the Contractor justify so. The Employer may have to rely on common law for termination if he has defaulted or did not comply with the contractual procedures.

Clause 26.0 Determination of Own Employment by Contractor

- ▶ 26.1 Default by Employer
- ▶ **The Contractor may determine his own employment if Employer had defaulted in any of the following ways:**
 - ▶ a) **fails or neglect to pay amount due on any certificate (less any LD and valid set-off) within the Period for Honouring Certificates;**
 - ▶ b) **interferes with or obstructs the issue of any certificate by the Architect;**
 - ▶ c) **fails to nominate a succeeding Architect or Consultant in accordance with Articles 3,4,5 and 6;**

Clause 26.0 Determination by Contractor

- ▶ 26.1 Default by Employer
- ▶ d) if before the date of Practical Completion, the works either in whole or substantially is suspended for a continuous period exceeding that stated in the Appendix by any of the following reasons:
 - ▶ i) **AI issued under Clause 1.4, 21.1 or 21.4** unless the instruction is to rectify default by Contractor or NSCs;
 - ▶ - 1.4 discrepancy or divergence between documents,
 - ▶ - **21.1 commencement and completion,**
 - ▶ - 21.4 postponement or suspension of the Works.

Clause 26.0 Determination by Contractor

- ▶ 26.1 Default by Employer
- ▶ ii) Contractor not having received in due time the necessary AI specifically applied in writing to the Architect in sufficient time and such AI was not required due to default of Contractor or NSCs;
- ▶ iii) delay on the part of craftsmen, tradesmen or other contractors employed or engaged by Employer in executing work not forming part of the Contract or failure to execute such work;
- ▶ iv) opening up for inspection or testing any work or materials as stipulated in Clause 6.3, unless the inspection showed the work/materials not in accordance or the opening or inspection is required due to default of Contractor.

Clause 26.0 Determination by Contractor

- ▶ 26.2 Procedure for determination
- ▶ - **the Contractor will give written notice** specifying which grounds under 26.1. {cause + clause}
- ▶ - if Employer shall continue the default for another 14 days from receipt of the notice, **the Contractor may within 10 days from the expiry of the notice, determine his own employment by a further written notice.**
- ▶ Both notices to be by registered post or delivery by hand
- ▶ Such notice not be given unreasonably or vexatiously

Clause 26.0 Determination by Contractor

▶ 26.3 Employer's insolvency

- ▶ Insolvency of Employer is a valid ground to determine Contractor's own employment

▶ 26.4 Rights and duties of Contractor and Employer

- ▶ In the event of determination as per 26.1 or 26.3:
- ▶ a) **the Contractor shall** within 14 days or longer period agreed in writing by Architect, remove from Site all his belongings and give facilities for NSCs to do the same;
- ▶ b) **the Employer** shall allow or pay to Contractor the total value of work properly executed and the value of materials and goods supplied **including any loss and/or expense suffered by Contractor** caused by such determination.

Clause 26.0 Determination by Contractor

▶ 26.5 Records of Works

- ▶ **The Contractor shall initiate** by serving written notice to Architect/QS within 28 days of the date of inspection on Site to jointly record the extent of Works executed and the materials/goods delivered. The records shall form the basis for the evaluation of value of executed works and materials delivered up to the date of determination.

▶ 26.6 Settlement of accounts

- ▶ **The Contractor shall** within 6 months after determination, submit to Employer, Architect and QS for the Employer's agreement, a final account for total value of work properly execute, value of materials/goods supplied and loss/expense suffered caused by such determination.

Clause 30.0 Certificates And Payment

- ▶ 30.1 Payment application and issuance of Architect's certificate
- ▶ The Contractor shall submit payment application (including claims from NSCs) at the interim interval with complete details/particulars to enable Architect and QS to consider and ascertain the amount to be included in an interim certificate.
- ▶ Upon receipt of such application, within 21 days, QS shall value and Architect shall issue an interim Certificate to Employer with a copy to Contractor and the Employer shall thereafter pay the amount within the Period of Honouring Period.
- ▶ - *Temloc v Errill Properties [1987]*

Clause 30.0 Certificates And Payment

- ▶ 30.1 Payment application and issuance of Architect's certificate (cont'd)
- ▶ If Contractor failed to submit a payment application, he shall be deemed to have waived his contractual entitlement and Architect will have the option to decide whether to issue or not to issue any certificate.
- ▶ After the issuance of CPC, Interim Certificates shall be issued as and when further amount are ascertained by Architect and QS as payable to the Contractor by Employer.

Clause 30.0 Certificates And Payment

- ▶ 30.2 Amount due in Architect's certificate
- ▶ The amount stated as due shall be the value of work properly executed and percentage of material/goods up to the date of the Contractor's payment application and less any amount which may be retained by Employer as per Clauses 30.5 and 30.6 and all previous interim payments. This Clause allows for stage payments to supersede the interim payment rules, subject to agreement between the parties.
- ▶ The materials and goods included must be for incorporation into permanent works and have been delivered to and properly stored at site and protected and be in accordance with the Contract and not prematurely brought to the Site.

Clause 30.0 Certificates And Payment

▶ 30.3 Errors in payment certificate

- ▶ Except for some clerical, computational or typography error or errors found in the certificate, the Architect shall not be entitled to revise or correct any payment certificate on other grounds.
- ▶ However the Architect may, in a later certificate, make correction or modification in respect of any valuation errors in any earlier certificate.

Clause 30.0 Certificates And Payment

- ▶ 30.4 Set-off by Employer
- ▶ The Employer shall be entitled to set-off all cost incurred and loss and expense expressly allowed under **Clauses 2.4, 4.4, 5.1, 6.5(e), 6.7, 14.4, 15.3(b), 15.3(c), 15.4, 15.5, 19.5 and 20.A3.**
- ▶ Provided (a) **Architect/QS has provided the assessment of such set-off**; and (b) written notice given not less than 28 days before the set-off is deducted from payment by the Employer.
- ▶ **Contractor may dispute within 21 days** and if the parties are unable to reach agreement within a further 21 days, **either party may refer the dispute to adjudication under 34.1. No set-off unless agreed by Contractor or as decided by adjudicator.**

Clause 30.0 Certificates And Payment

- ▶ 30.5 Retention Fund
- ▶ The Employer may retain and release later the amount of retention fund in accordance with the contractual provisions. The Retention Fund is a fixed sum and is not subject to change whenever the Contract Sum is adjusted as a result of any variation.
- ▶ 30.6 Rules regarding Retention Sum
- ▶ Follow the rules.
- ▶ 30.7 Suspension of Works for non-payment
- ▶ If the Employer fails to pay and continue such default for 14 days after receipt of written notice from Contractor, contractor may suspend by a further notice until payment is made. Provided such notice should not be unreasonable or vexatiously given.

Clause 30.0 Certificates And Payment

- ▶ 30.8 Compulsory suspension of Works
- ▶ Contractor shall **suspense works** upon being informed by Architect and/or Consultant in writing of their withdrawal from supervising the Works and shall continue such suspension until resumption of supervision. **He is entitled to EOT (28.3v) and loss and/or expense (24.3m).**
- ▶ 30.9 Cessation insurance resulting from suspension of the Works
- ▶ Contractor shall secure and protect the works during period of suspension and ensure that his “CAR” to cover for risk during such period of cessation of works on Site or to take up separate cessation insurance coverage. Any extra cost incurred, if not included initially, shall be added to Contract sum.

Clause 30.0 Certificates And Payment

- ▶ 30.10 Final Account
- ▶ Within 6 months after CPC, Contractor shall send all documents necessary for preparing Final Account to Architect and QS. Final Account shall be completed within 6 months from receipt of the same.
- ▶ - the period shall be adjusted if there is any delay by contractor to submit the necessary document.
- ▶ If Contractor failed to submit, the Architect/QS shall nevertheless complete the Final Account based on information available within the period to complete and a copy send to Employer and Contractor.
- ▶ If no dispute within 3 months, shall be conclusive and deemed agreed.

Clause 30.0 Certificates And Payment

- ▶ 30.10 Final Account (Cont'd)
- ▶ However if there is any dispute, the party disputing shall by written notice to the other party (copies to Consultants) set out the disagreement complete with particulars within 3 months of the date of receipt of final account from Architect/QS.
- ▶ The Architect/QS shall either amend or not amend within 3 months after receipt the same .
- ▶ Any party disagreeing with the amended Final Account or decision not to amend, shall refer the dispute to arbitration under 34.0 within 3 months from the date of receipt of the same. Failure to do so within the stipulated time, the Final account shall deem to be conclusive and agreed by the parties.

Clause 30.0 Certificates And Payment

▶ 30.11 Items in Final Account

- ▶ (a) Adjustment made to the Contract Sum;
- ▶ (b) Amounts that Architect considers Contractor is entitled under the express provisions of the Contract;
- ▶ (c) Adjustment of the P.C. Sums;
- ▶ (d) Adjustment of Provisional Sums;
- ▶ The following shall not be included in the Final Account and are to be resolved between the parties:
- ▶ (e) any LD imposed by Employer under 22.1;
- ▶ (f) set-off by Employer under 30.4;
- ▶ (g) interest payable by either of the parties to the other party under 30.17

Clause 30.0 Certificates And Payment

▶ 30.12 Conclusiveness of the Final Account

- ▶ The Final Account or the last amended Final Account shall be conclusive on the value of Works, **except for LD, set-off and interest.**

- ▶ The Final Account can only be rectified if :

- ▶ i) there is fraud, dishonesty or fraudulent concealment relating to the Works;
- ▶ ii) there is any arithmetical error.

▶ 30.13 Issuance of Penultimate Certificate

- ▶ A Penultimate Certificate for the release of retention fund and any outstanding sums for all NSC and/or NS not later than 14 days after the CMGD.

Clause 30.0 Certificates And Payment

▶ 30.14 Issuance of Final Certificate

▶ The Final Account shall be issued:

- ▶ (a) within 21 days after the Period of Honouring Certificates for the payment of the Penultimate Certificate;
- ▶ (b) within 28 days after the CMGD has been issued, in the event no Penultimate Certificate has been issued.

▶ 30.15 Final Certificate

▶ The Final Certificate shall state:

- ▶ (a) The Final Account, Less (b) The total sums certified in previous payment certificates (whether paid or not) to the Contractor.
- ▶ The difference, shall be the balance either as due to the Contractor or to the Employer as the case may be, shall be payable by the paying party, within the Period of Honouring Certificate. **The Final Certificate shall not be issued before CMGD.**

Clause 30.0 Certificates And Payment

- ▶ 30.16 Final Certificate not conclusive
- ▶ The final Certificate is only conclusive on the final value of the Works but it shall not be a conclusive evidence that any of the works, materials and goods to which it related and designs (if any) by the Contractor and NSC are in accordance with the Contract.
- ▶ 30.17 Interest
- ▶ (a) If the Employer fails to pay the amount due (less LD & set-off) after the Period of Honouring Certificate; or
(b) the Contractor fails to pay any sum due to the Employer within 21 days after receipt of written notification of such debt, then a simple interest based on Maybank BLR plus one percent shall be payable by the defaulting party on the outstanding amount until the date the payment is made.

Clause 31.0 Outbreak of Hostilities

- ▶ 31.1 Hostilities – determination by Employer or Contractor
- ▶ **Either Employer or Contractor** may at any time by written notice to the other, forthwith determine the employment of Contractor under the Contract.
- ▶ 31.2 Notices of determination
- ▶ Shall not be given:
 - ▶ (a) before the expiration of 28 days from the date on which the order is given for general mobilization; or
 - ▶ (b) after Practical Completion of the Works unless the Works have sustained war damage as defined in 32.2.

Clause 36.0 Notice

▶ 36.1 Notice

- ▶ Any written notice or other document to be given under the Contract shall be given or sent by:
(a) hand; (b) ordinary mail or registered post; or
(c) facsimile transmission.

▶ 36.2 Notice deem served

- ▶ (a) if by hand, at the time of delivery; (b) if by ordinary mail or registered post, after 3 days of posting; or (c) for facsimile transmission, at time of transmission.

Clause 36.0 Notice

▶ 36.3 Proof of Notice

- ▶ (a) if by hand, a signed acknowledgement of receipt; (b) if by ordinary mail or registered post, a receipt of posting from Post Office; or (c) for facsimile transmission, evidenced by transmission report.

▶ 36.4 Written Communication

- ▶ All shall be sent to the address stated in Articles of Agreement unless otherwise notify in writing.

Clause 37.0 Performance Bond

▶ 37.1 Submission of PB

- ▶ Shall submit before the Date of Commencement.

▶ 37.2 Form of PB

- ▶ Shall be in the form as specified unless approved by Employer.

▶ 37.3 Validity of PB

- ▶ Shall remain valid until 3 months after the Completion date. Contractor has the duty to extend the duration to expire after the projected Practical Completion of the Works.

▶ 37.4 Failure to extend validity

- ▶ If fail, Employer shall be entitled to withhold or deduct an amount equal from Contractor's progress payments.

Clause 37.0 Performance Bond

▶ 37.5 Payment from PB

- ▶ In the event the Employer determines the employment of the Contractor, the Employer may call on the PB and utilize such amount to complete the Works and recover his loss and/or expenses and refund only the balance to Contractor upon completion of Works.

▶ 37.6 Return of PB

- ▶ In the event the Contractor determines his own employment, the Employer shall within 28 days return the PB to Contractor for cancellation.

Clause 38.0 Governing Law

- ▶ 38.1 Governing Law
- ▶ The law governing the Contract shall be the Laws of Malaysia.

Conclusion (1)

- ▶ **PAM Forms of Contract**, being one of the most popular standard form of building Contract, had been in use in our local building industry since the 1st local edition of PAM/ISM 1969.
- ▶ **PAM 2006 Forms**, being the current form, had replaced PAM 1998 Forms in 2007.
- ▶ Unlike PAM1998, the current PAM 2006 forms has gone through **more drastic changes** whereby new provisions had been added while many existing provisions were either reworded, reshuffled or amalgamated.
- ▶ **Now PAM2006 Forms comes with 38 standard Clauses.**

Conclusion (2)

- ▶ 1. Risk allocation among the parties had been reorganized based on the concept of risk management whereby more emphasis had been placed on procedural compliance with specified performance time frame in the relevant contractual provisions for the parties to follow in order to preserve their respective contractual right under the Contract and/or under common law.
- ▶ 2. Such procedural compliance provisions are also introduced to keep the administration of the Contract to be more time conscious and systematic especially through stricter mechanism of administering contractor's claims made according to the contractual provisions.

Conclusion (3)

- ▶ 3. **Definite time periods** had been imposed on the Contract Administrator and the consultant team to carry out certain duties like certification and approvals within a specified period. **Failure to do so may subject the consultant team to professional negligent claims.**
- ▶ 4. The Consultant team must also pay great attention when preparing important document like the Letter of Award as it is the most prioritized document to referred to in case of any dispute whereby terms in Letter of Award shall now take precedent over the rest of the contradictory terms found in other documents. **Clause 3.1**
- ▶ 5. New provisions also been added to normalised certain existing conventional practices such as deduction of liquidated damages directly by the Employer.

Conclusion (4)

Briefly, major improvement/feature of this PAM 2006 Forms can be summarised as follows:

1. The extension of Article 7 and inclusion of Article 8 to provide wider definitions for clearer interpretations,
2. Definite time frame for the quick replacement of consultants by the Employer under Article 3, 4, 5 and 6 **is crucial to ensure continuity in a timely manner**,
3. Clearer definition for “**completion of works in accordance with Contract Documents**” rather than just relying on “**reasonable satisfaction of the Architect**”, may reduce the contentious challenges against alleged biased personal judgment of the Architect. **(Clause 1.0)**

Conclusion (5)

4. The issuance of AI in writing by Architect is now compulsory so that these important instruction can be easily identified for compliance and tracking purpose (Clause 2.2),
5. As mentioned before, the prioritization of documents in logical hierarchy within the Contract Documents is crucial in cases of clarification of inconsistencies between the documents (Clause 3.1),
6. New requirement that the Contractor shall proceed with the execution of Variations issued under AI while still pending the valuation should be carry out according to the fixed valuation rules, will hopefully reduce the delay due to waiting for confirmation of valuation (Clause 11.2),

Conclusion (6)

7. Granting new power to Architect to issue Variations after Practical Completion for works necessitated to comply with the requirement of Appropriate Authority or Service Provider provide practical solution in term of contract administration during OC application (Clause 11.3),
8. Deletion of existing Clause 12.2 under PAM1998 is vital as it had been heavily criticized of being defective and render any modification to standard terms to be of no effect,
9. New provisions with imposition of systematic procedural compliance and fixed time period will help to better administer the Contract though may increase exposure of consultants against possible claim of professional negligence. See the relevant Clauses.

Conclusion (7)

10. Contractor may now recover any loss and expenses as well as given extension of time if there is any delay in giving site possession within a specified period. Should the delay prolong after the specified period, **the Contractor will have the option to determine his own employment.** (Clause 21, 23, 24 and 26)
11. More grounds are added for Contractor to claim for extension of times as well as loss and/or expenses caused by matters affecting the regular progress of the Works; which is important to protect the interest of the Employer to keep his contractual right for the LD alive especially if such causes of delay are due to the Employer's default (including his agents i.e. consultant), (Clause 23.0)

Conclusion (8)

- ▶ Extension of Time (Clause 23.8)
- ▶ Relevant Events had been increased from 11 to 24 with 13 New Events.
- ▶ (f)-Late Possession of Site
- ▶ (g)-Compliance with AI for discrepancies, VO, postponement or suspension
- ▶ (i)-Delay in re-nomination of NSC
- ▶ (n)-War Damage, (o)-AI on antiquities, (p)-Changes to Laws/regulations/conditions
- ▶ (q)-Delay by Authority or Service Provider
- ▶ (r)-Replacement of Consultant
- ▶ (s)-Dispute with neighbour
- ▶ (t)-Provisional Quantity not accurately forecast
- ▶ (u)-Failure to give entry and exist from site
- ▶ (v)-Suspension for non-payment or compulsory suspension
- ▶ (w)-Suspension by order of Authority

Conclusion (9)

- ▶ Payment Provision (Clause 30):
- ▶ Interim payments are effected by the issuance of “Interim certificates” by the Architect.
- ▶ Now there are 3 main types of certificates namely Interim certificates, Penultimate certificate and Final certificate.
- ▶ The Architect and Quantity Surveyor, have a combined 21 days to carry out valuation and issue the interim certificate from the date of receipt of the Contractor’s application. (Clause 30.1)
- ▶ Failure of to issue interim certificate within 21 days upon receipt of contractor’s claim, is a breach of contract for which the Employer is liable.
- ▶ Similarly, definite time frames are also fixed to issue the Penultimate Certificate and Final Certificate.

Conclusion (10)

- ▶ Payment Provision (Clause 30):
- ▶ Clause 30.1 requires the Contractor to submit his claims with details and particulars for payment.
- ▶ Non compliance to Clause 30.1 is not fatal to the Contractor's entitlement since the Employer is obliged to pay the contractor for discharging his obligations.
- ▶ Clause 30.3 states that the Architect is allowed to correct the Interim certificate but limited to genuine errors and discrepancies in preparing the certificates. Any default, omission and deficiency may render the Employer in breach of his contractual obligations.
- ▶ Although corrections can be made in the certificates, the consultant can be liable for breach of contract or in tort of negligent.

Conclusion (11)

Set-off Provision (Clause 30.4)

- ▶ Under PAM Contract 2006 (With Quantities), the Employer is entitled to set-off the amounts previously stated as due in Interim Certificates and retention sum from the total value of work done up-to-date.
- ▶ It is clear that the Employer has no right to set-off the amount stated as payment due to the contractor under Architect's Certificate unless otherwise expressly stated in the contract.

Conclusion (12)

Set-off Provision (Clause 30.4)

- ▶ The Employer is NOW allowed to make deductions under certain situations as per Clause 30.4.
- ▶ These deductions are not reflected in the interim certificates but are instead deducted directly by the Employer from the amount stated as due when making payment.
- ▶ PAM Contract 2006 provide more grounds for the Employer to set-off payment from Contractor thus increases the Contractor's exposures while the Contractor should be more responsible in executing the Works in accordance to the contractual provisions.

Conclusion (13)

Other Payment Provisions (Clause 30):

- ▶ Provisions increased from 8 to 17.
- ▶ **New provisions are :-**
- ▶ 30.7-Suspension for non-payment
- ▶ 30.8-Compulsory suspension
- ▶ 30.11-Final account to exclude damages, set-off & interest
- ▶ 30.17-Interest payment

Conclusion (14)

In conclusion, it is my personal opinion that **PAM 2006 Forms of Contract**, for the time being, shall remain as “**the Standard Forms of Contract**” for our convenience use in the local building industry for the coming few years; **mainly due to its many familiar and well-tested features**, so far.

Conclusion (14)

While acting as the “agent” for the Employer and also duty-bound to play “judge and policeman”, the consultant as professional is responsible to analyses with care the “case” before him when preparing the building contract, in order to make amendments where necessary to appropriately distribute the risks between the Employer and the Contractor-to-be to facilitate better contract administration.

He must consider also the size and nature of the intended Works when making preference and judgment. Such reasonable skill and care is required of a competent professional in order to alleviate unnecessary disputes during the construction stage.

Conclusion (14)

Finally remember the standard exclusion remark by PAM:

“All parties must rely upon their skill and judgment or upon those of their advisers when using this document and PAM assumes no liability to any users or any third parties in connection with such use”

Legal Awareness In The Construction Industry

**LET'S TALK ABOUT
PAM 2006 AGAIN**

THANK YOU