

Half Day Seminar given to the IEM on the IEM Form of Contract by
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**THE INSTITUTION OF ENGINEERS, MALAYSIA
CONDITIONS OF CONTRACT FOR WORKS MAINLY
OF CIVIL ENGINEERING CONSTRUCTION
- 2ND MODULE : COMPARISON OF IEM FORM WITH
ESSENTIALLY THE PAM FORM**

BY

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**THE IEM FORM OF CONTRACT (COMPARED AGAINST THE
PAM FORM WITH OCCASIONAL REFERENCE TO THE FIDIC
FORM)**

1. INTRODUCTION

In this seminar notes the base form of contract against which the IEM Form of contract will be compared is the PAM Form 1998 edition. As both PAM Forms, i.e. with quantities and without quantities are almost identical, no distinction shall be made between them except when relevant.

Occasional reference shall be made to the FIDIC Form as a matter of interest. References shall be made to the 1999 Edition.

References to clauses which do not state the form of contract shall by default in this notes be taken to refer to the relevant clause in the IEM Form.

2. BASIC COMPARISON OF THE IEM AND PAM FORMS OF CONTRACTS

The similarities, areas of overlap, and differences of the civil engineering and building industries need to be borne in mind when trying to understand and compare the basic features of the IEM and PAM Forms of Contracts.

It is generally true that civil engineering projects tend to be simpler in terms of the details and involve less trades. This explains one fundamental difference between the IEM and PAM Forms. The IEM Form refers to essentially one party who acts as the contract administrator whereas the PAM Form recognizes roles to be played by others, i.e. apart from the Architect. This difference bears the greatest significance when it comes to the evaluation of variations which may either be valued by the Architect or by the Quantity Surveyor as instructed by the Architect. In practice and in most contracts, this means that variations are valued by the Quantity Surveyor. This fact is interesting because it reflects the fact that the training of quantity surveyors (and builders whose training is similar to that of quantity surveyors) makes them more suited to determining the rates for building works but less so for civil engineering works.

Another important area of difference between the IEM and PAM Forms lies in the greater emphasis given in the PAM Form to allow greater control over nominated sub-contractors by contractors. This fact is probably a result of the fact that a far greater level of utilization of specialist sub-contractors is required in the case of building works and the greater level of detailing required to be worked around by M&E consultants. Thus for example in the case of the PAM Form the Contractor is entitled as of right to reject the appointment of a NSC on reasonable grounds.

2.1 Agreement

The main difference between the two forms of contract in respect of this document is that the PAM Form is longer and contains subject matters which in the IEM form are included in the conditions of contract proper.

The main point of interest in respect of the form of agreement is the list of documents which form part of the contract. This list is included in both forms.

It is interesting to note that whilst the IEM Form includes documents known as "Special Provisions to Conditions of Contract For:" the norm amongst users of the PAM Form include any special qualifications to the conditions of contract in the "Preliminaries and Generally" section of the contract bills.

It should be noted that both forms of contract require in the case of companies that the common seal of the companies be applied, i.e. the necessary board resolution must be passed to authorise a director to execute the contract.

2.2 The parties to the contract and the duties, functions, and powers of the Architect/Engineer

Whilst in all forms of construction contracts the contractual relationship is between the employer and the contractor, one person appointed by the employer and theoretically agreed to by the contractor plays the role being "responsible for the overall supervision and direction" of the works (please see clause 2(a) of the IEM Form). It can also make with it in my humble opinion too general to carry much meaning and the actual powers of the Engineer must derive from individual clauses.

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Therefore the PAM Form does not specifically contain such a general provision but instead confers authority on the Architect in various clauses.

In both forms of contract the Engineer/Architect is entitled to instruct the Contractor to comply with instruction failing which a third party will be engaged and the cost of doing so will be back charged to the Contractor. In both forms the Engineer/Architect may act if the Contractor fails to comply after seven days. The relevant clauses under the IEM Form are clauses 5(a)(i) to (ix) and that under the PAM Form are clauses 2.1 and 2.2. The IEM Form helpfully lists in paragraphs (i) to (viii) the particular instances in respect of which the Engineer may require the Contractor to comply with his instruction. Paragraph (ix) expressly reserves to the Engineer his right to instruct the Contractor in instances referred to elsewhere in the conditions.

All the powers of the Engineer listed in clause 5 (a) are similarly provided in the various clauses of the PAM Form. For example the power to remove any employee of the Contractor is contained in clause 8.3 of the PAM Form under the heading “Site Agent”.

Comparisons are the Engineer’s and the Architect's powers will be dealt with under the various headings below.

A proper understanding of the dual role of architects/engineers in the administration of contracts may be helpful in the current context. In this connection I reproduce below an extract of the notes given by me at a seminar on the drafting of contracts held last year¹ (Architect here can be taken to mean Architect/Engineer):

An architect plays a dual role in the administration of construction contracts although quite often a particular function may include a greater element of one role and at the same time also include an element of the other function.

The first role is as the agent of the project owner. In this capacity an architect would for example indicate to the contractor the types of material which are to be incorporated into a building and accept or reject the materials which the contractor would then propose.

¹ “*Drafting Series : Building & Engineering*” held at Grand Seasons Hotel, Kuala Lumpur on 27-4-06

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Once the type of material has been accepted, the architect will then act in his second role to decide and act in a quasi-judicial capacity whether material actually supplied is up to the specification and approved sample. He will also decide whether for example the installation of the materials are in accordance with the specification.

The second role very importantly includes ascertaining and certifying payments, quite often with input by quantity surveyors. It is often in this role that an architect is under pressure to for example under certify or delay certification as it has to be borne in mind that it is the project owner who pays him! It can also be argued that in this role, the architect is also acting as an agent of the owner in deciding how much payment is due to the contractor.

3. THE OBLIGATIONS OF THE EMPLOYER

The employer in a construction contract has essentially three duties, i.e. to make the site available, to effect payments to the contractor, and appoint the Architect/Engineer and to appoint replacements whenever necessary.

3.1 Provision of the site

In this respect the IEM Form allows extension of time for delays in providing possession of the site as well as for parts of the site. Thus, in clause 38 (b) (i) it is provided:

Save in so far as the Contract may prescribe the extent of portions of the site which the Contractor is to be given possession from time to time and the order in which portions are to be made available ...

The PAM Form contains a corresponding provision at Clause 21.2 which allows the Employer to specify in the appendix the dates the Employer proposes to give to the

Contractor possession of various sections of the Works. This fact has been captured in the extension of time clause in the IEM and the PAM Forms but this matter shall be dealt with further under the section on extensions of time.

The extent to which the Employer must provide the site to the Contractor is a matter of some importance. Whilst issues of the extent to which the site must be provided is a topic under the purview of common-law and is thus outside the scope of this seminar the following two matters included in standard forms of contracts are related to this topic:

3.2 The Employer's other contractors and nominated subcontractors

There have been instances especially on megaprojects where the Employer because of its strong bargaining position have required the Contractor allow it other contractors to carry out works simultaneously without any payment for profit and attendance and without giving the Contractor any control over these other contractors. However as both the IEM and PAM Forms of contracts were not drawn up by a specific employer or even a body of employers they are both much fairer. On one such project in which the author was involved the employer's other contractor to whom the contractor was obliged to provide access as a term of the contract the other contractor did actually interfere with the main contractor's works but fortunately as the works involved was the purely of a civil engineering nature that mean contractor did not suffer serious delay as a result of this farcical state of affairs.

The Employer's obligation to appoint the nominated subcontractor promptly is again implied at law. Thus clause 43(f) of the IEM Form of contract recognizes not only the late receipt of instructions or information as a basis for extension of time but specifically recognizes late instruction on the appointment of a nominated subcontractor to so entitle the main contractor. The PAM Form in clause 23.7(vi) merely recognizes the late receipt of instructions or information as a basis for extension of time without making specific mention of late instruction for the appointment of nominated subcontractors. However the PAM Form at clause 27.1 specifically empowers the Architect to instruct the Contractor to expend any prime

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cost sum included in the bills of quantities in favour of such nominated subcontractors as maybe appointed by the Architect.

3.3 Partial possession of the site

In both forms of contracts whilst provision is made for the Employer to partially take over and possess the site it is subject to agreement being reached with the Contractor in its respect. Anything less will amount to an interference in the Contractor's right to quiet possession of the site. Following partial occupation of the site the first half of the retention shall be partially released in proportion to the ratio which the value of the part partially taken bears to the contract sum, liquidated damages shall be reduced (in the same ratio as mention), and the defects liability period for the part taken over shall commence with the second half of the retention reflecting the value of the part taken over to be released upon its expiry subject of course to satisfactory rectification of defects. The two forms of contract are *pari materia* in respect of the said and are contained in clauses 42 and 16 of the IEM and PAM Forms respectively. It is relevant to note one major difference, that this that whilst the PAM Form allows for a reduction in the insurance coverage in respect of the area taken over the IEM Form specifically forbids such reduction. The IEM Form also categorically states that the amount of the performance bond shall not be reduced as a result of the taking over, but it can be inferred as the PAM Form is silent on the matter that it does not permit such reduction.

3.4 Effect payments to the Contractor

The Employer's obligation to make payment to the Contractor and the consequences of failure to meet its obligation is dealt with under the heading "certificates and payment" in both forms of contract.

A comparison in respect of both forms is as follows:

| Particulars | IEM Form | PAM Form |
|---------------|-----------------|----------------------------|
| | Clause/ Remarks | Clause/ Remarks |
| Minimum value | 47(a) | No corresponding provision |

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|--|---|---|
| of first certificate | The actual value will be as indicated in the appendix | |
| Minimum value of subsequent certificates | - Ditto - | - Ditto - |
| Period for certification of Interim Certificates | 47(a) It requires that the Engineer shall do a valuation upon receipt of claim and certify within 14 days of the date of the valuation. It is probably fair to infer that the certification shall be made not later than 14 days from date of submission. | 30.2 Upon receipt, the Architect shall issue the Interim Certificate. This can be said to mean that certification shall be immediate although most contractors will accept certification within one week. Note that there is no mention of the quantity surveyor. In most cases where quantity surveyors are appointed, the submission is normally to the Architect and copied to the QS. |
| Right to amend errors | No corresponding provision | 30.1 The Architect made by any certificate correct any error discrepancy in any previous certificate. It is interesting to note that this entitles the Architect to issue a specific certificate to correct an Interim Certificate. This fact can be inferred by use of the word " certificate" rather than "Interim Certificate". |
| Payment for materials on site | 47(c) For 75% of value of unfixed materials delivered to or adjacent to the Works | 30.3 Only materials fully paid for to the Contractor's supplier shall be paid to the Contractor at 100% of their value. Includes both materials delivered to the Works as well as adjacent to it. |
| Default period from certification for payment | 47(d) 30 days | 30.2, Appendix to the Conditions of Contract 14 days |
| Contractor's right | 52(a)(i) | 26.1(i) |

| | | |
|---|--|--|
| to determine the Contract for non-payment by the Employer | The Contractor may terminate the Contract if payment is not made by the Employer after the expiry of a 30 days period after the period for the honouring of certificate. This may be done by the Contractor serving a notice on the Employer by registered post. | If after the expiry of seven days after the period for honouring of certificate payment is not made and the Contractor serves on the Employer a notice in writing and delivered by registered post and the Employer fails to make payment within a further seven days after its receipt of the notice, the Contractor may serve on the Employer a letter by registered post to determine the Contract. |
| | | |

Points to note on payment obligation of the Employer

1. *Payment for materials on site* – the safeguard provided under the PAM Form is from the legal point of view both justified and necessary. This is to ensure that in the event of a Contractor going insolvent there's no danger of a creditor laying claim of ownership over unpaid materials. However, knowing the manner of the operation of the construction industry where even the most creditworthy of contractors almost invariably depend on credit from their suppliers this clause is most unrealistic.
2. *Determination of the Contract upon failure by the Employer to make payment* -this shall be dealt with under the heading "Determination of the Contract".
3. It is interesting to note that FIDIC Form at Clause 14.8 allows the Contractor to claim for the payment interest compounded monthly without giving notice of its requirement to be paid for such. It is further interesting to note that FIDIC allows for suspension as well determination by the Contractor for both failure to issue certificate for payment within fixed durations.
4. Generally at law a contractor who complains of default in payment by an employer has to prove that “the circumstances the non-payment show an intention not to be bound”². Thus, the “principle to be applied in these cases is whether the non-delivery or the non-payment amounts to an abandonment of

² Please see *Hudson’s Building and Engineering Contracts* paragraph 4.221

the contract or a refusal to perform it on the part of the person making the default”³. It is therefore submitted that at law a situation which entitles a Contractor under PAM Form to determine the contract would not suffice. It is further submitted that a Contractor who has been receiving payments by as late as three to four weeks in respect of three or four consecutive or nearly consecutive payments would be entitled to determine the contract after giving a notice to its employer to remedy such default.

5. It is currently the law in Malaysia that unless a contract provides otherwise an employer must make payment of the sums certified by the contract administrator⁴. This rule of law is specifically recognized under the PAM Form in clause 30.3(i) where in the Employer is prevented from deducting any sums alleged to be due to it unless recognized in the Conditions.
6. It is therefore obvious that under the major forms of contracts used in Malaysia, apart from CIDB Form, that there is no right for an aggrieved Contractor suspend the works in the event of default in respect either of inordinate delay in issuing payment certificate or of effecting payment.

3.5 Supplying instructions as to the carrying out of the works

This obligation of the Employer is reflected in the power conferred on the Engineer to require the Contractor to comply with his instructions, the right of the Engineer to give or withhold approval for the works or the incorporation of materials, and the authority of the Engineer to require the Contractor to carry out variations to the contract works as of right.

3.5.1 The resolution of discrepancies

As for the IEM Form, clause 5 contains the following requirements in respect of the Employer's obligation to supply the necessary instructions to enable the Contractor to

³ Please refer to the case of *Freeth v Burr* (1874) LR 9 CP 208 cited in the paragraph referred to in footnote 1

⁴ See the case of *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, SC

proceed with the works (the Roman numerals indicate the paragraph of clause 5(a) containing the provision):

(ii)

the resolution of any discrepancy between the Contract Documents. If compliance the Engineer's instruction involves the Contractor in incurring additional expense which he could not have foreseen then the Engineer shall certify payment of an additional sum of money to cover the cost incurred (see clause 8 (b)). The PAM Form in clause 1.2 allows the Architect in respect of "any discrepancy in or divergence between the Contract Drawings and/or the Contract Bills". Such an instruction is arguably a "Variation" within the definition of clause 11.1 (i) as being an "alteration or modification of the design, quality or quantity of the works as shall in the Contract Drawings and described or by referred to in the Contract Bills"⁵.

3.5.2 Approval for incorporation into the works of materials or workmanship

It is essential in the execution of construction contracts that the contract administrator is able to approve or withhold approval of materials or workmanship for incorporation into the works. Without such authority the very basis of construction contracts is in danger of being undermined.

As such the IEM Form contains in clause 9(a) the provision that "*all materials, goods and workmanship shall be of the respective kinds and standards described in the bills of quantities and/or specifications*". It also provides that the Contractor shall upon the request of the Engineer provide vouchers and/or manufacturers' test certificates to demonstrate such compliance. The IEM Form in clause 9(b) further provides the Contractor shall upon the instruction of the Engineer entirely at his own cost provide samples of materials and goods for testing. The PAM Form includes a similar

⁵ Please note that the PAM Form in Article 7 m) of the Articles of Agreement defines the contract bills to comprise "Instructions to Tenderers", "Form of Tender and Conditions of Tendering", "Specification to All Trades incorporating Trade Preambles and Specification", "Preliminaries and Generally", "Measured Works, Provisional and Prime Cost sums and Final Summary", "Appendices, including inter-alia the Letter of Acceptance".

provision in clause 6.2 and goes on in clause 6.3 to allow the Architect to require the provision of not just samples but also the carrying of tests.

Whilst refusal to certify for payment of non-compliant materials and/or workmanship is in my view one of the best weapons to ensure that quality obligations of the Contractor are met, the IEM and PAM Forms go further in allowing the Engineer/Architect to require removal of noncompliant materials instruct and/or workmanship from the site (please see clause 5(a)(iv) and clause 6.4 the IEM and PAM Forms respectively) and to engage another party to carry out the works and charge to the Contractor the costs incurred in doing so.

It is implied in the construction contracts that approval of materials or workmanship will be given promptly and failure to do so shall entitle the contractor to an extension of time.

3.5.3 Instructions to vary the Works

It is essential for construction contracts to fulfill the purpose they are entered into, i.e. to design and construct for an employer a structure of some complexity and for a definite purpose, to allow for on course modifications to the design. Without allowance for this an employer will be at the contractor's mercy. Imagine what would happen if for example a contractor is entitled not to proceed with varied works until after agreement to the rates is achieved, bearing in mind the fact that the contractor is in full custody of the site and the employer is obliged to provide quiet possession of the same. Therefore in this context all standard forms of construction contracts include in them the power for the contract administrator to require the contractor to carry out varied works as of right.

Therefore both the IEM and PAM Forms of contract allow for the Engineer/Architect to instruct the Contractor to carry out varied works and charge to the Contractor the cost of engaging a third party to do so if the instruction is not complied with within seven days. The provision within the IEM Form is contained in clause 5(a)(i) and the PAM Form in clauses 2.1 and 2.2 read together with clause 11.2. It is interesting to note that both forms of contracts require instructions to vary the works to be in writing. It is also of further interest to note that the IEM Form contained in clause

23(a)(v) a catch all provision in that it empowers the Engineer to instruct that the Contractor is to “execute additional work of any kind necessary for the completion of the Works”. The right of the Architect under PAM Form to require the Contractor to carry out variations can be inferred by reading clause 2 and clause 11.0 (variations) together.

It is a term implied into construction contracts that instructions to vary the works shall be given in a timely manner. Therefore without the inclusion in the extension of time clause an allowance for extension of time on the basis of the late provision of information or late giving of instruction the time for completion will become at large. This subject will be dealt with in the section on extensions of time.

4. OBLIGATIONS OF THE CONTRACTOR

4.1 Obligation to complete

4.1.1 The doctrine of entire contracts and substantial performance

This doctrine in my view finds its expression in modern-day contracts in the conferment on an employer of the right to sue for damages including especially the additional cost to be incurred in procuring another contractor to complete works abandoned by an earlier contractor.

Modern-day contracts take into account this entitlement of employers by incorporating provisions on contract security, i.e. performance bond and retention, the requirement that the works be practically complete before a contractor will be deemed to have discharged his obligations in respect of the construction of the works, and the requirement for insurance of the works. We shall examine each of these in turn:

4.1.2 Contract Security

The feature of contract security is to ensure that in the event of a contractor failing to complete the works or failing to complete the works satisfactorily an employer will either be saved the trouble of recovering the costs from the contractor or at least ensure that the difference to be recovered is substantially reduced.

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Performance bond - in order to fulfill the purpose that they are intended to serve performance bonds should be “ irrevocable, on demand, without protest and uncontestable”. Herein lies the biggest difference between the IEM Form and the PAM Form (at least in so far as the 1998 Edition goes) as the PAM Form is completely silent on this subject. In fact the IEM Form goes so far as to include a proforma form of the performance bond. The form in fact satisfies the four conditions mentioned. Under the IEM Form at clause 37(a) the performance bond for 5% of the contract sum is to be provided before any works is commenced. The performance bond provided is to be valid for period of six months after the expiry of the defects liability period. Clause 37(c) provides that “ if the Contractor fails to execute the contract or commits any breach of obligations under the contract, the Employer the Engineer on its behalf may utilise and make payments out of or deductions from the set performance bond”.

Retention - both forms of contracts provide that a certain percentage of interim payments shall be retained until the limit of retention is reached (please see clause 47 (e) and clause 30.4 of the IEM and PAM Forms respectively). It is interesting to note that whilst the PAM Form in the appendix indicates defaults of 10% and 5% for the rate of retention and maximum retention respectively it provides space for alternative rates to be included where as the IEM Form actually indicates these rates without allowing alternative figures, however there is nothing to stop the parties from deleting these figures and inserting in their place other rates. Both forms of contracts indicate the percentages as being of the contract sum and the variations clauses in both allow for the adjustment of the contract sums upon evaluation of variation orders.

Insurance of the works - this is necessary to ensure that any mishaps which may otherwise destroy the works do not leave the Employer and/or the Contractor fully exposed to the full cost of restoring the works. In this respect the PAM Form allows a choice between three different options, i.e:

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- i. New buildings with the insurance to be taken by the Contractor -it should be noted that the contract requires only that the Contractor is to proceed with the restoration works only after the settlement of claims by the insurer (see clause 20.A.3). Clause 20.A.4 specifically provides that the Contractor's entitlement to payment for restoration works carried out is limited to insurance moneys received.
- ii. New buildings with the insurance to be taken by the Employer - it is interesting to note in this respect that if the Employer fails to provide evidence of it as having undertaken the insurance, the Contractor is entitled to do so and claim for the cost and have this added to the contract sum. The Contractor is obliged to carry out the restoration works with due diligence, i.e. there is no waiting for settlement of the insurance claim. The contract specifically disallows the deduction of the damage suffered from any payments due to the Contractor. The works of restoration is treated as a variation to the contract and paid according. These are all covered under clauses 20.B.1 to 20.B.5.
- iii. Alterations or extensions to existing buildings with the Employer to take the insurance - this clause contains the strange clause at 20.C.4 (ii) that if it is equitable after the occurrence of an incident, then and if it is equitable either one of the parties may determine the contract and the other party may if it so wishes serve a notice of arbitration the challenge the determination. If either no notice of arbitration is served or if the arbitrator decides against the notice of arbitration, then the Contractor shall proceed with the restoration works and the works shall be treated as a variation to the contract.

In this regard the IEM Form is much simpler and does not provide any options. The features of the IEM Form in this respect (which doesn't have any equivalents in the PAM Form):

- i. The incorporation of is cross liability clause covering damage to the property on or adjacent to the site of one Contractor or subcontractor or Employer by another Contractor or subcontractor;

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- ii. An endorsement that the engineers, architects and surveyors and their representatives are deemed to be third party; and
- iii. The insurer is to waive its subrogation rights.

4.2 Obligations as to design and quality of materials and work

It would be a misconception to believe that contractors under build only contracts do not have design obligations, although admittedly such obligations are quite restricted. Although outside the scope of this seminar a comparison with the scope of specialist nominated subcontractors will be interesting. For example a nominated subcontractor who is required to supply a pump to deliver water at a specified cubic metre per second to a specified head when the pump is working at the particular efficiency has certain design obligations in respect of the durability and suitability of the components used in the manufacture of the pump. From this it will be clear that in contracts for the construction of buildings or infrastructure projects the reliance on the skill of the Contractor to choose suitable materials is one of degree. This obligation of contractors has been encapsulated in the IEM Form at clause 9(a) and in the PAM Form at clause 6.1. Both conditions stipulate that “ works, materials, workmanship and goods shall be of the respective kinds and standards described”. There is thus reliance on the skills of the contractor to choose suitable working methods and proper materials. Therefore if a specification merely requires the laying of clay bricks it is implied that the bricks shall be well burnt. This obligation is absolute and a contractor will be liable to the consequence of non-compliance irrespective of whether there is any fault, in other words the contractor bears the risk resulting from non-compliance.

However this issue is generally not a problem in civil engineering and building works as most specifications go into great detail in respect of what the contractor has to provide. Whilst both forms of contracts provide that materials and goods are to be tested (please see section 3.6 above) and clauses 9(b) and 6.3 of the IEM and PAM Forms empower the Engineer and Architect to require the opening up for inspection of goods and materials which have been covered up. In both cases if the tests reveal

that one has been buried are compliant and then the costs involved shall be paid for. However it is noted that the IEM Form includes additionally the right to order opening up of any executed work on top of goods and materials. As far in situ tests and these are generally not a problem as all specifications include comprehensive details of such.

Following the detection of non-compliance the Engineer or Architect can instruct its “removal and/or re-execution” or to have demolished and re-execute as provided for in clause 5(a)(iv) and clause 6.4(i) of the respective forms of contracts. In both cases failure to carry out the relevant instruction will entitle the Engineer/Architect to engage a third party and charge the cost involved to the Contractor.

4.3 Obligations as to progress

There are two sets of obligations which the contractor must comply with in respect of the requirement as to progress. Therefore whilst a contractor will face liquidated damages if it fails to complete the works by the contractual date for completion this in itself is inadequate to protect an employer's interest to ensure that the works without undue delay. Thus for example what is an employer to do if it faces a recalcitrant contractor who mobilizes to the site only 10% of the level of resources necessary to ensure completion by the contractual date for completion, i.e. the contractor does not proceed with the works diligently?

In this respect one of the major defects in both forms of contracts is the lack of a responsibility on the part of both the Engineer and Architect to monitor the progress of the works and to require the contractor to take remedial action if the progress is found to be unsatisfactory. Whilst the PAM Form talks about the works programme clauses 3.5 and 3.6 the IEM Form silent on this very important topic. In this respect the FIDIC form despite all its perceived “contractor friendliness” is a more proactive approach (or at least requires the Engineer to do so) and allows at clause 8.6 the Engineer to instruct the Contractor to submit a revised programme and to take steps to expedite the progress and complete within the time for completion. The FIDIC form specifically recognizes that such steps may involve not only the mobilisation of additional resources but also the working of extended hours. The FIDIC form also

enables the Employer to recover additional costs from the Contractor if the catch up measures involves the Employer in the in the incurrence of additional costs.

An additional recourse available to an Employer faced with a recalcitrant Contractor who does not carry out the works diligently the right to determine the contract. However, and from the business perspective, determination of the contract is always recourse in which the parties are in a “lose-lose” position, the only question being who has the better card. In this respect it is observed that both Clause 51(a)(ii) of the IEM Form and Clause 25.1(ii) of the PAM Form use exactly the same words, i.e. “fails to proceed regularly and diligently with the Works” as a basis for determination of the Contract.

The term “proceed regularly and diligently” which is submitted to have the same effect as “due diligence” requires the Contractor to “*impose on the Contractor “an obligation to execute the work with such diligence and expedition as was reasonably required to meet the (completion) dates”*”⁶ (word in bracket supplied).It is interesting to note that the FIDIC Form does not use the terms “regularly” or “diligently” but rather more sensibly refers to the Contractor’s obligation to observe the programme with failure to do so entitling the Employer to determine the Contract.

5. DELAYS AND EXTENSIONS OF TIME, LIQUIDATED DAMAGES, AND DETERMINATION OF CONTRACT

This section of the seminar will move away from an examination of both forms of contracts and will instead look at specific clauses, which will effectively examine the Employers’ and Contractors’ rights, obligations, and liabilities in the event that things do not go as planned.

5.1 Delays and extensions of time

In this connection the PAM Form is more comprehensively drafted especially in respect of the Contractor's obligation to provide sufficient particulars support the

⁶ *Greater London Council v Cleveland Bridge and Engineering Company Ltd* (1986) 34 BLR 50

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extent of his entitlement whilst the IEM Form merely requires that the Contractor shall “upon it becoming recently apparent that the progress of the works is delayed, forthwith give notice of the causes of delay to the Engineer” from which point onwards the matter lies entirely in the hands of the Engineer.

The PAM Form on the other hand requires not only requires that the Contractor is to give notice of the relevant events causing delay but is also required give particulars of the expected effect and an estimate of the extension of time required. One substantial difference between the effects of the two forms of contracts is that the PAM Form in clause 23.3 attempts to require the Contractor to submit its notification before the date of completion.

Of interest to most people involved in the administration of construction contracts are the bases which entitle the Contractor the extension of time. The differences between the two forms of contract in this regard as follows:

| IEM Form Clause 43 paragraph/Basis for EOT | PAM Form Clause 23.7 paragraph/Basis for EOT | Remarks |
|--|---|---|
| <u>(c)</u> Directions given by the Engineer necessitated by disputes with neighbouring owners provided the disputes are not the result of any negligence or default by the Contractor | Not provided for | In such a case where the delay is not clause by the Contractor and where it is also not a result of a default by the Employer, then than the Contractor has to bear the risk. |
| <u>(h)</u> Due to the occurrence locally of industrial action which affects the | <u>(iv)</u> Similar but extended to workers involved in manufacture, | - Ditto - |

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| Works. | fabrication off-site. | |
| Not provided for | <u>(iv)</u> Postponement of any part of the Works | - |
| Not provided for | (xi) Due to any other act of prevention by the Employer | In order for an Employer to be entitled to require the Contractor to complete by a certain date failing which you will be able to recover liquidated damages there must be a provision under the contract for the Employer to extend of the time for completion for that particular act of prevention of the Employer. Accordingly the law is very strict that if an Employer is to be allowed to extend the time for completion that particular act of prevention must be specifically provided under the contract as a grounds for extension of time. Therefore whilst it is obvious that the intention of such a general provision is to cover any other basis not enumerated in clause 23.7 is to “catch” any other causes of delay by the Employer it is doubtful whether such a clause will succeed. In such a situation the time for completion |

| | | |
|--|--|-----------------------|
| | | will become at large. |
|--|--|-----------------------|

5.2 Liquidated damages

In the IEM Form the LAD clause is contained in Clause 40 whilst in the PAM it is contained in two limbs, i.e. Clauses 22.1 and 22.2.

The 1st limb in the PAM Form is almost identical in wording (and definitely in its effect) with the IEM Form's Clause 40 save except that the IEM Form's Clause 40 employs the now obsolete language and says for example "the Contractor shall pay a sum calculated for the period during which the said Works shall so remain and have remained incomplete..". The IEM Form goes on to call the certificate issued the Certificate of Non-Completion" whilst the PAM Form does not ascribe a name to the said certificate.

As for the 2nd limb of the PAM Form, an understanding of it requires an understanding of both S75 of the Contracts Act 1950 and the Federal Court's decision in the case of *Selva Kumar a/l Murugaiah v Thiagarajah a/l Retnasamy*⁷.

S75 of the Contracts Act 1950 is reproduced below:

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

It therefore appears that whilst on the one hand S75 says that liquidated damages may be proved, on the other hand it says that reasonable **compensation** may be recovered. The conflict arises from the use of the word compensation, which implies that the party seeking to recover liquidated damages must have actually suffered loss.

⁷ [1995] 1 MLJ 817

The Federal Court decided in favour of the latter stipulation in S75 in the case of *Selva Kumar v Thiagarajah* the facts of which are very briefly as follows:

Two persons entered into a contract for the sale of a clinic. The sale price was RM 120,000.00 to be paid in ten equal installments. There was a liquidated damages clause to the effect that should one of the parties rescind from the contract, then the installments paid to the date of the rescission shall be due as liquidated damages. After the 8th installment had been paid, the purchaser changed his mind and rescinded the contract. The vendor forfeited the installments paid, relying on the liquidated damages clause. The matter went to the Federal Court which held that it was that only one installment of RM 12,000.00 could be recovered as damages as the sum of RM 96,000.00 was unreasonable and did not reflect the estimated actual damage suffered.

In other words, the liquidated damages must approximately reflect the actual damage suffered. It need not be the actual loss. The Federal Court also made an observation in the case that the approach that entitlement to liquidated damages can be recovered whether actual damage is proved to have been incurred can be upheld only in cases when “*the court will find it difficult to assess damages for the actual damage or loss*”. Therefore, in the PAM Form which was drafted after the decision in *Selva Kumar v Thiagarajah* the draftsman has attempted to circumvent this difficulty by stipulating that the rate of liquidated damages “*is to be deemed as the actual loss which the Employer will suffer in the event that the Contractor is in breach of the clause hereof*”. This clause has never been tested in a court of law although there have been some opinion expressed that in order for the clause to be effective in circumventing this interpretation of S75 it is necessary that it expressly stipulates that the clause is to hold notwithstanding S75. In other words “the jury is still out” on this matter.

5.3 **Determination of Contract**

It should first and foremost be pointed out that the inclusion of clauses permitting either party to a contract to determine the contract on particular grounds do not

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preclude the right under common law for determination of the contract on the same grounds. Needless to say the inclusion of determination of contract clauses on certain grounds do not exclude the right to determine on other grounds under common law.

It is also relevant to note that particular rights conferred on a party exercising the right to determine also do not take away the rights at law. However construction contracts often confer on the party exercising the right additional powers which it would otherwise not possess at law. One common such is the right of an employer to withhold further payments to the contractor and to use plant and equipment which a contractor is required to leave at the site upon termination of the contract. This is one of the reasons why termination clauses are important especially in securing the right of an employer to continue with the works engaging a third party if necessary.

The above explains the common opening phrase employed in the termination clauses of both forms of contracts “without prejudice to any other rights and remedies”.

Apart from instances of bankruptcy of the contractor wherein the Employer is entitled to straight away terminate the contract, both forms of contracts require that the right to terminate be exercised in two steps. In the first step the Engineer/Architect serves a notice of default on the contractor by means of registered post or recorded delivery. If after 14 days the contractor fails to redress the default or if at any time after the expiry of the 14 days period the contractor repeats the default, the Employer may by a notice served on the Contractor either by registered post or by recorded delivery terminate the contract. One difference in the PAM Form should be noted, i.e. there is a further 10 days’ period after the expiry of the earlier 14 days (at the end of which the default has not been redressed) within which the contract must be terminated or if that there is a repeat the notice to terminate must be served on the Contractor within 10 days of its being repeated.

A brief comparison of the bases for termination under both forms of contracts is as tabulated below:

| IEM Form Clause 51(a) paragraph/Basis for EOT | PAM Form Clause 25.1 paragraph/Basis for EOT |
|--|---|
| (i) | (i) |

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| | |
|---|---|
| Suspension of the works without reasonable cause | Wholly suspend the works without reasonable cause. Defines reasonable cause to include compliance with instruction of the Architect or an order from a statutory or government body |
| (ii) Failure to proceed regularly and diligently with the Works. | (ii) Failure to proceed regularly and diligently with the Works. |
| (iii) Failure to execute the works in accordance with the contract or persistent neglect to carry out obligations under the contract | No equivalent provision |
| (iv) Similar to PAM Form | (iii) Refusal or neglect comply with a written notice of the Architect to remove or remedy defective work or improper materials with such refusal or neglect affecting the progress of the works |
| (v) Failure to provide the performance bond | The PAM Form is silent on the performance bond |
| No equivalent provision | (v) Unauthorised subletting or assignment of the contract works |

The rights of the Employer following the termination of the contract which are common to both forms of contracts are:

1. The Contractor is obliged to vacate the site and return possession thereof to the Employer

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2. the Employer may require the Contractor to leave behind its plant and equipment for use by the Employer to complete the balance of the works
3. the Employer may require the Contractor assign for its benefit its sub-contracts for works and/or the supply of materials. This includes the right to effect payments in respect of which Contractor is liable at the time of termination.

One major difference in the right of the Employer between the two forms is that the PAM Form explicitly allows the Employer to withhold further payments from the Contractor until a final accounting is done.