

**THE LEGAL STATUS OF CONSTRUCTION WORK PROGRAMME IN THE  
CONSTRUCTION INDUSTRY**

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*For my beloved Mother,  
Husband, Sisters, Brothers  
And Farya Nafeesa*

*Thank you for your support, guidance and everything.*

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## ABSTRACT

In construction contracts, a programme is usually produced to record the sequence of work. Most standard forms of contract neither state it to be part of the contract document nor give guidelines of how to prepare a work programme and the form it should take. The form does not clearly defined the programme's role and it does not state that there is a clear obligation to proceed in accordance with the programme. The aim of this research is to identify the legal status of a work programme and whether it is contractually binding or not and whether it can be used as an evidence in establishing variations, assessing extension of time and in determining a contractor's employment. The research is based on literature information about construction work programme, its provisions for international and local standard forms of contract and the legal implications in court cases where work programme was considered an important document in the judgment. From the research, it is found that a contractor has to have at least an updated documents about its project's progress, minimally in the form of critical path analysis and logical link for a causative event of delay to be proven. If the programme includes a method statement then that stated method may become the specified method of working. This entitles the contractor to a variation if the specified method is required to be changed. It is also found that the subcontract programme had no contractual effect as to original main programme. But non-performance under its obligations may be treated as a repudiatory breach and claims for damages is liable due to parties determination. Lastly the research found that his entitlement to recover losses due to the delay or awardment of an extension of time can be considered the compensation under the contract. All the existence and extent of these obligations are determined by the terms of the contract.

## ABSTRAK

Dalam kontrak pembinaan, perancangan kerja biasanya dikemukakan untuk menunjukkan aliran kerja projek tersebut. Tetapi kebanyakan Borang Kontrak Setara menyatakan perancangan kerja bukannya sebahagian dokumen kontrak. Cara-cara dan bentuk program yang harus ada, peranannya dari segi kontrak, obligasi pelaksanaan kerja mengikut aliran dalam perancangan kerja juga tidak spesifik dinyatakan. Oleh itu, penyelidikan ini adalah bertujuan untuk mengkaji status penggunaan perancangan kerja dari segi perundangan berdasarkan ikatan kontrak serta kesahihan dokumen tersebut dalam membuktikan perubahan kerja, lanjutan masa mahupun menjadi asas untuk penamatan kontrak. Kajian ini dibuat berdasarkan maklumat penulisan mengenai perancangan kerja, peruntukan klausa berkenaan yang ada dalam Borang Kontrak Setara di Malaysia dan Antarabangsa dan beberapa kes mahkamah yang menggunakan rekod perancangan kerja ini sebagai sandaran perbicaraan. Kajian mendapati seseorang Kontraktor harus mempunyai dokumen yang sentiasa dikemaskini mengenai pencapaian pelaksanaan sekurang-kurangnya melalui analisa laluan genting dan analisa secara pautan logik untuk membuktikan peristiwa penyebab kelewatan projek itu. Perancangan kerja berserta penyata kaedah merupakan dokumen rasmi aturan kerja ketika pembinaan. Jika adanya perubahan kepada aturan kerja yang diluluskan, ia boleh diberi hak berdasarkan klausa perubahan. Perancangan kerja subkontraktor tidak mempunyai sebarang implikasi kontrak kepada perancangan kerja kontraktor utama, namun prestasi yang tidak memuaskan boleh dianggap sebagai perlanggaran perjanjian dan boleh mendapatkan tuntutan ganti rugi jika penamatan kontrak berlaku. Kajian juga menunjukkan pemberian ganti rugi atas sebab kelewatan mahupun lanjutan masa merupakan alternatif pampasan dalam kontrak. Namun obligasi pengurusan kontrak adalah termaktub terhadap syarat-syarat kontrak itu sendiri.

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## LIST OF ABBREVIATIONS

AC	-	Law Report Appeal Cases
Adj.LR	-	Adjudicator Law Report
BLR	-	Building Law Reports
CA	-	Contract Administrator
CIDB	-	Construction Industry Development Board
Con LR	-	Construction Law Report
ECC	-	Engineering and Construction Contract
EWHC	-	High Court of England and Wales Decision
FIDIC	-	Federation Internationale de Inginieurs Conseils
ICE	-	The Institution of Civil Engineers, UK
I ChemE		Institution of Chemical Engineers
JCT	-	Joint Contract Tribunal
LT	-	Law Times Report
MF	-	Model Forms
MLJ	-	Malayan Law Journal
PAM	-	Persatuan Arkitek Malaysia
PWD	-	Public Work Department
TCC	-	Technology and Construction Court
SLR	-	Singapore Law Report
SO	-	Superintending Officer

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## **CHAPTER 1**

### **INTRODUCTION**

#### **1.0 Introduction**

This chapter will discuss briefly the background of the study, objective of the study, scope of the study as well as the methodology of the study.

#### **1.1 Background of the study**

A contractor is someone who contracts to build things or someone who contracts for and supervises construction, as of a building (Ashley, 1985). According to Chan (2002), a contractor's obligation in a traditional contract to carry out and complete the works would require him to provide the workmanship and materials as required by the specifications given by the architect and engineers. Ficken (2006) similarly acknowledges that the contractor is required to perform construction fully in accordance with the contract documents, usually consisting of at least plans, specifications and the

building code within required time. Thus, if the contractors fail to construct in accordance with applicable contract documents, he is responsible for resulting damages.

Contract period is a binding period within which the contractor not only must do the work but it is also a license for the contractor to spend that time carrying out the works. In addition, he may plan and do the work in whatever order he pleases. It is usually an express obligation for the contractor to proceed regularly and diligently with the work, and where he must make sufficient progress to achieve the completion date (Eggleston, 1992).

Any contract will have a time requirement even if it is simply to complete in a reasonable time. In construction contracts, it is usual for a programme to be produced to record the sequence of work. It is intended to assist the parties to plan and manage the Contract and the various interfaces between the Employer and the Contractor as well as other contractors. The programme of work is normally submitted by the Contractor after entering into the Contract. The programme has two possible roles in the management of the contract, either a Monitor Role or a Dynamic Role. The Monitor Role allows the extent of compliance with the parties' obligations as to time to be assessed at particular stages. The Dynamic Role allows an analysis of progress to determine the corrective actions to be taken to comply with the particular obligation or to ascertain the right to compensation<sup>1</sup>.

In the Malaysian standard form of contract, the employer usually requires the contractor to provide a programme (construction work programme) at the commencement of the work to show the sequences and timing of the activities involved in the construction of the project. In most standard forms, the programme which the

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<sup>1</sup> Retrieved from <http://www.atkinson-law.com>

contractor is required to submit is not stated to be a contract document as in PWD 75 (rev.2006) Clause 14.2, PAM 2006 3.6. In PWD 203A (Rev.2007), the express obligation of work programme requirement is silent. But for other international standard forms the provision of the programme entitles to become a compensation programme in determining delay and damages allowable. This again depend on what is the content of the work programme required and the comprehensiveness of its usage in context of the standard forms.

## **1.2 Statement of issues**

The effect of making the programme an express requirement without it being a contract document is that while the contractor may in breach for failure to submit a master programme, he may not be in breach if the series of events are not followed as scheduled (Rajoo,1999). But if the contract requires the contractor to submit a programme in accordance with the requirements of the contract then his failure to do so will be a breach of contract. The contractor will then be liable for substantial damages if the Employer can establish a loss.

For Malaysian standard forms, it makes provision for the submission of programme and their revision to S.O. for approval or endorsement. But there are no guideline of how to prepare a work programme, the role of the programme is not clearly defined, and the uniformity of form it should take is not described. It also does not state a clear obligation to proceed in accordance with the programme, the exceptions being FIDIC Forms and ICE. Even though Rajoo (1999) in *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)* had stated the elements of work programme, it is not defined in any clause in any standard form of contract. He stated that,



.....*the elements of Work programme is not defined in clause 3.4. As such, it may take the form of a bar chart, critical path, precedence diagram, schedule, network analysis or otherwise. A good work programme should show interfaces with sub-contractors, dated, time frames, activities, stages and more.*

For example in Malaysia, the programme of works as prepared by the contractor is usually not detailed, not realistic or do not have the activities properly linked to show the critical path. It is usually used for 'show' only more than anything else which is the cause of many incidents where EOT was not granted even when the contractor rightly has its entitlement to EOT if a proper programme of works was presented and all the information related to delays was provided (Entrusty Group, 2006). It is essential to appreciate in EOT computations that the period of extension to be granted is the effect (actual or estimated) that the delaying event had (or will have) on the date for completion. The recording of immediate or direct consequence of the event on the carrying out of the work is of no concern, for its effect on the final outcome may be very different, not least because it is the contractor's duty to mitigate the effect of a delaying event as far as he reasonably can with his intended level of resources<sup>2</sup>.

Engineer or architect appointed as Superintendent Officer (SO) or C.A (Contract Administrator) generally acts as an agent of the employer, and the certifier in administering the contract on the employer's behalf. The responsibilities of the CA and SO include deciding whether an event is one that gives rise to an entitlement on the part of the contractor under the contract and whether that event has caused delay and or is likely to affect the date for completion of the work<sup>3</sup>. In practice generally, the measure of actual progress against the programme will be cogent evidence of a failure to proceed with due expedition. The failure of the Contractor to proceed in accordance with the programme will be sufficient, without more, to terminate the Contract, providing that

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<sup>2</sup> Construction Law in Singapore & Malaysia (2nd Ed) at p 312

<sup>3</sup> Sundra Rajoo (1999).*The Malaysian Standard Form of Building Contract (The PAM1998 Form)*. MLJ

this is "*without reasonable excuse*". The meaning of that term is not further defined, but an entitlement to an extension of time will clearly qualify. The statement of "*failure to proceed regularly and diligently*" must be significant in terms of the overall contract or a particularly critical activity for the project, and not simply a failure to follow the timing of isolated activities on the programme<sup>4</sup>. Only an updated and verified 'quality' work programme, will be able to show the status or progress of any in contractor's plan of proceeding the works. It will also be a strong evidence in any dispute which may arise on issues of responsibilities arising from delay to completion from changes of programme sequences and duration of activities<sup>5</sup>.

The main aim of this research is to identify the legal status of a work programme whether contractually binding or not and whether the obligations in programming can be used as evidences in establishing variations, assessing extension of time and in determining a Contractors employment.

### **1.3 Objective of Study**

The objective of this research is

- i). To identify the legal status of work programme in the current construction industry in binding contractual obligations of parties involved and as supporting evidences in assessing validity of delays, variations, and in determination of employment

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<sup>4</sup> Vincent Powell-Smith and John Sims (1989). *Building Contract Claims*.

<sup>5</sup> Edward M. Willis (1997), *Scheduling Construction Projects*.

## 1.4 Scope of Study

The main thrust of this dissertation is on determining the legality of work programme incorporated as part of contract document and its attribute to notifying delay in managing ongoing construction phase. The scope of this study will be confined to the following areas:

- a. The available construction work programme
- b. Available standard forms emphasizing usage of work programme
- c. Cases related to works programme and mitigation to the delay and loss

## 1.5 Importance of research

This study is intended to give an in-depth insight of how a programme is (or should be) formulated and give indications of the legal aspect as to who should make the decisions, and the factors that should be taken into account when making these decisions due to the effect of methods, sequencing and programme on works and finally the outcome of it. A better understanding of the process of compiling and monitoring a programme, and indeed the limitations of a programme, and that they will also have a better understanding of the factors that need to be reviewed when adjudicating a dispute<sup>6</sup>. Some of the issues to be taken into account when analysing for example determination of contract due to delay of works, an entitlement to EOT which were inherent in the analysis in the *John Barker*<sup>7</sup> case, are:

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<sup>6</sup> Edward M. Willis (1997), *Scheduling Construction Projects*.

<sup>7</sup> *John Barker Construction Ltd. v. London Portman Hotel Ltd* (1996).

- The need for a programme.
- The need to take into account the actual progress and update the programme.
- The need to consider the critical path (including changes in the critical path).

The courts, in tune with practice, regularly make their decisions taking into account assessments based on as-planned programme. That is, of course, provided that the programme are realistic and applicable in the first place. See for example the English case of *Skanska Construction UK Limited v Egger (Barony) Limited*<sup>8</sup> where the judge held that the programming expert had based his analysis on a programme which had become “virtually redundant, almost at the outset”.

## 1.6 Research Method

In pursuance of the aim or objective as stipulated above, the primarily methods that have used to complete this project are research by literature review.

Sources for literature review are from books, journals, newspaper article, lecturer notes and magazines. These sources provide lots of data that can help to determine the

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<sup>8</sup> [2004] EWHC 1748 (TCC)

background of the research, work programme roles, and nature of contractor's obligations in enforcing his schedule of works.

All these reading sources can be obtained at the internet sites that are related to this dissertation and library; Perpustakaan Sultanah Zanariah, UTM . Analysis of cases collected from Malayan Law Journal (MLJ) and UK Cases and Combined Courts.

## **1.7 Organisation of the Report**

The dissertation consists of five chapters. The brief descriptions of each chapter are as follows:

### **Chapter 1: Introduction**

This chapter presents the overall content of the whole project writing. It introduces the subject matter, the problems that are purported to solve. The objective is specified with an appropriate research method to achieve them.

### **Chapter 2: Work Programme in Construction Industry**

This chapter with the overview and analysis of work programme promising valuable information for identifying and modeling delays and their effect on progress and the use of computerized work programme techniques for proving delay is become a practical requirement nowadays. Nevertheless techniques are being considered by the courts and

it is now almost inevitable in litigation involving disputes over the extent of project delays that a programming expert will be appointed. Therefore, it is good for the parties involved in a construction project, especially contractor to have a proper documented record such as work programme as a step to help in reducing disputes in the future, although it is still not a legal requirement in standard form of contract in Malaysia.

### **Chapter 3: Provision of Work Programme and Relation to Other Provisions In Standard Forms of Construction Contract**

This chapter reviews the various definitions of International and Malaysia Standard Forms in used, the relation to the provision of work programme and the different of approaches under contract.

### **Chapter 4: Legal Implications and Cases**

This chapter analyses the results from the judicial decisions as reported in law reports and further explore related cases regarding the contractor's liability to third party for not following through its work programme during construction works and what circumstances that the contractor liable or not liable. Attempts were made to analyse the reported judicial decisions and to state the law there from. This would allow not only the law to be stated, but equally important, it allows the law to be assessed in relation to the facts as found by the court.

## **Chapter 5: Conclusion and Recommendations**

This chapter presents the conclusions for the overall dissertation. It includes the summary of the findings of this study, conclusions, recommendations for future management of contracts as well as enhancements of the current practice.

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