

NEW ENGINEERING CONTRACT (NEC) 1993  
AS RADICAL CHANGES TO THE  
MALAYSIAN STANDARD FORMS OF CONTRACT

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*To my parents for giving me such a good start,  
and to my sisters for your love and the countless hours of laughter  
and joy we shared throughout the years.*

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## ABSTRACT

The construction industry in Malaysia has been plagued by the rising of claims, disputes and litigation. Design and bidding documents are seldom adequately complete prior to the tendering exercise. Hence, tender documents and conditions of contracts were tinkered in an amateurish way loading substantial amount of risk on to the Contractor. All these in turn, precipitated certain notable changes in attitude of Contractors towards cost recovery and claims. The Malaysian Construction Industry Development Board (CIDB) entrusted with the responsibility to address pertinent issues and problems faced by the industry drafted and issued the CIDB Standard Form of Contract for Building Works in year 2000. Prior to that, the Pertubuhan Arkitek Malaysia (PAM) issued a revised Standard Form of Contract in year 1998 to replace the old 1969 PAM Form that has been used for over 30 years by private sector. Of late, for the purpose to meet the needs of the Malaysian construction industry, the revised PAM Form of Contract 2006 is now at its final stage of drafting. Stakeholders and constituents of the industry are seen to be of the opinion that improved contracts or further tightened of clauses in a contract will better govern the projects and control of disputes. In line with this development in Standard Forms of Contracts in Malaysia, this research attempts to examine the possibility of implementing the New Engineering Contract (NEC) 1993 issued under the sanction of Institution of Civil Engineers (ICE), United Kingdom in the Malaysian construction industry. This study however concluded that the industry is generally not ready to embrace the NEC at this point of time. Nevertheless, the industry showed encouraging response to certain aspects of the NEC such as “simple plain language contract” and “adjudication” which could provide rooms for further development in Malaysia.

## ABSTRAK

Industri pembinaan di Malaysia sedia ada dibelenggu dengan peningkatan tuntutan pembinaan, pertikaian masalah dan litigasi. Rekabentuk dan dokumen pembidaan jarang disempurnakan sepenuhnya sebelum pembidaan dilaksanakan. Dengan demikian, dokumen tender dan syarat-syarat kontrak yang dirangka secara kurang professional membebankan kontraktor dengan risiko yang berlebihan. Situasi ini mengakibatkan perubahan sikap kontraktor ke arah tuntutan pembinaan. Dalam menangani masalah tersebut, Lembaga Pembinaan Industri Pembinaan Malaysia (CIDB) yang diamanahkan dengan tanggungjawab menghadapi isu-isu dalam industri pembinaan telah merangka dan menerbitkan Borang Kontrak Setara CIDB pada tahun 2000. Manakala sebelum itu, Pertubuhan Arkitek Malaysia (PAM) telah mengemaskini Borang Kontrak Setara PAM pada tahun 1998 bagi menggantikan Borang Kontrak Setara PAM 1969 yang telah digunakan lebih daripada 30 tahun dalam industri pembinaan di Malaysia. Kebelakangan ini pula, Borang Kontrak Setara PAM 2006 sedang diperkemaskinikan dan kini berada dalam tahap terakhir pengemaskinian. Ada pendapat yang mengatakan bahawa kontrak yang diperbaiki atau klausa-klausa kontrak yang diperketatkan mampu memberi lebih kawalan terhadap projek pembinaan dan masalah-masalah pertikaian. Selaras dengan perkembangan borang-borang kontrak setara di Malaysia, kajian ini cuba menyelidiki kemungkinan penggunaan *New Engineering Contract (NEC)* 1993 yang diterbitkan di bawah naungan Insitituti Jurutera Awam (ICE) di United Kingdom dalam industri pembinaan Malaysia. Kajian ini bagaimanapun, menyimpulkan bahawa industri pembinaan di Malaysia pada masa sekarang belum bersedia menerapkan penggunaan NEC. Namun begitu, industri pembinaan Malaysia menunjukkan respon yang memberangsangkan terhadap beberapa aspek NEC. Antaranya adalah “penggunaan bahasa yang jelas dan mudah” serta “adjudikasi” yang mempunyai ruang untuk perkembangan dalam industri pembinaan.

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## LIST OF ABBREVIATIONS

AC	-	Adjudicator's Contract
ACE	-	Association of Consulting Engineers
CCSJC	-	Conditions of Contract Standing Joint Committee
CIDB	-	Construction Industry Board Malaysia
CIOB	-	Chartered Institute of Building, UK
ECC	-	Engineering and Construction Contract
ECSC	-	Engineering and Construction Subcontract
FCEC	-	Federation of Civil Engineering Contractors
FIDIC	-	Fédération Internationale des Ingénieurs- Conseils
HGCRA	-	Housing Grants, Construction and Regeneration Act
ICE	-	Institute of Civil Engineering, UK
IFC	-	Intermediate Form of Contract
ISM	-	The Institution of Surveyors, Malaysia
JCT	-	Joint Contracts Tribunal, UK
NEC	-	New Engineering Contract
PAM	-	Pertubuhan Arkitek Malaysia
PA	-	Partnering Agreement
PSC	-	Professional Services Contract
PWD	-	Public Works Department
RIBA	-	Royal Institution of British Architects
RICS	-	Royal Institution of Chartered Surveyors
SC	-	Short Contract

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# **CHAPTER 1**

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INTRODUCTION

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of Research

Professor John Uff QC wrote:-

*“The growth and proliferation of construction contract forms are notable and suggest an intention to achieve some objectives. The object is however, rarely defined other than generality, usually consisting of a desire to ‘improve’ the operation of the form”.*<sup>1</sup>

This sentiment seems to be the forerunner of the ever increasing numbers of contractual forms available. Building contracts some 30 years ago were all based upon United Kingdom’s Joint Contracts Tribunal (JCT) Standard Form 1963, albeit with amendments. On the other hand, Civil Engineering contracts were based on the Institution of Civil Engineers (ICE) of Fèdèration Internationale des Ingènieurs-Conseils (FIDIC) Conditions. These are however something of many years ago.

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<sup>1</sup> Uff, John. (1989). *Origins and Development of Construction Contracts*. London : King’s College.

We are now faced with innumerable forms of contract and it's release into the market has become something of a fashion.

The rate of change is seen to be accelerated over the last 10 years. Some say the contractors brought about the changes by their increasing readiness to make claims. This emergence of claims has prompted the various institutions and professional bodies to further tightened the contract conditions. Or could it be the reverse trend where changes or tightening of contract conditions brought about the new breed of claim conscious contractors?

On the evolution of contractual form, the first standard form of contract used in the industry was the Royal Institute of British Architects (RIBA) Form first published in 1870. This evolved further leading to the formation of the Joint Contracts Tribunal. The JCT Forms were said to be direct descendants of the original RIBA Form.<sup>2</sup> The development of local government in the late nineteenth century led to each major local authority independently drawing up their own conditions of contracts and changes were made periodically to remove any ambiguities.

By early 1900's, the Federation of Civil Engineering Contractors (FCEC) was founded with intention of securing a model form of contract. It was not until 1930, FCEC published a form with the Association of Consulting Engineers (ACE) though it was not well accepted by the industry then. In 1945, together with the ICE, FCEC releases ICE Form of Contract resembling very closely to the standard form issued in 1930. ICE Form of Contract has since published its sixth edition in year 1991.<sup>3</sup>

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<sup>2</sup> Broome, J. C. (n.d.) *A Comparison of the Clarity of Traditional Construction Contracts and of the New Engineering Contracts*. URL:<http://lexinter.net/WEB7/ks-constr.html>.

<sup>3</sup> Norrie, C. M. (1956). *Bridging the Years – A Short History of British Civil Engineering*. London : Edward Arnold Publishing Ltd.

Joint Contracts Tribunal meanwhile released the 1963 Joint Contracts Tribunal Form (JCT 1963 Form) which PAM69 is closely modelled for building works. The grossly defective JCT 1963 was formally retracted from the industry when a JCT 1980 was issued in year 1980. Since then, the climate in United Kingdom was clouded by the plethora of other standard forms of contracts and subcontracts namely, Intermediate Form of Contract 84 (IFC 84), FIDIC Contract (4th Edition) and not to mention the ICE Conditions of Contract (6th Edition) stated earlier.<sup>4</sup>

Malaysia too, was not spared from the trend of innumerable forms of contract being release into the market. In 1998, under the sanction of Pertubuhan Arkitek Malaysia (PAM) and Institution of Surveyors of Malaysia (ISM), PAM98 was released to replace the old PAM69 which has been in use for the last 30 years. The players of the industry was concerned about PAM98 as often than not, PAM98 is used with much amendments.

In year 2000, CIDB Standard Form of Contract for Building Works was drafted and issued by the Construction Industry Development Board (CIDB) as an alternative to the newly issued PAM98. Of late, for the purpose to meet the needs of the Malaysian construction industry, the revised PAM Form of Contact 2006 is now at its final stage of drafting.

The tinkering of contracts was generally done in an amateurish way by non legal professionals usually the Quantity Surveyors or by lawyers oblivious to the practicalities of the construction process in responding to the employer's demand in private sectors. Contracts then become excessively complicated and confrontational with opportunities for disputes at every turn.

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<sup>4</sup> Uff, John. (1991). *Construction Law*. London : Sweet & Maxwell.

The fact that a plethora of forms was seen worldwide and the recent issuance of new standard form of contract in Malaysia to address long standing issues on claims, disputes, arbitration and litigation provokes a mind boggling question to the possible long term solution in Malaysia. At present, contract documents do little to minimize adversarial thinking and provide too little incentive to avoid disputes. Most often than not, these contract documents are left in the drawer untouched and only surface when problems arises for finger pointing purposes.

On the other hand, professionals or stakeholders in the industry namely the Architects, Engineers and Quantity Surveyors were seen trying to grapple with the novel and unfamiliar conditions of numerous forms of contracts that ripple through the industry. In addition, one of the circumstances of many standard forms also appear to lack clearly defined design objectives and to disregard modern principles of risk allocation and project management has been widespread criticism of standard forms for failing to meet the needs of the construction industry. The introduction of the New Engineering Contract (NEC) is said to be a specific response to this criticism.<sup>5</sup>

The NEC introduces a new systematic approach to contracting which is multidisciplinary in nature and fully interlocked in form. Unlike traditional contracts, the NEC attempts to achieve improvement in contractual relationships, managerial practices and business values.<sup>6</sup> The NEC is intended by its supporters to be more flexible and easier to use than any current leading traditional standard forms of contract. The NEC drafters assert that these features reduce adversariality and disputes. The NEC seeks to achieve this aim primarily through co-operative management techniques and incentives built into the NEC's procedures. In brief, this research undertakes to analyse and evaluate these and related claims of innovation.

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<sup>5</sup> McInnis, A. (2001). *The New Engineering Contract: A Legal Commentary*. London : Thomas Telford Ltd.

<sup>6</sup> Potts, K. (1995). *Major Construction Works : Contractual and Financial Management*.

## 1.2 Problem Statement

Malaysia is said to be something of a 'contractual backwater'. It has been operating based upon JCT conditions of contract save for the new CIDB Contract released in year 2000. Though a revised form was published in year 1998 (PAM98), PAM69 presence is still very much felt in the private sectors.

Due to the lack of standard forms available in Malaysia, tendency is such that amendments are made to the general conditions on an ad-hoc basis drafted by Quantity Surveyors lacking in legal expertise or by lawyers representing their client lacking in knowledge about the complexities of construction industry. The conditions are seen to be hastily modified and executed during a hurried tendering process. This in turn led to much disputes and litigation.<sup>7</sup>

Stakeholders in the industry also faced multinational company's predilection to have it's own standard form of contract (be-spoke forms) in constructing buildings in Malaysia. Analogue to other forms of contract, wordings found is typically inscrutable legalese that tends to promote contradictions within clauses leading to litigation. These multinational companies tend to have be-spoke forms that is used worldwide having disregard to its suitability in the host countries buildings are being built.

For those pursuing their rights within the legal framework, the dispute resolution arrangement is somehow calculated. The industry depended upon the limited and outdated Contracts Act 1950 where references were made to previous court cases. This shall mean lengthy and expensive court cases.

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<sup>7</sup> Sundra Rajoo. (2005). Why Arbitration is Popular in the Construction Industry. Kuala Lumpur : *The Ingenieur*, Vol. 25 March-May.

The PAM 69 Standard Form of Contract issued under the sanction of Pertubuhan Arkitek Malaysia has been the *de facto* Standard Form of Contract used by the private sector for the last 30 years for building contracts.<sup>8</sup> The PAM 69 is very much modelled against the JCT 63 Conditions of Contract in United Kingdom which is subjected to severe criticisms. Its inherent weaknesses led to many successful monetary and time claims by the contractors against the employers.

In the usage of PAM 69, amendments were made to the clauses often by Quantity Surveyors to address its shortcoming. In year 1998, PAM issued the PAM 98 Form rectifying some glaring defects found in PAM 69. Since its inception in year 1998, the industry expected a further revised PAM Form that is based on feedback crystallised from the usage of PAM 98.

In 2005, Ar Chee Soo Teng reported that the draft of PAM Form of Contracts 2005 Edition has been forwarded to one of the largest law firms in Malaysia; SKRINE & Co. for a legal overview.<sup>9</sup> The seminar on the PAM Form of Contract 2005 Edition was held in October 2005. Participants of the seminar were given 30 days to comment on the drafted PAM Form.<sup>10</sup> The revised PAM Form of Contract 2006 is now at its final stage of drafting and will be ready for publication shortly.

The Construction Industry Development Board (CIDB) meanwhile established a Procurement Policy Committee in 1997 with the task of drafting appropriate standard forms of contracts serving the various sub sectors in the construction industry. The Procurement Policy Committee subsequently set up various drafting committees under the chairmanship of various professional institutions in the issuance of Standard Form of Building Contract, Standard Form of

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<sup>8</sup> Sundra Rajoo. (1999). *The Malaysian Standard Form of Building Contract (the PAM 1998 Form)*, 2<sup>nd</sup> ed. Kuala Lumpur : Malayan Law Journal Sdn. Bhd.

<sup>9</sup> URL : [http://www.pam.org.my/practice\\_projects0411.asp](http://www.pam.org.my/practice_projects0411.asp)

<sup>10</sup> Pertubuhan Arkitek Malaysia. *Berita Arkitek*. November/December 2005.  
URL : [http://www.pam.org.my/Library/BA\\_PDF/BA\\_Nov-Dec05.pdf](http://www.pam.org.my/Library/BA_PDF/BA_Nov-Dec05.pdf)

Civil Engineering Contract and Standard Form of Contract for Industrial Processes.

11

CIDB Standard Form of Building Contract issued in year 2000 is the first time of the series of contracts to be published by CIDB. CIDB 2000 is seen to be a Standard Form of Contract that is radically different from PAM or other forms of contract. Notable differences between PAM 98 and CIDB 2000 are the attending of Superintending Officer (SO) and provision option of part of the works to be designed by the Contractor. CIDB 2000 is said to “streamline contractors by providing an elaborate framework for the effective and efficient administration of the contract so as to reduce uncertainties with its associated costs and delays”.<sup>12</sup>

It appears to be an inclination in Malaysia for Employer to elect for design and build contracts in their developments. Other than the Public Works Department (PWD)<sup>13</sup> Design and Build Contract, there is not other Standard Forms of Contract in Malaysia that is drafted specifically for Design and Build works.<sup>14</sup> CIDB 2000 have such provision but it is limited to ‘part’ of the works. Due to this lacuna, the FIDIC Orange Book appears to be the form popularly received.

In short, the evolution of standard forms of contract in building and engineering has been haphazard. Over time, divergent aims and interests among various constituencies that use standard forms have hampered systematic development and design. Many standard forms also appear to lack clearly defined design objectives and to disregard modern principles of risk allocation and project management.<sup>15</sup>

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<sup>11</sup> Ong See Lian *et al.* (2000). *Guide on the CIDB Standard Form of Contract for Building Works*. Kuala Lumpur : Construction Industry Board of Malaysia

<sup>12</sup> Wong, J. (2002). The CIDB Standard Form of Contract Poised to Dominate the Construction Industry? *The Malaysian Surveyor*, Vol 37.1, pp. 30-33.

<sup>13</sup> Also known as Jabatan Kerja Raya (JKR)

<sup>14</sup> Harban Singh K. S. (2004). *Engineering and Construction Contracts Management : Law and Principles*. Malaysia : Lexis Nexis Business Solutions.

<sup>15</sup> McInnis, A. (2001). *The New Engineering Contract: A Legal Commentary*. London : Thomas Telford Ltd.



### 1.3 Objective of Research

The objective of the research is to examine the possibility of implementing the New Engineering Contract (NEC) 1993 issued under the sanction of Institution of Civil Engineers (ICE), United Kingdom in the Malaysian construction industry.

### 1.4 Scope and Limitations of Research

It should be first emphasized that the observation made in this thesis are based upon information available to date. Although NEC was introduced in the United Kingdom back in 1993, Malaysia has never utilized this form of contract. Therefore, to many in the industry, NEC is very much a new concept. Nevertheless, this research attempts to look into both public and private sector in the Malaysian construction industry.

As the research is concerned with examining the possibility of implementing NEC in the Malaysian construction industry, a survey via structured interview is conducted with highly prominent professionals within the construction industry as an assessment of their perception of how far NEC's concept is acceptable, which could drive the possibility of implementing NEC in the Malaysian construction industry. Due to time constraint, this survey could only afford a minimum sample covering all professionals of the industry.

There is also a lack of reported cases in Malaysia due to the short legal history of the NEC as little research material and other literature on the use of the Form to draw from. There are in fact very limited usage and knowledge of NEC in Malaysia. The *de-facto* forms used in the market have been the PAM 69, PAM 98 and PWD 203A. Thus, any possibility of lacking in knowledge on the existence of NEC and clauses within is acknowledged.

## **1.5 Research Methodology**

- a. Study on the New Engineering Contract (NEC) 1993 and related published work relating to NEC for a strong understanding on NEC.
- b. Study on the Latham Report (a report by Sir Michael Latham endorsing the NEC).
- c. Comprehensive study on write up, journals, and commentary to the development and significance of the principles underlying preparation of the NEC as well as the arguments in favour of and against them.
- d. Analyse and evaluate the background of NEC whether it improves upon the traditional standard forms of contract.
- e. A survey via structured interview with highly prominent professionals within the construction industry as an assessment of their perception of how far NEC's concept is acceptable, which could drive the possibility of implementing NEC in the Malaysian construction industry

## **1.6 Significance of Research**

There is an urgent need for research to study the response of industry towards the recent issuance of standard forms of contracts in Malaysia. The research will take a chance to investigate the industry to look into the importance of management of contracts rather than legalistic contracts that do little to diffuse the augmenting litigious nature of the industry. Though much was written on NEC on its success in the implementation worldwide, no write-ups were found on its presence or rather it's usage in Malaysia.

This research also undertakes to examine the background to the NEC, its design objectives, structure and its key features to determine whether it improves upon the traditional standard forms of contract. Thus, this research is vital to determine whether NEC does make a significant contribution to the development of standard forms of contract, addresses many of their shortcomings and offers one of the best models for their future design.

In essence, this research is expected to provide an analysis of the NEC's main tenets that is radically different in term of its style and structure from the traditional forms of contract used in the construction industry specifically addressing the problems of the industry. The research is then brought forward to the industry to gauge its response to the possibility of trying out NEC. Hence, this study fills a void that has not been studied.

## **1.7 Organisation to Thesis**

This research covers six (6) segments as follows:-

### **1.7.1 Chapter 1 : Introduction**

This segment introduces the foci of the research. An introduction to the evolution of contractual form and the problems and challenges plaguing the Malaysian construction industry particularly in regards of standard forms of contract is discussed. The objective undertaken for this thesis is presented in Chapter 1. It also presents the scope and limitations; significance of the research; as well as the methodology and the outline of this research.

### **1.7.2 Chapter 2 : Critique of Traditional Forms and the Need to Change**

A significant part of wide range of reports written in the construction industry has dwelled upon the merits and demerits of the industry standard forms of contract. This chapter outlines the criticisms in a number of respects of the traditional standard forms of contract. It also undertakes a clear understanding of the need to change in regards of the criticisms of the traditional forms of contract.

### **1.7.3 Chapter 3 : The Development and Implementation of the New Engineering Contract**

This chapter provides information on the New Engineering Contract (NEC). It looks at how the NEC was created and implemented in the United Kingdom (UK) as a response to the UK construction industry's problems with adversarial relations, claims, and litigation. Also, the chapter reviews the status of the NEC's implementation in the construction industry to date.

### **1.7.4 Chapter 4 : New Engineering Contract Principles**

The NEC has spread its wing to numerous prestigious projects across the globe. Its simplicity in language and setting enables it to serve as a multi-purpose form of contract and was endorsed by Latham Report as a testament of good sense and effective project management. This section explores the NEC family of contracts, the structure and objectives of NEC as well as detailing salient aspects of NEC.

### **1.7.5 Chapter 5 : Possibility of the Implementation of NEC in Malaysia**

This segment carries an assessment of the industry's perception of how far the NEC's concept is acceptable at this point of time, which could drive the possibility of implementing the NEC in the Malaysian construction industry.

### **1.7.6 Chapter 6 : Conclusion and Recommendations**

This chapter consolidating the research results and findings infers conclusions from this study. This section also includes recommendations and suggestions for future research.

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