

**TERMINATION OF CONSTRUCTION CONTRACTS BY
EMPLOYER**

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To
my loving wife
“Mahboubeh”
and
my beloved son
“Iliya”

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ABSTRAK

Dalam projek pembinaan, berlakunya pertikaian boleh menyebabkan impak yang serius; sebagai klien, ia diharapkan untuk mengelakkan sebarang kejadian pertikaian semasa kerja, namun ia seolah-olah tidak dapat dielakkan. Pada keadaan seperti ini, secara idealnya ia dijangka bahawa syarat-syarat nyata di dalam kontrak pembinaan secara adil akan mengagihkan risiko antara pihak yang berkontrak. Tetapi dalam realiti, beberapa fasal-fasal, yang dibentangkan untuk mencegah atau menyelesaikan pertikaian mereka tidak melaksanakan seperti yang diharapkan. Sebagai contoh, di Iran, Terma Am Kontrak (GTC) disediakan untuk menganjurkan sistem perolehan, bagaimanapun, ia tidak dapat melakukan secara munasabah untuk mencegah atau menyelesaikan kemungkinan kesan pemusnah pertikaian pembinaan. Sebagai contoh, beberapa projek pembinaan di bawah GTC Iran ditinggalkan dan kontrak ditamatkan di mana majikan akan mengambil kelebihan ketidakpastian beberapa fasal dalam GTC Iran terutamanya fasal penamatan (fasal 46 dan 47 GTC Iran). Tetapi walaupun GTC Iran, seolah-olah masalah ini, yang membawa kepada penamatan kontrak dalam manfaat majikan adalah kurang diperhatikan dalam kontrak pembiaian kerana lebih banyak butir-butir yang berkaitan dengan penamatan kontrak oleh pihak-pihak yang dijelaskan dalam kontrak pembiaian Malaysia. Sebagai contoh, dalam JKR203A Malaysia, penamatan kontrak dijelaskan dalam hak-hak kedua-dua majikan dan kontraktor, yang termasuk kemungkiran, prosedur dan kesan (fasal 51 - 58). Pada asas ini isu timbul seperti: apakah sebab-sebab yang paling kerap yang telah menyebabkan penamatan kontrak faedah majikan dalam industri pembinaan sebenar? Oleh itu, kajian ini bertujuan untuk menyediakan syarat-syarat dan prosedur yang lebih menyeluruh untuk fasal penamatan dalam kontrak pembinaan GTC di Iran dengan menganalisis pertikaian yang paling kerap dikaitkan dengan penamatan kontrak oleh majikan dalam projek pembinaan di Malaysia dan Iran. Untuk mencapai matlamat ini, analisis perbandingan antara fasal penamatan dalam JKR203A Malaysia dan GTC Iran telah dijalankan serta mengkaji kes-kes relevan yang telah berlaku di Malaysia dan Iran.

ABSTRACT

In construction projects, disputes occurrence can have serious impacts; as a client, it is expected to avoid any disputes occurrence during the work; however, it is seemingly inevitable. On such conditions, ideally, it is expected that the express terms and conditions under standard forms of contracts would fairly distribute the risks between the contracting parties. But in reality, some of these clauses, which are set out to prevent or solve those disputes in reasonable time did not perform as expected. For instance, in Iran, General Terms of Contract (GTC) is provided in order to organize procurement systems; however, it could not perform reasonably in some cases in order to prevent or solve the probable destructive impacts of construction disputes. For instance, some of the construction projects under GTC of Iran are abandoned and the contracts are terminated in which the employers will take advantages of the uncertainty of some clauses in GTC of Iran especially termination clauses (clause 46 and 47 of GTC of Iran). But despite GTC of Iran, seemingly this problem, which leads to termination of contract in benefits of employers is less observed in standard form of contract in Malaysia since more details relevant to termination of contract by the parties are clarified in Malaysian standard forms of contracts. For instance, in PWD 203A of Malaysia, termination of contract is explained in rights of both employer and contractor, which include default, procedure and effects (clause 51 – 58). On this basis the issue arises as: what are the most frequent reasons that have caused the termination of contract in benefits of employer in the actual construction industry? Hence, this study aims to prepare more comprehensive and legally correct conditions and procedure for termination clauses in GTC of Iran in its construction contract by analyzing the most frequent disputes associated with the termination of contract by employer in Malaysian and Iranian construction projects. To achieve this aim, comparative analysis between termination clauses in PWD 203A of Malaysia and GTC of Iran is done with reviewing relevant cases which have been under these standard forms and due to dispute occurrence and termination event referred to the court in Iran and Malaya.

TABLE OF CONTENT

CHAPTER	TITLE	PAGE
	TITLE	i
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENTS	iv
	ASTRAK	v
	ABSTRACT	vi
	TABLE OF CONTENTS	vii
	LIST OF CASEDS	xiv
	LIST OF TABLES	xix
	LIST OF FIGURES	xx
1	INTRODUCTION	Error! Bookmark not defined.
	1.1 Background of Research	Error! Bookmark not defined.
	1.2 Problem Statement	Error! Bookmark not defined.
	1.3 Objective of Research	Error! Bookmark not defined.
	1.4 Scope of Research	Error! Bookmark not defined.
	1.5 Significance of Research	Error! Bookmark not defined.
	1.6 Research Process and Method of Approach	Error! Bookmark not defined.
	1.6.1 Stage 1: Identifying The Research Issue	Error! Bookmark not defined.

- 1.6.2 Stage two: Initial study **Error! Bookmark not defined.**
- 1.6.3 Stage three: Data collection **Error! Bookmark not defined.**
- 1.6.4 Stage four: Data analysis **Error! Bookmark not defined.**
- 1.6.5 Stage Five: Writing and Completion **Error! Bookmark not defined.**
- 1.7 Organization of the chapters **Error! Bookmark not defined.**
 - 1.7.1 Chapter 1: Introduction **Error! Bookmark not defined.**
 - 1.7.2 Chapter 2: Principles of discharge of contract **Error! Bookmark not defined.**
 - 1.7.3 Chapter 3: Termination of contract in PWD 203A (Rev. 2010) of Malaysia and GTC of Iran. **Error! Bookmark not defined.**
 - 1.7.4 Chapter 4: Analysis and discussion **Error! Bookmark not defined.**
 - 1.7.5 Chapter 5: Conclusion and Recommendations **Error! Bookmark not defined.**

2

PRINCIPLES OF DISCHARGE OF CONTRACTS **Error! Bookmark not defined.**

- 2.1. Introduction **Error! Bookmark not defined.**
- 2.2. Contract **Error! Bookmark not defined.**
 - 2.2.1 Contract law **Error! Bookmark not defined.**
 - 2.2.2 Construction Contract **Error! Bookmark not defined.**
- 2.3. Standard forms of contract **Error! Bookmark not defined.**
 - 2.3.2 Common types of standard form building contracts in Iran **Error! Bookmark not defined.**
- 2.4. Determination of Contract in Malaysia **Error! Bookmark not defined.**
 - 2.4.1 Determination at Common Law **Error! Bookmark not defined.**
 - 2.4.1.1. Discharged by Performance **Error! Bookmark not defined.**

- 2.4.1.2. Discharged by Frustration **Error! Bookmark not defined.**
- 2.4.1.3. Discharged by Repudiation **Error! Bookmark not defined.**
- 2.4.1.4. Discharged by Agreement **Error! Bookmark not defined.**
- 2.4.2. Determination at Contract Act 1950 **Error! Bookmark not defined.**
 - 2.4.2.1. Discharged by Performance **Error! Bookmark not defined.**
 - 2.4.2.2. Discharged by Agreement **Error! Bookmark not defined.**
 - 2.4.2.3. Discharged by Impossibility of Performance **Error! Bookmark not defined.**
 - 2.4.2.4. Discharged by Breach **Error! Bookmark not defined.**
- 2.5. Determination of contract at Legal System of Iran **Error! Bookmark not defined.**
 - 2.5.1. Termination of contract at Civil Law Code in Iran **Error! Bookmark not defined.**
 - 2.5.1.1. Refusing by the guilty party to perform his obligations **Error! Bookmark not defined.**
 - 2.5.1.2. Non-payment or delay in payment in the sale of goods **Error! Bookmark not defined.**
 - 2.5.1.3. Non-payment in the event of bankruptcy of the purchaser **Error! Bookmark not defined.**
 - 2.5.1.4. Refusing to give the possession of the property by Landlord to Tenant **Error! Bookmark not defined.**
 - 2.5.1.5. Non-performance of duties in farming contracts **Error! Bookmark not defined.**
- 2.6. Summary **Error! Bookmark not defined.**

**DETERMINATION OF CONTRACT BY EMPLOYER IN
CONSTRUCTION UNDER PWD 203A IN MALAYSIA AND GTC
STANDARD FORMS OF CONTRACT IN IRAN**Error! Bookmark
not defined.

- 3.1. Introduction **Error! Bookmark not defined.**
- A. PWD Standard Form of Contract:**Error! Bookmark not defined.**
- 3.2. Determination of Contract under PWD 203A (Rev. 2010)
Standard Form of Contract**Error! Bookmark not defined.**
- 3.2.1. Breach of condition of contract by employer**Error!
Bookmark not defined.**
- 3.2.2. Breach of condition of contract by contractor**Error!
Bookmark not defined.**
- (i) Fail to commence the works**Error! Bookmark not defined.**
- (ii) Suspension of Work**Error! Bookmark not defined.**
- (iii) Failure to Proceed Regularly and Diligently**Error!
Bookmark not defined.**
- (iv) “Fails to execute the works in accordance with the
contract”; **Error! Bookmark not defined.**
- (v) “Persistently neglects to carry out his obligations
under the contract**Error! Bookmark not defined.**
- (vi) Neglect to remove defective work**Error! Bookmark
not defined.**
- (vii) Subletting the contract without Consent**Error!
Bookmark not defined.**
- (viii) Fails to comply with any terms and conditions of this
contract **Error! Bookmark not defined.**
- 3.2.2.1 Termination procedure**Error! Bookmark not
defined.**
- 3.2.3. Termination of contract by employer due to non – breach
reasons **Error! Bookmark not defined.**
- (i) Bankruptcy, Insolvency of the Contractor**Error!
Bookmark not defined.**

- (ii) National interest **Error! Bookmark not defined.**
 - (iii) Corruption, unlawful or illegal activities **Error! Bookmark not defined.**
 - (iv) Force majeure event **Error! Bookmark not defined.**
- 3.2.4 Effects of Determination of Contractor's Employment
Error! Bookmark not defined.
- 3.3 Termination in General Term of Contract of Iran (Clause 46)
Error! Bookmark not defined.
- 3.3.1 Clause 46 of General Terms of Contract (GTC) **Error! Bookmark not defined.**
- 3.3.1.1 Termination of contracts by employer due to breach of conditions of contracts by contractor **Error! Bookmark not defined.**
- (i) Delay in taking over the site **Error! Bookmark not defined.**
 - (ii) Delay in submission of work program **Error! Bookmark not defined.**
 - (iii) Delay in mobilization of the site **Error! Bookmark not defined.**
 - (iv) Delay to commence the project **Error! Bookmark not defined.**
 - (v) Delay in completion of each part of work based on Plan **Error! Bookmark not defined.**
 - (vi) Delay in completion of work more than ¼ **Error! Bookmark not defined.**
 - (vii) Supervision of the site or suspension of the work **Error! Bookmark not defined.**
 - (viii) Non-performance of consultant engineer's obligations in removing defectives **Error! Bookmark not defined.**
 - (ix) Delay in payment **Error! Bookmark not defined.**
 - (x) Bribe or giving gift **Error! Bookmark not defined.**
 - (xi) Sublet the contract to the third party **Error! Bookmark not defined.**

3.3.1.2. Termination of contacts by employer due to non - breach reasons **Error! Bookmark not defined.**

- (i) Non-performance of the work after eliminating the “Event of Force Majeure” **Error! Bookmark not defined.**
- (ii) Insolvency of the contractor’s company **Error! Bookmark not defined.**
- (iii) The contractor’s bankruptcy **Error! Bookmark not defined.**
- (iv) Formal and official prohibition of contractor **Error! Bookmark not defined.**
- (v) Employer’s self interest and convenience **Error! Bookmark not defined.**

3.3.2. Procedure of termination of contract under GTC of Iran **Error! Bookmark not defined.**

3.3.3. Effects of termination of contract under GTC of Iran **Error! Bookmark not defined.**

4

DISCUSSION AND ANALYSIS **Error! Bookmark not defined.**

- 4.1. Introduction **Error! Bookmark not defined.**
- 4.2. Similar termination clauses in GTC of Iran and PWD 203A of Malaysia **Error! Bookmark not defined.**
 - 4.2.1. Fail to commence the work **Error! Bookmark not defined.**
 - 4.2.1.1 Review of the Disputes Caused by fail to commence the works **Error! Bookmark not defined.**
 - 4.2.2. Suspension of Works **Error! Bookmark not defined.**
 - 4.2.2.1 Review of the Disputes Caused by Suspension of Works **Error! Bookmark not defined.**
 - 4.2.3. Failure to Proceed Regularly and Diligently **Error! Bookmark not defined.**

- 4.2.3.1. Review of the Disputes Caused by Failure to Proceed Regularly and Diligently **Error! Bookmark not defined.**
- 4.2.4. Failure to Remove Defective Work **Error! Bookmark not defined.**
 - 4.2.4.1. Review of the Disputes Caused by Failure to Remove Defective Works **Error! Bookmark not defined.**
- 4.2.5. The contractor bankruptcy **Error! Bookmark not defined.**
 - 4.2.5.1. Review of the Disputes Caused by The contractor bankruptcy **Error! Bookmark not defined.**
- 4.2.6. Assignment or Sub-letting without Consent, Corruption, unlawful or illegal activities **Error! Bookmark not defined.**
- 4.3. Different termination clauses between GTC of Iran and PWD 203A (Rev.2010) of Malaysia **Error! Bookmark not defined.**
 - A. PWD 203A (Rev.2010) of Malaysia **Error! Bookmark not defined.**
 - 4.3.1. Others dispute caused the termination of contract by employer **Error! Bookmark not defined.**
 - B. GTC of Iran **Error! Bookmark not defined.**
 - 4.3.2. Delay in payment **Error! Bookmark not defined.**
 - 4.3.2.1. Review of the disputes caused by delay in payment **Error! Bookmark not defined.**
 - 4.3.3. Delay in mobilization of the site **Error! Bookmark not defined.**
 - 4.3.3.1. Review of the Disputes Caused by delay in mobilization of site **Error! Bookmark not defined.**
 - 4.3.4. Delay in completion of work more than ¼ **Error! Bookmark not defined.**
 - 4.3.4.1. Review of the Disputes Caused by delay in completion of work more than ¼ of contract time **Error! Bookmark not defined.**
 - 4.3.5. Non-performance of the work after eliminating the “Event of Force Majeure” **Error! Bookmark not defined.**

- 4.3.5.1. Review of the Disputes Caused by Non-performance of the work after eliminating the “Event of Force Majeure” **Error! Bookmark not defined.**
- 4.3.6. Review of the disputes caused by delay in submission of Work Program **Error! Bookmark not defined.**
- 4.3.7. Review of the Disputes Caused by Delay in taking over the site **Error! Bookmark not defined.**
- 4.3.8. Review of the Disputes Caused by Bribe or giving gift **Error! Bookmark not defined.**
- 4.4. General strength and weaknesses of PWD 203A of Malaysia and GTC of Iran **Error! Bookmark not defined.**
 - 4.4.1. General strengths and weaknesses of PWD 203A (Rev. 2010) of Malaysia **Error! Bookmark not defined.**
 - 4.4.2. General strengths and weaknesses of GTC of Iran **Error! Bookmark not defined.**
 - 4.4.2.1. Weaknesses **Error! Bookmark not defined.**
 - 4.4.2.2. Strength **Error! Bookmark not defined.**
- 4.5. Conclusion **Error! Bookmark not defined.**

5

CONCLUSION AND RECOMMENDATION **Error! Bookmark not defined.**

- 5.1. Introduction **Error! Bookmark not defined.**
- 5.2. Contractors’ rights to terminate the contracts **Error! Bookmark not defined.**
 - 5.2.1. Employer’s Refusal to be bound **Error! Bookmark not defined.**
 - 5.2.2. Preventing Execution of Works **Error! Bookmark not defined.**
 - 5.2.2.1. Failure to Supply Plans **Error! Bookmark not defined.**
 - 5.2.3. Failure to Give Possession of the Site **Error! Bookmark not defined.**

5.2.4 Failure to Make Interim Payment **Error! Bookmark not defined.**

5.2.5 Under-Certification of Payments **Error! Bookmark not defined.**

5.2.6 Interference or Influence of Certifier **Error! Bookmark not defined.**

5.3 Recommendations **Error! Bookmark not defined.**

REFERENCES Error! Bookmark not defined.

TABLE OF CASES

<i>Acrow (Automation) Ltd. v. Rex Chainbelt Inc. (1971) 1 WLR 1676</i>	123
<i>Arkitek Tenggara v. Mid Valley [2007] 5 MLJ 697</i>	55
<i>Avery v Bowden [1855] 26 Law Journal Queen's Bench 3</i>	31
<i>Azad Talashgaran Yaran Khorasan Co v Investment Industrial Sakhteman Niru Co</i>	99, 111
<i>Ban Hong Joo Mines Ltd v. Chen & Yap Ltd [1969] 2 MLJ 83</i>	125
<i>Black Lake Pipe Line Co. v. Union Construction Co, 538 S.W.2d 80 (Tex. 1976)</i>	52
<i>Brani Readymixed v. Yee Hong [1995] 1 SLR 205 (CA)</i>	125
<i>Carr v. J.A. Berriman (1953) 89 CLR 327</i>	124
<i>Choo Yin Loo v Visuvalingam Pillay (1930) 7 FMSLR 135</i>	37

<i>Chunna Mal Ram Nath v Mool Chand [1928] 55 IA 154</i>	35
<i>Cort v Ambergate, Nottingham, Boston and Eastern Junction Railway (1851) 17 QB 127</i>	122, 123
<i>Cory Ltd v. City of London Corp [1951] 2 KB 476 (CA)</i>	123
<i>Davis Contractors Ltd. v. Fareham Urban Council (1956) [1956] AC 696</i>	28
<i>Dawber Williamson (Roofing) Ltd v Humberside Country Council[1979] 14 BLR 70</i>	58
<i>Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 at 855</i>	18
<i>Earth & General Contractors Ltd v</i>	124
<i>Farley v Housing & Commercial Developments Ltd (1984) 26 BLR 66</i>	102
<i>Felton v. Wharrie (1906) HBC (4th ed.), Vol. 2, P.398 (CA)</i>	124
<i>Foruz Razi zadeh v Mohammad Kamereii</i>	86
<i>Freeth v. Burr (1873-74), 9 CP 208</i>	125
<i>Ganayes Co v Road and Transportation ministry [1992]145,66</i>	109
<i>HGH Co v the office of road and transportation of Zahedan City [2007]63210</i>	107
<i>Highceed Corp Sdn Bhd v Warisan Harta Sabah Sdn Bhd & Anor [1986] 2 MLJ 241</i>	104
<i>Hochster case, (1853) 2 E&B 678</i>	122

<i>Hounslow Borough Council v Twickenham Garden Developments Ltd</i> [1979] 7 BLR 81	55
<i>Islamic Azad University of Bojnord v Beton Shargh Co</i>	92, 110
<i>Kingdom v. Cox</i> (1848) 5 CB 522	122, 123
<i>Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd</i> [1995] 1 MLJ 214	93, 100
<i>Lim Chon Beng v Pulau Kembar Sdn Bhd</i> [2005] 7 MLJ 180	87
<i>Loke Hong Kee (S) PTE Limited v United Overseas Land Limited</i> [1982] 2 MLJ 83	94
<i>Ludenhams Fidelity v. South Pembrokeshire District Council</i> (1986) 33 BLR 39 (CA)	125
<i>Majlis Perbandaran Seremban v Maraputra Sdn Bhd</i> [2004] 5 MLJ 469	88
<i>Malayan Flour Mills Sdn Bhd v Raja Lope & Tan Co & Anor</i> [1998] 6 MLJ 377	95
<i>Maskan e Mehr Co v Almaskaran Co</i>	92, 99, 107
<i>Mersey Steel & Iron Co</i> (1884) 9 App. Cas. 434	30, 122, 124, 125
<i>Metropolitan Water Board v Dick, Kerr & Co. Ltd</i> [1918] AC 119	29
<i>Moschi v Lep Air Services Ltd</i> [1973] AC 331 at 346	18
<i>Mvita Construction Co Ltd v Tanzanian Harbours Authority</i>	49

<i>[1988] 46 BLR 19</i>	
<i>Official Assignee v Chartered Industries of Singapore Ltd</i>	96
<i>Pan Ah Ba & Anor v Nanyang Construction Sdn Bhd [1969] 2 MLJ 181</i>	35
<i>Panamena, etc. v. Frederick Leyland & Co. Ltd [1947] AC 428</i>	125
<i>Perini Corporation v. Commonwealth of Australia (1969) 12 BLR 82</i>	125
<i>Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261</i>	96
<i>Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257</i>	37
<i>Rees v. Lines (1837) 8 C&P 126</i>	124
<i>Road and Transportation Ministry v Kofraran Morison Co [1998]29815575</i>	112
<i>Roberts v. Bury Commissioners (1870) LR4CP 755</i>	123, 124
<i>Rothmans of Paul Mall (NZ) Ltd v Attorney-General [1991] 2 NZLR 523 at 328</i>	19
<i>Salleh Abas F.J. in Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151</i>	33
<i>Shahab Afrooz Pooya Co v North Gas Co [2006]89600235</i>	85
<i>Siaphiatoon v Lim Siew Hui [1965] MLJ 305</i>	49
<i>Sir Lindsay Parkinson & Co. Ltd v Commissioners of Works and Public Buildings [1950] 1 ALL ER 208</i>	29

<i>Southern Foundaries v. Shirlaw</i> [1940] AC 701	123
<i>Steel & Iron Co. Ltd case</i> , (1884) 9 App. Cas. 434	122
<i>Stirling v. Maitland</i> (1864) 5 B&S 840, 852	123
<i>Suisse Atlantique Societe d' Armement Maritime SA v NV Rotterdamsche Kolen Central</i> [1966] 2 All ER 61	31
<i>Sutcliffe v. Thackrah</i> [1974] AC 727	125
<i>Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak)</i> [2005] 2 MLJ 442	97
<i>Thamesa Designs Sdn Bhd v Kuching Hotels Sdn Bhd & 3 Ors</i> [1993] 2 AMR 2083	60
<i>The office of Roads and Transportation of Ilam v Gardan Pey Co</i> [2000]23/6/10049	101
<i>Thomas Feather & Co (Bradford) Ltd v Keighley Corporation</i> [1953] 52 Local Government Reports 30	26, 103
<i>Usaha Damai Sdn Bhd v Kerajaan Negeri Selangor</i> [1995] 5 MLJ 601	49, 51, 89
<i>West Faulkner Associates v London Borough of Newham</i> [1994] 71 BLR 1	52
<i>White & Carter (Councils) Ltd v McGregor</i> [1961] 3 All ER 1178	31
<i>Willment Brothers Ltd v North-West Thames Regional Helth Authority</i> (1984) 26 BLR 51	102
<i>Yeoh Kim Pong (Realty) Ltd v Ng Kim Pong</i> [1962] MLJ 118	33

LIST OF TABELS

TABLE NO.	TITLE	PAGE
3.1	Classification of PWD Forms of Contract	47
3.2	Termination Clauses in PWD 203A of Malaysia	48
3.3	General causes of termination in PWD 203A of Malaysia	49
4.1	Termination clause in GTC of Iran and PWD 203A of Malaysia	83

LIST OF FIGURES

TABLE NO.	TITLE	PAGE
3.1	Termination process of contracts in GTC of Iran	81
5.1	Party that committed the breach	122

CHAPTER 1

Introduction

1.1 Background of Research

Nowadays, we enter into contracts day after day. Taking a seat in a bus amounts to entering into a contract. Putting a coin in a slot of a weighing machine, amounts to making a contract... In such cases, we do not even realize that we are making a contract. In the case of people engaged in trade, commerce and industry, they carry on business by entering into contracts.¹

There are many versions of definition of contract made by many authors. For instance, Treitel(1999) defines a contract as: *an agreement in which law would enforce or recognize the duties and obligations between the contracting parties.*²

But a little deeper and more accurate definition of contract is given by Beatson, in *Anson's Law of Contract (2002)*, as:

*“A legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others”.*³

Contract Act 1950 of Malaysia in Section 2(h) defined the contract as: A

¹ Gulshan S.S, “Business Law Including Company Law”, New Age International, Jan 1, (2006).

² Sir Guenter Heinz Treitel, Professor of English Law, “The Law of Contract”, (1999).

³ Beatson J, et al, “Anson's Law of Contract”, 28th edition, Oxford, (2002).

*contract is an agreement enforceable by law*⁴.

The term contract is defined by Iranian authorities as; “*exchange of promises between one or more parties against another one or more parties, which is accepted by both parties.*”⁵

Contracts that are simply agreements, which oblige the parties to do specified things, cover the enormous numbers of construction works are performed. In the case of a construction contract, it is specified that the contractor requires building the works and the employer requires paying for them.

As noted in Ramsey (2007), Contracts present a number of different functions as in the case of a construction contract followings are listed:

a) Identifying the work that should be done by the contractor or subcontractor, etc. including the scope, required quality and time for completion of various parts of the work,

b) Specifying the amount of payments that should be made by the employer, how any additional or reduced payments are to be computed and when payments should be made,

c) Defining the responsible party in occurrence of the events that are outside the parties' direct control which affect the work (events of force majeure); such events may include bad weather, access difficulties, local authority restrictions, changes, in the law, unexpectedly poor ground, etc.

d) Defining the responsible authority for undertaking the various administrative or dispute resolution functions which may be required, including giving instructions, making decisions about claims, appointing adjudicators, arbitrators, etc.⁶

⁴ Section 2(h) of Contracts Act 1950.

⁵ Section 183, Civil Law Code of Iran.

⁶ Ramsey, V., Telford Limited, T., “Construction Law Handbook”, Thomas Telford, 2007.

On condition that a construction project is required to be carried out, the parties must decide what conditions of contract should be used. There are a number of basic options noted by Ramsey (2007):

- a) *“A bespoke set of contract conditions, designed specifically for the particular project;*
- b) *A standard form contract, published by one of the major professional institutions, or*
- c) *A standard form contract with amendments to suit the particular circumstances”.*⁷

According to needs of individual project, a bespoke form that is called ‘home made’ contract is provided based on experience expressed in existing standard forms. In other words, when the parties need a more complex, detailed or specific documents for a particular contract, they will negotiate, organize, and draft non-standard bespoke contracts, incorporating the required and necessary legal detailed and specific provisions, for their particular transactions.

In spite of standard forms of contracts, bespoke forms involved in construction works have almost more disadvantages. To make it clear, it can be noted that standard forms of contracts are cheaper compared to bespoke forms. Moreover, the parties are more familiar with standard forms, which lead to reduce the cost of tendering and also, enhance the parties’ confidence in the arrangement and avoid containing unforeseen anomalies. Where the standard form is drawn up by a body representing all sides of the industry – as are the NEC, ICE conditions of contract, the JTC contract and the FIDIC contracts – then ideally, the parties can have increased confidence in the balance of risk allocation.

There is no comprehensive definition of ‘Standard form of Contract’. However, generally term a standard form contract will usually be one that one party would prepare to the contract and is not negotiable between the parties. In other words, it is offered on a ‘take it or leave it’ basis.

⁷Ibid.

Standard form contracts are normally used transactions, such as: supply of goods and services to clients in many industries, including;telecommunications, finance, domestic building, motor vehicles, travel, utilities and etc.⁸ Insurance policies are simple examples of ‘take it or leave it’ basis of standard form contracts (where the insurer decides what it will and will not insure and also the language of the contract) and contracts with government agencies (where certain clauses must be included by law or regulation).

JTC and IEC are the most common standard forms of contract used by United Kingdom in its construction contracts. Pertubuhan Arkitek Malaysia (PAM 1969, 1998, 2006), Construction Industry Development Board (CIDB 2000), Jabatan Kerja Raya (JKR) or Public Works Department (PWD 10/83, 2007, 2010) and Institution of Engineers, Malaysia (1989), are some types of standard form of contract used by Malaysia in its construction contracts. While, General Terms of Contract (GTC) is used as standard form of contract in Iran for the public works and also FIDIC is standard form of contract, which is for international contracts in Malaysia and Iran.

Generally, it can be noted that, standard forms of contract contains all necessary terms for the purpose of performing construction work. In this way some clauses are provided which are pointing out to the duties and obligations of each party. For instance, payments, variations, termination, performance bonds, damages and etc. are parts of content of standard form of contract clauses.

Termination of contract is one of the issues, which is discussed in GTC of Iran (clause 46-47) and PWD 203A of Malaysia (clause 51-58). In clause 46 of GTC of Iran general defaults, which lead to termination of contract, are noted which is followed by termination procedure in clause 47. In PWD 203A of Malaysia the following issues relevant to termination of contract are stated in clause 51 to 58:

- Termination by agreement
- Causes of termination

⁸ Ahmed Umar Abubakar, “Business Law School Of Business Of Economics Major”: *Business Management*

- Procedure of termination
- Effect of termination
- Non-breach causes

Based on Asniah Bt Abdin 2007⁹, followings are the main reasons which lead to termination of contract:

1. Payment
2. Variation
3. Termination
4. Delay
5. Defect
6. Damages
7. Performance bond
8. Default

1.2 Problem Statement

In construction projects, disputes occurrence can have serious impacts; for instance, the project may suffer cost and time overrun, the owner may suffer significant loss and profit and worst still the project may be abandoned or failed. As a client in any construction project, it is expected to avoid any disputes occurrence during the construction work; however, the disputes occurrence is seemingly inevitable. On such conditions, the parties don't want any lengthy litigation process in resolving disputes.

In occurrence of any dispute in construction project, ideally, it is expected that the terms and conditions under standard forms of contracts would fairly

⁹Asniah Abidin, "The Profile of Construction Disputes", Master thesis, University Technology Malaysia, (2007).

distribute the risks between the contracting parties. For example, if a contractor is required to provide performance bond, employer could also be required to provide the contractor with payment bond. And also, if the contract contains express provision for termination of contract by employer, the contractor should also be expressly provided with similar right. I.e. to terminate the contract both contracting parties should have similar rights; however, despite this express provision, disputes do occur.

As mentioned earlier, the standard forms of contracts contain vital terms for performing contractual obligations by parties in reasonable manner such as: payments, variations, termination, performance bonds, damages and etc. But in reality in some cases, some of these clauses, which are set out to prevent or solve those disputes in reasonable time did not perform as expected.

For instance, in Iran, General Terms of Contract (GTC) is provided in order to organize procurement systems. To be sure about achieving this goal in Iran, as start point of this research, 50 Iranian construction experts are randomly chosen to be primarily interviewed by the author. The respondents were asked about the roles of GTC of Iran in resolving the disputes among parties. Based on results of primary interviews, those construction experts believed that, GTC of Iran could not perform reasonably in some cases in order to prevent or solve the probable destructive impacts of construction disputes.

The interviewed construction experts believe that some of the construction projects are abandoned and the contracts are terminated in which the employers will take advantages of the uncertainty of some clauses in GTC of Iran (e.g. clause 46 of GTC of Iran). I.e. the employer has right to terminate the contract on his own benefits due to uncertainty of clause 46 of GTC of Iran. But despite GTC of Iran, seemingly this problem, which leads to termination of contract in benefits of employers is less observed in standard form of contract in Malaysia since more details relevant to termination of contract by the parties are clarified in Malaysian standard forms of contracts. For instance, in PWD 203A of Malaysia, termination clauses, which include default, procedure and effects, are presented in clause 51 –

58; however, termination and its procedure are only discussed in clause 46 - 47 of GTC of Iran.

Discharge of Contract relates to the circumstances in which the contract is brought to an end. Where a contract is discharged, each party is freed from their continuing obligations under the contract. In other word, discharge of contract means '*termination*' of the contractual relationship between the parties.

There are dissimilarities between "*determination*" and "*termination*". According to the Oxford Advanced Learner's Dictionary, the word '*determination*' explain as: *the quality that makes you continue trying to do something even when this is difficult or the process of deciding something officially*. However, the word '*termination*' is explained as:*the act of ending something*.¹⁰

In defining termination, Wong (2005) noted that:

*"Briefly, termination of contract takes place at a point in time in the course of the contract period when a legally binding contract period is brought to an end before it has been discharged by performance due to the acts of one or both parties."*¹¹

In the common law two situations are considered as the ground for termination or '*repudiation*' of a contract as following:

*Firstly, one party may make clear that it has no intention of performing its side of the bargain. Secondly, that party may be guilty of such a serious breach of contract that it will be treated as having no intention of performing.*A breach of this kind is identified as a '*repudiatory breach*'.¹²

In both cases, the innocent party has two options to choose:

¹⁰ Wehmeier S, Oxford Advanced Learner's Dictionary of Current English, Sixth Edition, Oxford University Press, New York, 2000.

¹¹ John Wong, "Terminated or be Terminated",*The Malaysian Surveyor*, 39.1. Page 12. 2005.

¹² Murdoch, J and Hughes, W. "Construction Contracts: Law and Management". E & FN Spon. London. Pg 324, (1997).

Firstly, to 'affirm' the contract and hold the other party to its duties (while claiming remedies for damages as appropriate for the breach), and

Secondly, to bring the contract to an end. In term of occurrence of any repudiation or termination, then all parties are released from any further contractual obligation to carry out.¹³

Having more focus on termination of a contract, it is noted that in some cases termination is raised by the way in which contracts are set out. For instance, termination clause in General Terms of Contract (GTC) of Iran is based on benefits of employers in which the employer can terminate the contract based of his own profits. In this situation, the contractor lose his benefits in the project and in some cases the employer can unfairly apply for remedy against the contractor.

According to the standard form of construction contract in Iran and Malaysia, there are several reasons listed under the provided clause, which allow the employer or the contractor to terminate the contract. For instance, ICE, PAM 2006, CIDB 2000 and JCT standard forms of contract used in Malaysia contain clauses to clarify the right of termination of contracts by both employer and contractor. However, in PWD 203A (Rev. 2007) there is no clause provided to explore the right of termination of contracts by contractor. Later, in PWD 203A (Rev. 2010), the clause 55 is provided in order to generally state the termination of contracts by contractor. In contrary, in clause 46 of GTC of Iran the right of termination of contracts is only allocated to the employers.

Hence, this research attempts to compare termination condition in benefits of the employer in construction projects in General Terms of Contract in Iran (GTC) clause 46 and PWD standard form of contract in Malaysia (clause 51). And the main issues are:

- Uncertainty, ambiguity and not comprehensive termination clauses and;

¹³ Murdoch, J and Hughes, W. Ibid

- Lack of positive right for contractor in GTC of Iran especially in Termination Clauses.

On this basis, the main question followed in this research is as: what are the most frequent reasons that have caused the unilateral termination of contract by the employer in the actual construction industry?

Therefore, this study will focus on the most frequent disputes associated with the termination of contract by employer in construction projects in Iran and Malaysia, which are referred to the court under GTC and PWD 203A standard forms of contracts.

1.3 Objective of Research

The objective of this research is to make recommendations for termination clauses in GTC of Iran in its construction contract by analyzing the most frequent disputes associated with the termination of contract by employer in construction projects.

1.4 Scope of Research

This research will focus on termination of construction contracts and is limited to the following:

- a) To termination of contract clauses in GTC of Iran (clause 46) and PWD of Malaysia (clause 51)

- b) Chosen cases are reported in Malaysian Law Journals and Iranian law journals and court archives.
- c) Cases related to Building Contract and associated with termination of contracts only.

1.5 Significance of Research

As highlighted before, termination clause in GTC of Iran is set up in benefit of employer and the employers can terminate the contract unfairly. Hence, the contractors will face with lots of financial difficulty because of unilateral termination by employer. Consequently, the contractor do not participant the Government project because of possibilities of high risks in this kind of project, while seemingly this problem is less seen in PWD of Malaysia. Hence, it is important to improve termination clause of GTC of Iran in order to prevent termination of the contracts in benefit of employers.

Therefore, by investigating the most frequent reasons of determination of contracts by employer according to the terms mentioned in the standard form of contract, it is expected to be able to create awareness among the contractors. So, the contractors can prevent from being determined by the employer.

Hence, this study can be used as the guidance for those whom are engaged in construction projects such as consultant, architect, contractor and engineers in order to prevent dispute occurrence and make a better relationship among parties. Once the parties are informed about their legal rights and duties, it is expected to see a healthier working environment.

Due to the importance of termination of contracts in construction industry, in this study, the author will focus on the most frequent disputes associated with termination of the contracts in benefit of the employer, which are referred to the

court in Iran and Malaysia. Termination of contracts by employer is studied under PWD 203A of Malaysia and GTC of Iran.

1.6 Research Process and Method of Approach

In order to achieve the research objective which is pointing out to the making recommendation for unilateral termination clause in benefit of employers in GTC of Iran, a systematic process has been organized in which five major stages including identifying the research issue, initial study, data collection, data analysis, and completion are involved.

1.6.1 Stage 1: Identifying The Research Issue

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting, which can easily be attained from the UTM library. Also, as mentioned earlier, by doing primarily self-interview by 50 justice construction experts in Iran the main issue regarding the termination of contract by employer was highlighted. Identifying the main issue, the objectives of the study have also been specified. Hence, this research is done to review the most frequent disputes associated with the determination of contract by employer in construction, which are referred to the court under PWD 203A standard form of contract of Malaysia and GTC of Iran.

1.6.2 Stage two: Initial study

At second step of this research relevant literature to the termination of contract was reviewed which was obtained through books, law journals, articles, and

related websites. Also discussion with supervisor, lecturers, and colleagues helped me to gather more ideas and knowledge regarding the main problem of this study.

1.6.3 Stage three: Data collection

In this stage, relevant information and cases were collected. There were two types of data which was being collected: relevant Malaysian cases which was collected from Malayan Law Journals via UTM library electronic database, namely *Lexis Nexis* website¹⁴ through its own search engine by using keywords of “Termination Clauses” and recent Iranian cases relevant to the topic which were collected from Courts Archive of Mashhad city in Iran and *Vekalat Online* website¹⁵.

1.6.4 Stage four: Data analysis

In this stage, all the collected data, information, idea, opinions and comments were arranged, analyzed and also interpreted. As mentioned above, cases used in data analysis were concentrated in the case happened in Malaysia and Iran. All selected cases are studied, analyzed and compared in order to find the possible weaknesses and strength of each termination clause under GTC of Iran and PWD 203A standard form of contract of Malaysia.

1.6.5 Stage Five: Writing and Completion

In final step of this research, the whole writing and formatting of the study are checked and finalized. In this stage, the important matter is to be sure that

¹⁴ <http://www.lexisnexis.com>

¹⁵ <http://www.vekalatonline.ir>

research objective had been obtained. Finally, the conclusion, recommendation, and suggestions for further studies were noted based on the findings during the analysis stage.

1.7 Organization of the chapters

1.7.1 Chapter 1: Introduction

As mentioned earlier, this research would explore more in termination clauses in GTC of Iran and PWD 203A of Malaysia in order to solve the problem of unfair termination of contracts by employers due to uncertainty in some clause in standard form of contracts. To achieve that aim, in chapter 1 of this study, the main problem is identified and a brief background related to the mentioned problem is also explained which is followed by goal and objectives and research methodology.

1.7.2 Chapter 2: Principles of discharge of contract

Chapter 2 of this study would define relevant notions and terms as; Contract, Standard forms of contract, Terminations, Types of termination, Conditions of termination and etc. This chapter would provide the basis for the further analysis and discussion in other chapters.

1.7.3 Chapter 3: Termination of contract in PWD 203A (Rev. 2010) of Malaysia and GTC of Iran.

In chapter 3, the differences between termination clauses of GTC of Iran and PWD 203A (rev. 2010) of Malaysia is described and then the differences between termination clauses of both standard forms are clarified.

1.7.4 Chapter 4: Analysis and discussion

In chapter 4 of this research, following main questions are specified in chapter 1; advantages and disadvantages of termination clause in each standard form of contract (PWD and GTC) are clarified. At the end of this chapter by analyzing both clauses the objective of study would be achieved.

1.7.5 Chapter 5: Conclusion and Recommendations

In chapter 5, all discussions would be concluded and some recommendations would be suggested in order to solve the problem of unilateral termination of contract by employer based on analysis in chapter 4.

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