SERVICE OF NOTICE FOR DETERMINATION IN CONSTRUCTION CONTRACTS

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requirement for the award of the degree of
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DEDICATION

To my wife and children for giving me the strength to complete this study

and

most of all strength

to go through

every moment of life

Thanks for everything.

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ABSTRACT

Determination is a remedy provided under contract for a party to discharge his obligations upon breach by the other party. When the party to contract intends to determine a contract, he must let the other party knows his intention to do so. He is required to follow several procedures before he is said to determine the contract validly. Standard forms and bespoke construction contracts usually provide procedures for parties to contract to do so. Failure to adhere to the procedures may cause the termination invalid and the repercussions of such failure is severe and of serious consequences to the determining party. When one party exercises his intention to determine a contract, the other party often seeks to destroy his intention by claiming non compliance to procedural requirement for valid exercise of determination under the contract. One party argues that he has followed the required procedures for service of notice and the other party claims otherwise. This has led to numerous arguments and disputes between the parties often end with arbitrations or litigations. The arbitrators and courts are not helping either as decisions have not been consistent depending on how one construes the ambiguous words. The underlying matter is the interpretation adopted by arbitrators and courts in construing the ambiguous words. There are two commonest methods of interpretations used by arbitrators and courts in construing commercial contracts; by literal method or commonsense business method. Different interpretation method conveys different decisions. The question is which one would be the appropriate interpretation method for service of notice for determination in construction contract. Hence, this research intends to identify the appropriateness between the two methods. This research was carried out mainly through documentary analysis of law journals and law reports. Eleven law reports from various jurisdictions were used in this research. Result appears to indicate that commonsense business approach would be the appropriate interpretation method for service of notice for determination in construction contract. A concrete answer may not be found as the literal and commonsense business methods for interpretation are built on different nature and most of all how one interpret contracts depends on one's conception of contracts. Absolutely, there is no easy answer to this. One thing is absolute is that employer or contractor considering to determine a contract in construction contracts must follow the procedures strictly.

ABSTRAK

Penamatan kontrak adalah satu penyelesaian di bawah kontrak yang diberikan kepada pihak kontrak atas kemungkiran perjanjian di pihak lain. Bila satu pihak kontrak ingin menamatkan kontrak yang dimeterai, pihak tersebut hendaklah memaklumkan hasrat tersebut kepada pihak yang lagi satu. Pihak terbabit dikehendaki mematuhi prosedur-prosedur yang tertera dan dipersetujui di dalam kontrak tersebut. Borang-borang kontrak setara dan tidak setara biasanya memyediakan klausa dimana prosedur-prosedur untuk penamatan kontak yang perlu dilakukan oleh pihak-pihak yang berkontrak. Kegagalan dan kesilapan mematuhi prosedur-prosedur tersebut boleh menyebabkan penamatan kontrak yang tidak sah yang mana boleh mengakibatkan kesan-kesan yang buruk kepada pihak yang memulakan penamatan kontrak. Kebiasaannya, pihak yang ingin menamatkan sesebuah kontrak lazimnya mengakui mematuhi prosedur penyerahan notis penamatan kontrak dan di pihak yang lain, ingin memusnahkan usaha tersebut dengan menuduh prosedur tersebut tidak dipatuhi sepenuhnya. Perbalahan-perbalahan tersebut mengakibatkan banyak penyelesaian terpaksa di buat melalui kaedah timbangtara dan mahkamah. Keputusan-keputusan penyelesaian melalui timbangtara dan mahkamah pula tidak konsisten kerana penyelesaian adalah bergantung kepada penafsiran sesuatu ayat yang diragui dalam klausa terbabit. Perkara utama dalam penyelesaian adalah kaedah-kaedah penafsiran yang dipilih oleh penimbangtara dan hakim. Kaedah penafsiran yang biasa dalam kontrak komersial ialah penafsiran harfiah dan pendekatan perniagaan. Kedua-dua kaedah penafsiran tersebut boleh mengakibatkan keputusan-keputusan yang berlainan. Soalannya penafsiran yang manakah sesuai untuk penyerahan notis penamatan kontrak klausa di dalam kontek kontrak pembinaan. Maka, penyelidikan ini dijalankan untuk mengenalpasti perkara tersebut. Sebanyak sebelas kes mahkamah di dalam dan diluar negara dianalisis dalam penyelidikan ini. Hasil penyelidikan mendapati kaedah pendekatan perniagaan adalah kaedah interpretasi yang sesuai untuk penyerahan notis penamatan kontrak pembinaan. Ini adalah kerana kaedah tersebut berasaskan atas prinsip interpretasi yang mengambilkira latarbelakang sesuatu kontrak yang dipersetujui semasa berkontrak. Interpretasi sesuatu klausa sebenarnya banyak bergantung kepada konsep pemahaman penimbangtara dan hakim mengenai kontrak tersebut. Keputusan sebenar mungkin tidak diperolehi tetapi yang pastinya adalah pihak kontrak yang ingin menamatkan kontrak mesti mengikut prosedur-prosedur penyerahan notis yang tertera dalam kontrak dengan teliti dan tepat.

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LIST OF ABBRIEVATIONS

AC	Law Reports Appeal Cases
All ER	All England Law Reports
ALJ	Australian Law Journal
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
App Cas	Appeal Cases
B	Beavan
B & S	Best and Smith's Reports
Build LR	Building Law Reports
CA	Court of Appeal
CB	Common Bench Reports
Ch	Chancery
Ch App	Chancery Appeal
Ch D	The Law Reports, Chancery Division
CIDB	Construction Industry Development Board
CLD	Construction Law Digest
DC	Divisional Court, England
Const LJ	Construction Law Journal
Const LR	Construction Law Reports
CP	Law Reports, Common Pleas
CPD	Law Reports, Common Pleas Division
DLR	Dominion Law Reports
Exch	Exchequer Reports
Eq	Equity Case
EWHC	High Court of England and Wales Decisions

FC	Federal Court
F & F	Foster & Finlayson's Reports
H & N	Hurlstone & Norman's Exchequer Reports
HL	House of Lords
HKC	Hong Kong Cases
HKLR	Hong Kong Law Reports
IEM	The Institution of Engineers, Malaysia
IR	Irish Reports
JKR	Jabatan Kerja Raya
KB	King Bench
LGR	Local Government Reports
LJKB (QB)	Law Journal Reports, King's (Queen's) Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
LT	Law Times Reports
JP	Justice of the Peace / Justice of the Peace Reports
MLJ	Malayan Law Journal
NS	Nova Scotia
NZLR	New Zealand Law Reports
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department
PD	Probate, Divorce and Admiralty Division of High Court
QB	Queen Bench
TCC	Technology and Construction Court
SLR	Singapore Law Reports
Stark	Starkie's Nisi Prius Reports
WLR	Weekly Law Reports
WR	Weekly Reports

LIST OF CASES, ACTS, STANDARD FORMS

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CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Cooke J in *Canterbury Pipe Lines Ltd v Christchurch Drainage Board*[1] said '*Building contracts have been traditionally a fertile source of disputes*…' The enunciation aptly summarizes the very nature of construction industry as an industry notorious for complex disputes.[2] The primary cause of such disputes arises from inadequate legal knowledge.[3] Majority of construction practitioners comes from technical engineering and architectural background without adequate legal knowledge in contracts and this has led to numerous disputes in construction contracts. One of the disputes is the different in interpretations of ambiguous words in termination of construction contracts.

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[1] [1979] 16 BLR 76 (CA

[2] Sundra Rajoo, Dato' WSW Davidson, Ir Harbans Singh KS, *The PAM 2006 Standard Form of Building Contract* (2010), LexisNexis, page 22

[3] Keith Pickavance, *Delay and Disruption in Construction Contracts*, 3rd Ed, (2005), page 31

Termination of contract may be exercised upon another party by operation of expressed contractual provision or by operation of law. Under common law, if the innocent party decides to repudiate the contract, the innocent party would be required to notify the guilty party of its intention to terminate the contract. The act of notification is commonly known as service of notice of termination. The requirement for service of notice under common law provisions brings in the express procedural requirement for termination under contract. It is intended to regulate the process of exercising termination regime empowered to the party and to alert the party to contract to take appropriate steps and measures with regards thereto.

Bringing an end to one contract is usually not an easy and simple matter because the effect to terminated party is severe. The terminating party, possibly in the anxiety of terminating the other party to minimize impacts of delays or possibly lack of sufficient knowledge in construction law often does not follow the express procedures in applying the termination provision of the contract resulting in a wrongful termination procedure.[4] Notwithstanding the merit of grounds on which termination process was invoked, a wrongful termination procedure may nullify the effect of termination and could result in terminating party to be held repudiating the contract and the innocent party may claim damages including loss of profits on uncompleted works. An invalid service of notice may end in wrongful termination procedure. Under a contractual termination clause the express procedures need to be carefully followed for which failure to do so may prevent a successful termination. The nature and circumstances of service of notice in termination regime and extent of compliance to procedural requirement in service of notice is what this thesis is seeking to explore.

[4] *See Lubenham Fidelities & Investments Co Ltd v South Pembrokeshire District Council* [1986] 6 Con LR 85 (CA) and *Alkok v Grymek* [1968] 67 DLR (2d) 718 (SC Canada)

1.2 Problem Statement

The central issue of termination in construction contracts is the process of termination. When a party to contract wishes to terminate a contract, the terminating party is required to undertake several procedural steps before the contract can be validly terminated. The procedural steps are usually expressed in contracts, in particular concerning the service of notice of default and notice of termination. Most construction contracts, standard forms or bespoke contracts prescribe the procedures for service of notice of default and termination notice.[5] The procedures for termination usually describe matters *inter alia* the form of notice, how is it to be sent, what should the contents be, when to issue the notice, where to send, to whom the notice should be given and so on. Some contracts describe the procedures meticulously and some just simple and plain.[6]

Depending on the contract provision, termination may be exercised either by one-tier notice or two-tier notice procedures. The difference is one-tier notice consists of only notice of termination whilst in two-tier notice, notice of default must be issued before notice of termination.[7] In issuing notice of default, the Architect or Contract Administrator often neglects certain essential elements in the notice which may cause the notice to be ineffective for its purpose. The courts of law will usually construe the notice before proceeding with other matters to see whether the procedural requirement has been complied or not. The question may then arise as to what should constitute the forms and contents of notice to ensure the notice is valid in law? In *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd*, (1998)[8] the Court has to decide whether the events of default must be specified in the notice or architect's mere opinion that the defaults have occurred sufficed for a valid notice of termination. It was held that assertion of facts of default committed by contractor was needed, not mere opinion by Architect that contractor has committed

[5] Cl. 25 and 26 in PAM 2006, Clause 51 in PWD 203A (Rev 2007) Clause 44 in CIDB 2000 Ed
[6] Cl.25.2 PAM 2006 describes procedural steps with more details than Cl. 51.1 in PWD 203A (Rev 2007)
[7] Cl. 25.2 in PAM 2006 and Cl. 51.1 PWD 203A are two-tier notice procedures. Cl. 51.2 in PWD 203A is one-tier notice.
[8] [1998] 6 MLJ 40

default in the notice was insufficient and the notice of default was held invalid. It is apparent that the party wishing to terminate the contract should ensure the notice of default constitute a proper content complying with the exact nature of the termination clause.

Some termination clauses in construction contracts specify notice shall be delivered by certain mode such as by registered post.[9] In practical, it is common for construction players transmit documents by hand, by ordinary post, by company dispatcher to office, by electronic mail or by facsimile transmission. Perhaps because of habit, parties to contract may be unaware of express provision with regards to the mode of service of notice required under termination clause or may tend to regard it as merely directory. The question is would the notice be invalid if it was delivered by hand instead of registered post as required under the contract or in general, served by any mode other than the mode specified in contract?

Construction industry involves many parties where each party has its specific duties and responsibilities. Because of interactions of so many parties, managing a project could become so complex where the assigned duties and responsibilities between the parties could not be so clear or could be overlapped. Contracts are supposedly created to assign duties and responsibilities of respective party but sometimes, it is worded in manner that traps unwary party if the clauses were not read in total especially with regards to exclusion clauses. It could lead to a party taking an action but not empowered that he could do so under the contract. For termination, this brings in question whether could anybody serve the notice of default for termination of contract?

[9] Ibid 6

The questions have been practically argued in Courts of law in *Central Provident Fund Board v Ho Bock Kee* (1981)[10] in which the Singapore's Court of Appeal held that notice of default transmitted by hand instead of registered post as stipulated in contract was invalid. The Court of Appeal also held that notice of default signed by the Superintendent Officer was also invalid as the Officer was not authorized to sign the notice of default under the contract. Until a higher court overruled the decision by the Court of Appeal in Singapore, it is concluded that mode of service of notice in termination regime must be strictly followed. The decision by Court of Appeal have been questioned as harsh on the Board since the argument by contractor was merely on technical aspect of the clause that is concerning the method of delivery of notice and contractor did not deny receiving the notice of default. The contractor was actually guilty for failing to proceed with reasonable diligent where the building project was delayed behind schedule. It appears that technical fault in serving notice overrides the rights of one party to end the contracts despite of the clear fault of the other party in failing to perform its obligations under the contract. Some argued that the decision by Court of Appeal was influenced by the fact the notice of default was signed by unauthorized person.

Time is an essence in construction contracts.[11] The time allocated for construction project usually depends on the nature and magnitude of the projects. Contractor may during the course of the project encounters certain complications affecting its obligations and performance under the contract which could cause the employer to initiate the termination process. Contractor may have remedied default satisfactorily after being given notice to do so. As larger project usually take a fairly longer time to complete, the project may suffer complications and delays could occur again. Could this lend the contractor in trouble again if the default was the same default? What could Employer do if the contractor repeated the same default again in future? Whether the Employer needs to issue new notice of default depends on the construction of the contract itself. If the

[10] [1981] 1 MLJ 162 (CA)
[11] PWD 203A (Rev 2007), Cl. 78

contract provides that Contractor is not entitled for further period for notice of default once notice of default of similar event has been issued previously, could the Employer simply issue notice of termination upon the repeat of the default? What is the position taken by Courts of law if the time period when the notice of default was issued and repeated default was categorically farther apart? Does reasonable exercise of such right applies for the defaults in such circumstance? Of course, it depends on the construction of the termination clause itself.

The line of authorities derived from Courts of law affirming the position that non-compliance with any material aspect of procedural requirement in service of notice of termination appears to be somewhat consistent. In general, non-compliance to the procedural requirement in notification may nullify the termination process. In *Ho Bock Kee v Central Provident Fund Board*, (1981)[12] Rajah J said: -

> *"It was common ground that Condition 34 (determination clause) being a forfeiture clause should be construed strictly...."*[Emphasis in bracket added by writer]

It was further echoed in *Re Fajar Menyensing, supra* by Nik Hashim J said –

> *"....it is obvious by its provision and marginal notes that clause 25(i) is a determination clause and as such, it must be construed strictly. Its provision is mandatory in nature. Therefore, any formal or procedural requirements stipulated in the determination clause must be complied with exactly and meticulously....."*

The Courts of law in Malaysia and Singapore appear to adopt a strict interpretation of termination clause in construction contracts. The Courts prefer to treat all material aspects of the termination clause as mandatory notwithstanding the merits of grounds on

[12] [1981] 1 MLJ 80

which the termination process has been invoked. Therefore, non-compliance with any material aspect of the procedural will be fatal to the termination process. One similar aspect in *Re Ho Bock Kee* and *Fajar Menyensing, supras* is the use of standard forms prepared by the government and professional institutions. The Courts will adopt *contra proferentum* rule in interpretation of contracts that use standard forms prepared by government and professional institution. Under *contra proferentum* rule, terms containing ambiguous wordings relied by the employer will be construed in favour of the contractor. The use of standard forms in both cases could be argued to have influence on the decision by the Courts.

A later case distinguishes the strict interpretation adopted in the aforesaid cases. In *DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd*, (1999)[13] Kamalanathan Ratnam J distinguished the case from *Re Fajar Menyensing, supra* upon the wordings of general clause in the contract on service of notices and claims clause which required the Employer to serve upon subcontractor all notices and instructions at the address given under the Contract. The Court construed the meaning of the word 'served upon' and held that

> "….*the only mode of informing the defendant where the address is known, is by service upon him and to my mind such a mode of service, clearly includes service by hand*."

There is no doubt that the court in this case departs from the decision established in *Re Ho Bok Kee* and *Fajar Menyensing, supras* because of the construction of the general clause in servicing notices and claims under the contract. The termination clause did not contain specific wording under which notices in relation to termination should be given to the subcontractor and so the parties argued on the general clause of notices and claims under the contract. In construing the general clause which applied to all matters governing transmission of notices and claims under contract, the Court concluded that the

[13] [1999] 4 MLJ 243

service of notice of termination by hand was sufficiently valid as long as it can be shown the other party had received the notice which in the instant case, the subcontractor received the notice when he replied its rejection of the notice on the same day.

The decision in *Re DMCD Museum Associates, supra* generally reinforces the contention that degree of compliance with procedural requirements depends upon the construction of the termination clause, in general the contract itself. A rather contrary approach from *Re Ho Bock Kee* and *Fajar Menyensing, supras* but in similarity to the decision of learned judge in the *Re DMCD Museum Associates, supra* was taken by the Court in a later case of *SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd*[14] in which the Faiza Tamby Chik J opined that the manner in which notice was served to the other party was immaterial but the fact that the notice was actually served. The Court in the instant case purported to follow the business commonsense approach of interpretation of commercial contract. This is seemed or a rather an attempt to depart from the usual strict interpretation that had overshadowed the termination regime in construction contracts for quite some times.

In his latest book, Sundra Rajoo said the decision by the learned judge in the instant case followed the current trend of taking a 'business common sense approach' in interpreting construction contract.[15] The issue is why the business common sense approach in service of notice of termination is becoming the preferred current trend adopted by the Courts compared to strict construction? Given that parties are free to negotiate their own terms of contract and in view of the conflicting decisions by the Courts of law from the aforesaid cases, what would be the most suitable construction of service of notice of termination in construction contracts?

[14] [2004] 5 MLJ 385
[15] Ibid 2, p 568

1.3 Objective of Research

It is trite that termination in construction contract is not an easy matter to be dealt with given to the complex nature of construction contracts and its adverse effects to the party on which the termination has been exercised. In construing the service of notice in termination clause, the Courts of law have taken two different approaches in the construction of termination clause, namely literal and purposive construction which have led to different decisions. Given the facts that Courts have given different construction of termination clause and termination provision under various standard forms have undergone substantial changes to its forms and contents from its previous predecessors, the objective of this study is to determine the most suitable rule of construction of clause for service of notice for termination in construction contracts.

1.4 Previous Researches

Numerous researches or studies have been made in the past concerning the issues of termination in construction contracts. The study by Tan Lee Yong in 2006 examined the expressed defaulting events of termination most commonly exercised in construction disputes in Malaysia and found that the most prevailing defaults were fail to proceed regularly and diligently followed by wronged exercise of suspension of works by Contractor. In 2008, Nanie Ernie Binti Othman studied the aspect of termination that suit the doctrine of frustration of Contract under PWD DB/T. In 2009, Awang Arifin studied the implication of performance bond in the event of determination of own employment by Contractor. In the same year, Roslinda Binti Rosli also researched on the status and reasons of construction contracts of termination cases.

The author found no previous studies has been made to examine in details the approaches and relevance of business common sense approach in termination clause.

1.5 Scope of Research

The scope of research is limited to the termination clauses and service of notice stipulated in the latest standard forms PWD 203A (Revision 2007) Conditions of Contract and PAM 2006 Agreement and Conditions

1.6 Significant of Research

Lack of knowledge in construction laws by construction players has been the leading cause of dispute. Employers, Consultants and Contractors though with years of experiences in the industry are usually lacking of the legal knowledge and understanding on the operation and effects of various clauses in construction contracts in general and termination of contracts in specific. The lacking in understanding the legal and contractual aspects of contract may be caused by not having the experience to undergo the process itself or just plain ignorance of the topic overridden by over-zealous attitude of churning maximum profits and in the understanding that legal experts are there to provide all the required advice and service. Lack of knowledge in construction law will lead to wrong interpretation of contracts in which the party tends to take trivial matters like mode of service of notice stipulated in termination clause lightly without realizing that it may turn out to be matter of great importance in the eye of Courts of law.

The validity of notice in terminating construction contract is the most crucial aspect of termination taken into account by the Courts. Notice said to be bad in law is fatal to the termination process and will exonerate the terminated party. The terminating party will suffer in terms of damages claimed by the innocent party. Therefore, this study is significant to give the Employers, Consultants and Contractors who are the major players in construction projects, an understanding of the concept, applications, issues and current trend or approaches of Courts of law in matters relating to service of notice in termination regime. By understanding the most suitable construction of service of notice of termination, any party to contract who wish to terminate the other party will exercise the termination regime provided under the contract effectively and prudently.

1.7 Method of Research

In achieving the intended objective of the study, the study will involve several systematic stages as follows:

Stage 1- Identification of the issues

The stage will begin with intensive readings of articles, journals and newspaper cutting available from the libraries operated by UTM library and others. Inputs on the current issues in termination from professors and industry players will be sought that will provide better resolution of the pandemic issues relating to the topic

Stage 2- Reviews of Literatures

Once the issues and objectives of the topic have been established, extensive reviews of available literatures will be conducted. Data for the study will be reviewed mainly from journals, books, newspaper, law or business reports and internet.

Stage 3- Collection of Data

Data for the study will be collected and gathered mainly from the extensive reviews of literatures, legal cases relating to the termination of contracts both domestic and international jurisdictions via LexisNexis Legal Database UTM library electronic databases and websites.

The collection of relevant data on construction contracts within domestic jurisdiction may be limited as not many construction projects end up with termination but the data will be extensive in other jurisdictions where construction projects have developed earlier and matured. Law reports from international jurisdictions will occupy most of the legal cases in service of notice in termination topic upon which matters relating to the objective of the study will be made.

Stage 4- Data analysis

Careful and detailed study and analysis on books, journals and case laws from various jurisdictions will be conducted in this stage. The analysis will cover the material facts collected from the literatures, approach and decisions of the Courts and interviews in connection to the issues of the subject of study.

Stage 5- Conclusion and Recommendations

This is the final stage where conclusions and recommendations to the construction players on the topic will be presented. The whole process will be reviewed and finalized to determine whether the objective of the study is achieved or not.

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