TERMINATION OF CONTRACTOR DUE TO THE CORRUPTION, UNLAWFUL OR ILLEGAL ACTIVITIES

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UNIVERSITI TEKNOLOGI MALAYSIA
TERMINATION OF CONTRACTOR DUE TO THE CORRUPTION, UNLAWFUL OR ILLEGAL ACTIVITIES

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A master’s project report submitted in partial fulfillment of the requirements for the award of the degree of Master of Science (Construction Contract Management)

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Special dedicated to my beloved family for your love and support

‘With Love and Appreciation’
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ABSTRACT

A construction contract can be brought to an end in various ways either by performance, agreement, frustration or by breach. Normally, termination of contract is a remedy for discharged of contract or put the contract to an end by breach. A contract for government project normally use PWD Form 203A (Rev. 2007). In its effort to eradicate corruption in the construction industry, the government has incorporated an anti-corruption clause in the PWD standard form of contract that is Clause 53.0. However, it is silent on the true meaning of the words corruption, unlawful or illegal activities. It can be anything to the ordinary person since there is no clear meaning. It also raise a question whether the clause (without clear definition) is adequate enough for the employer to terminate the contract. The objectives of this research is to determine the meaning of corruption and unlawful or illegal activities and their differences. It is also to determine whether the employer, is entitled to terminate the contract based on Clause 53.0 of PWD Form 203A (Rev. 2007). This research is confined to the Clause 53.0 of PWD Form 203A (Rev. 2007) and the reported English court cases on corruption, unlawful or illegal activities. This research is carried out by analyzing selected court cases. It is found in this research that the meaning of corruption is offences relating to the improper influencing of people in certain position of trust and willing to act dishonestly in return for money or personal gain. Meanwhile an unlawful or illegal activity is means by activities commit by a person or a group of person that is forbidden by law. It also pointed out that it is wrong for the employer to terminate the contract under Clause 53.0 of PWD Form 203A (Rev. 2007).
ABSTRAK


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AI  Architect’s Instruction
Ariz.  Arizona Supreme Court
BLR  Building Law Report
CIDB  Construction Industry Development Board
CILL  Construction Industry Law Letter 1983
Con LR  Construction Law Report
Exch  Exchequer
IEM  Institute of Engineering Malaysia
IIM  Integrity Institution of Malaysia
JKR  Jabatan Kerja Raya
KB  King’s Bench
LJ  Law Journal
LR  Law Report
MATRADE  Malaysian External Trade Development Corporation
MLJ  Malayan Law Journal
NIP  National Integrity Plan
NSWSC  New South Wales Supreme Court
PAM  Pertubuhan Arkitek Malaysia
PKFZ  Port Klang Free Zone
PMC  Project Management Consultant
PWD  Public Work Department
QB  Queen’s Bench
S.O  Superintending Officer
UTM  Universiti Teknologi Malaysia
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CHAPTER ONE

INTRODUCTION

1.1 Background of Research

Contractors are builders who entered into a contract to build things or who contracts for and supervises construction, as of a building. As a contractor, he owes an obligation to carry out and completed the works accordingly to the contract and provides the workmanship and materials as required by the specifications given by the architects and engineers. In a construction industry, corruption might be happen. It can be involved in pre-contract or post-contract stages. Corruption is the abuse of entrusted power for private gain and it is damaging to a country because decisions are taken not for the public benefit but to serve private interests. The best example for corruption is bribery.

Construction industry cannot be escape from corruption and bribery. We can see that in Malaysia there is some of the construction project that involved in corruption. And due to this, many problems can occur such as delay in completing the project and the project cost will balloons into a higher amounts. Corruption is generally understood to be the giving or offering of any reward to any person in power to influence his conduct so that he can abuse his power and act in favouring
the giver. In Malaysian Anti-Corruption Commission Act 2009, Section 17 (b) stated:

"Corruptly gives or agrees to give or offers any gratification to any agent as an inducement or a reward for doing or bearing to do or for having done or forborne to do any act in relation to his principal’s affair."

Clause 53.0 of PWD Form 203A (Rev. 2007) deals with the termination on corruption, unlawful or illegal activities commit by the contractor and in year 2009, Jabatan Kerja Raya Malaysia had issue an instruction to make an amendment to all tender documents for procurement of employment and include additional provision relating to corruption. Clause 53.0 stated:

“Termination on Corruption, Unlawful or Illegal Activities”

a) Without prejudice to any other rights of the Government, if the Government is satisfied that the Contractor, its personnel, servants, agents or employees is or are involved in corruption or unlawful or illegal activities in relation to this Contract or any other agreement that the Contractor may have with the Government, the Government shall be entitled to terminate at any time, by giving immediate written notice to that effect to the Contractor.

b) Upon such termination, the Government shall be entitled to all losses, costs, damages and expenses (including any incidental costs and expenses) incurred by the Government arising from such termination and clauses 51.1 (c) (i) and (ii) shall apply.

c) Nothing in Clause 53 or anything else contained in this Contract shall render the Government in any way liable for payments upon termination.
To stop and to be a corruption free in the construction industry, all of the parties should be responsible and play their roles properly. Previous prime minister of Malaysia, Dato’ Seri Abdullah Ahmad Badawi had launched the National Integrity Plan (NIP) and the Integrity Institute of Malaysia (IIM) as a new measures to combat corruption according to the following quotation:

"Integrity is one of the several paths; it distinguishes itself from the others because it is the right paths and the only one upon which you will never get lost” M.H McKee

Forms of corruption exist in the construction industry can be summarized in two groups which are contractor related and professional consultant clients of government officers related. The forms of corruptions related to contractors include, the construction company offer bribes to client or the tender evaluation committee members in order to win the project. Bribery, normally for the tender evaluation committee to lower the tendering price for the tenderer to win the project.

In November 2004, a local newspaper, The New Straits Times carried a front-page story on seriously defective buildings and road. The immediate response of the Minister of Works was that the 2 billion ringgit fiasco was not the fault of the Public Works Department (PWD) but of a group of contractor known as Project Management Consultant (PMC). The PMC practice allowed government agencies to carry out their own projects through limited tender or direct negotiations. With the introduction of the PMC, PWD was by-passed and the justification of this new procedure was the speedy completion of projects but the cost for some projects almost doubled.

For examples are a work on the RM167 million MATRADE (Malaysian External Trade Development Corporation) building began in 1994 and was scheduled to be completed in 1997 but till 2004 the building could not be occupied. It was reported that repairs to the defects in the building would cost RM28.4 million.
Meanwhile, in The Star newspaper dated September 4, 209 reported on the Port Klang Free Zone (PKFZ) scandal that shows a shocking trail of how businessmen, top civil servants and professionals have colluded to cause multi-billion ringgit losses to taxpayers.

Thus, the government of Malaysia had introduced Malaysian Anti-Corruption Commission which is to incessantly eradicate all forms of corruption, abuse of power and malpractices. A quote from Karl Kraus (1874-1936) said that:

“Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.”

1.2 Statement of Issues

The foregoing discussion lead us to several important issues which are the clause is silent on the true meaning of the corruption, unlawful or illegal activities. Since it is a new clause, it has not been tested yet and really defined. It can be anything to the ordinary person since there is no clear meaning and what exactly does it mean by corruption, unlawful or illegal activities. Normally, people are confusing in understanding or interpreting it. According to Begovic (2005), bribery is most probably comes first to mind when people talking about corruption. Besides that, it also raises a question of whether the clause (without clear definition) is adequate and can be use by the employer to terminate the contract.
1.3 **Objective of Research**

The objectives of this research are:

1. To determine the definition and differences of corruption, unlawful or illegal activities.

2. To determine whether the employer is entitled to terminate the contract under Clause 53.0 of PWD Form 203A (Rev. 2007).

1.4 **Scope and Limitation of Research**

The scope of research will be focused on the following matters:

1. Clause 53.0 of PWD Form 203A (Rev. 2007) regarding on termination due to the corruption, unlawful or illegal activities.

2. Reported English court cases related to the corruption, unlawful and illegal activities based on Lexis Nexis Legal Database via UTM Library website.

1.5 **Significant of Study**

There are many provisions relating to the termination of contract in the standard form of contract. Termination of contract is one of the remedies that can the
aggrieved party take because of the one party fails to perform their obligation or breach of the contract. However, termination of contract only can be done if one of the party in the contract breach the contract and it is fundamental breach.

In PWD Form 203A (Rev. 2007), there is a provision to terminate the contractor’s employment because of the corruption, unlawful or illegal activities involved by the contractor, its personnel, servants, agents or employees. Therefore, this research is done to determine whether illegal contract can be terminated or it was wrong to terminate.

### 1.6 Research Methodology

In order to achieve the research objectives, a systematic process of conducting this research had been organized. Briefly, the research process will be divided into five (5) stages as shown in the Figure 1.1.

### 1.6.1 Identifying the Research Issue

The initial study will be carried out to identifying the research issue by extensive reading on variety sources of published materials. From the issue, the objectives of this research have been identified.
1.6.2 Literature Review

This is the second stage of the research where it involved in collection of data and information from the books, internet, paper and previous thesis. Other than that, reports court cases found through the access of Lexis Nexis Legal Database which is available in the UTM Library website.

1.6.3 Data and Information Collection

After finishing the literature review stage by extensive readings on the related issue, all the relevant information based on the secondary data will be collected and carry out the case studies. Legal cases based on previous court cases which are related to this research will be collected from Lexis Nexis Legal Database via UTM library website.

1.6.4 Data Analysis and Interpretation

Data analysis will be done on collected information and those legal court cases. In this stage, the objectives of this research will be determined whether it is achieved or vice versa.

1.6.5 Conclusion and Recommendations

Conclusion and recommendations is the final stage of this research. Finally, the author will make the conclusion from the analysis and able to show the result of the research. Other than that, some recommendations related to the problem will be made and further research will be suggested.
Figure 1.1: Outlines of Research Stages

Stage 1
Identifying the Research Issue

Stage 2
Literature Review

Stage 3
Data and Information Collection

Stage 4
Data Analysis and Interpretation

Stage 5
Conclusion and Recommendations
1.7 Organisation of the Research

This research is structured into 5 chapters and briefly described as follows:

Chapter 1: Introduction

This chapter presents an introduction to the subject, background and the specific problem associated with it. This chapter also specifies the aim and objectives, the methodology of conducting this study to achieve the objectives and a brief summary on the structure of the research.

Chapter 2: Termination of Construction Contract

This chapter generally discussed about standard form of contract used in Malaysian construction industry. Other than that, the definition of termination and determination are determined in this chapter and the termination of contract by common law or contractual provision.

Chapter 3: Corruption, Unlawful or Illegal Activities

This chapter discussed about the definition and differences between corruption and unlawful or illegal activities. The classification and types of those default also been discussed in this chapter.

Chapter 4: Analysis of Case Laws

This chapter analysed about the result from the judicial decisions based on the court cases which are related to the research objectives.
Chapter 5: Conclusion and Recommendations

Conclusion on the research based on all the discussion in the previous chapter will be presented in this chapter. Furthermore, recommendations and further research will be suggested.
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