

National Association for Dispute Resolution, Inc USA

In affiliation with

Nationwide Academy for Dispute Resolution UK Ltd



Malaysia Sdn Bhd

**N.A.D.R.**

# CONSTRUCTION CONTRACT

Containing Adjudication, Arbitration, Mediation, Dispute Management Systems Clauses  
and additional provisions in respect of payment of costs

## For Use With PAM FORM 1998

And in association with

Nationwide Mediation Academy UK Ltd

For the Advancement of Skill and Knowledge in



Dispute Resolution Practice

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**DRAFT NADR CONSTRUCTION PROVISIONS  
to  
BE ADDED TO PAM 1998 FORM 'WITH QUANTITIES'**



Where the parties so desire, the following provisions of this document are to be incorporated, by attachment, into an original PAM 1998 WITH QUANTITIES Construction Contract, at the time that the agreement is concluded between the parties, to form an integral part of that agreement.

It is the responsibility of the contracting parties to ensure that all revenues owing to PAM for the use of their contract forms are respected and duly paid.

This NADR document is freely available at no extra charge from NADR Malaysia SDN Bhd in hard copy or electronic form, for incorporation into the PAM Contract, except that the parties should be aware that :-

the nomination of an adjudicator / arbitrator in the contract will not bind the person so nominated without his or her consent

and further, that

the incorporation of a Dispute Review Scheme and the appointment of a Dispute Review Board is dependent on the knowledge and full participation of Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd and compliance with the contractual arrangements inherent in the establishment of said Scheme.

**MAY 2001**

## NATIONWIDE ACADEMY FOR DISPUTE RESOLUTION

**The following clauses and parts of clauses are read as if inserted into the PAM 1998 With Quantities Construction Contract as hereby directed**

### **Article 7 Definitions : Insert after subsection (r)**

- (r) “Adjudicator” means the person appointed under Clause 36 as the adjudicator.
- (s) “Arbitrator” means the person appointed under Clause 34 as the arbitrator.
- (t) “Mediator” means the person appointed under Clause 35 as the mediator.

**Insert after Article 7 the following articles 8-12**

### **Article 8 Dispute or Difference - adjudication**

If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 36.

### **Article 9 Dispute or Difference – arbitration**

Subject to Articles 8 and 11 and Clauses 36 and 37, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith, except in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference arising thereunder, shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor, it shall be referred to arbitration in accordance with clause 34.

### **Article 10 Dispute or Difference - mediation**

Notwithstanding the provisions of Articles 8 and 9 and Clauses 34 and 36, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith, including a dispute or difference in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference arising thereunder, shall arise under this Contract which is embraced by Clause 35, upon the agreement of both parties, the dispute or difference may be referred to mediation in accordance with Clause 35.

### **Article 11 Dispute or Difference – dispute management scheme (Optional)**

Notwithstanding the provisions of Articles 8, 9 and 10 and Clauses 34, 35 and 36, negotiations between the Parties regarding any matter or thing of whatsoever nature arising under this Contract or in connection therewith should be conducted through the auspices of the Dispute Management Board (if any) duly appointed in consequence of this agreement incorporating a Nationwide Academy for Dispute Resolution “Dispute Management Scheme” as provided for in Clause 37

The parties to this contract shall ensure that all construction contracts related to the Works provided for herein will contain relevant back to back Dispute Management Scheme and Dispute Management Board provisions, as set out in Clause 37 and will not conclude a contract with another party who refuses to contract on these terms. Relevant contracts include contracts of engagement of architects, engineers, quantity surveyors, specialist consultants, nominated sub-contractors and nominated suppliers and un-nominated sub-contractors. The employer and the contractor will indemnify each other for the consequences (if any) of failing to provide relevant back to back provisions in related construction contracts.

In the event that a settlement is not reached it shall be referred

- a) to adjudication by the Dispute Management Board, in accordance with Clause 37 and the general adjudication requirements, excepting those requirements governing the nomination of the adjudicator, of Clause 36. In the event that a party is dissatisfied with the decision of the adjudicator the dispute shall be referred to final binding arbitration in accordance with Article 9 and Clause 34\*\* (delete as appropriate).
- b) to final binding arbitration by the Dispute Management Board, in accordance with Clause 37 and the general arbitration requirements, excepting those requirements governing the nomination of the arbitrator, of Clause 34.\*\* (delete as appropriate)

## NATIONWIDE ACADEMY FOR DISPUTE RESOLUTION

### **Article 12      Communality of dispute settlement and payment provisions in all related construction contracts.**

The parties to this contract shall ensure that all construction contracts related to the Works provided for herein will contain relevant back to back provisions in respect of adjudication as set out in Clause 36 and payment provisions as set out in Clauses 38 – 47 and will not conclude a contract with another party who refuses to contract on these terms. Relevant contracts include contracts of engagement of architects, engineers, quantity surveyors, specialist consultants, nominated sub-contractors and nominated suppliers and un-nominated sub-contractors. The employer and the contractor will indemnify each other for the consequences (if any) of failing to provide relevant back to back provisions in related construction contracts.

### **2.0      Architect's Instructions : Replace Clause 2.4. with the following**

#### **2.4      Compliance with Architect's Instructions without dissent validates the instruction**

If the Contractor thereafter does comply with the said instruction

(where neither party, before such compliance, had

- a) given notice of an intention to refer to adjudication under Clause 36.0 of these conditions or
- b) given notice of an intention to refer to Dispute Management Board under Clause 37 or
- c) given the other party a written request to concur on the appointment of an Arbitrator under Clause 34.0 of these Conditions

in order that the adjudicator / DMB / arbitrator may decide whether the provision specified by the Architect empowers the issue of the said instruction)

then the issue of the said instruction shall be deemed for all purposes of this Contract to have been empowered by the provision of the Condition specified by the Architect in answer to the Contractor's request.

### **20.C.4 Loss or Damage Occasioned by Insured Risks : Replace Clause 20.C.4.(ii) as follows**

20.C.4(ii) if it is just and equitable to do so the employment of the Contractor under this Contract may be determined at the option of either party within twenty eight (28) days of the occurrence of such loss or damage.

Within seven (7) days of receiving such a notice (but not thereafter) either party may give notice to the other

- a) of an intention to refer to adjudication under Clause 36.0 of these conditions or
- b) of an intention to refer to Dispute Management Board under Clause 37 or
- c) a written request to concur on the appointment of an Arbitrator under Clause 34.0 of these Conditions

to decide whether such determination is just and equitable.

### **Replace Clause 20.C.5 as follows**

**20.C.5** Upon the giving or receiving by the Employer of a notice of determination or where a reference to adjudication / DMB / arbitration is made as aforesaid and if the Adjudicator / DMB / Arbitrator upholds the notice of determination, then the provisions of Clause 26.2 (except sub-clause 26.2 (ii) (f)) shall apply.

### **Replace Clause 20.C.6 as follows**

**20.C.6** If no notice of determination is served under sub-clause 20.C.4 (ii) or where a reference to adjudication / DMB / arbitration is made as aforesaid and if the Adjudicator / DMB / Arbitrator decide against the notice of determination, then:

20.C.6(i) the Contractor shall, with due diligence, reinstate or make good such loss or damage and proceed to carry out and complete the works;

20.C.6(ii) the Architect may issue instructions requiring the Contractor to remove and dispose of any debris; and

20.C.6(iii) the reinstatement and making good of such loss or damage and the removal and disposal of debris shall be deemed to be a Variation required by the Architect.

### **Replace Clause 30.3(ii) as follows**

30.3(ii) In the event of any disputes or differences as to any rights of the Employer to set off or to any counterclaims or any allegation of defective works, materials or goods or for any other reasons then such disputes or differences shall be referred to

- a) to adjudication under Clause 36.0 of these conditions or
- b) to the Dispute Management Board under Clause 37 or
- c) an arbitrator for judgment under Clause 34.0.

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### **34.0 Arbitration : Replace Clauses 34.1 – 34.3 as follows**

#### **34.1 Disputes or Differences to Be Referred to Arbitration**

In the event that any dispute or difference arises between the Employer or the Architect on his behalf, and the Contractor, either during the progress or after completion or abandonment of the Works regarding:

- 34.1(i) any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the Architect; or
- 34.1(ii) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to; or
- 34.1(iii) the measurement and valuation in sub-clause 30.5 (i); or
- 34.1(iv) the rights and liabilities of the parties under Clauses 25.0, 26.0, 31.0 or 32.0; or
- 34.1(v) the unreasonable withholding of consent or agreement by the Employer or the Architect on his behalf or by the Contractor.

then such disputes or differences shall, subject to and without prejudice to the provisions of Articles 10 and 11 and the provisions of Clauses 35 and 36, in accordance with Article 9 and the provisions of Clause 34, be referred to arbitration.

#### **34.2 Procedures for Appointment of Arbitrator : Upon the disputes or differences having arisen then:**

- 34.2(i) any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties; or
- 34.2(ii) failing agreement or absence of reply or reluctance to act by the other party then the party serving the written notice may after the expiration of fourteen (14) days from the date of the notice to concur on the appointment of an Arbitrator, apply to (\*delete as required)
  - a) the President or Deputy President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator,\*
  - b) the Managing Director for the time being of Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd or such other person from time to time empowered by Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd to make an arbitral appointment,\*

and such arbitrator so appointed shall be deemed to be appointed with the agreement and consent of the parties to this Contract

#### **34.3 "Ex Parte" Hearing**

Upon appointment the Arbitrator shall, with despatch, initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Revised 1972) or any statutory modification or re-enactment thereof for the time being in force and the (\*\*Delete as required in accordance with Clause 34.2.(ii) above and in a like manner)

- a) PAM Arbitration Rules or any modification or revision thereof. \*\*
- b) NADR Arbitration Rules (Malaysian Version) or any modification or revision thereof. \*\*

The hearing may be held "ex parte" should either party, after having been given proper notice, fail to attend.

### **35.0 Mediation : Replace Clauses 35.1 and 35.2 as follows**

#### **35.1 Reference to Mediation and the Appointment of the Mediator : Notwithstanding Clause 34.1 of**

the Conditions, upon the agreement of both the Employer and the Contractor, the parties may refer their dispute as to any matter arising under or out of or in connection with the carrying out of the Works and whether in contract or in tort, or as to any direction or instruction or certificate of the Architect or as to contents of or granting or refusal of or reasons for any such direction, instruction or certificate for mediation under the Mediation Rules of either the (\* Delete as required)

- a) Pertubuhan Akitek Malaysia before a mediator to be appointed by the President or Deputy President for the time being of Pertubuhan Akitek Malaysia. \* or
- b) Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd before a mediator appointed by the Managing Director for the time being of Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd, or such other person from time to time empowered by Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd to make mediator appointments. \*

**35.2 Prior Reference to Mediation Does Not Prejudice the Parties Rights to Adjudication or Arbitration :** For the avoidance of doubt, prior reference of the dispute to mediation under Clause 35.1 shall not be a condition precedent for its reference to adjudication or arbitration by either the Contractor or the Employer, nor shall any of their rights to refer the dispute to arbitration pursuant to Clause 34.0 of the Conditions or to Adjudication pursuant to Clause 36.0 be in any way prejudiced or affected by this clause.

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Insert Clauses 36 – 46 in their entirety after Clause 35.

### 36 Adjudication

- a) A party to any construction contract, as defined by Clause 36(1) below, has / does not have \* (delete as required in accordance with the selection made in Article 8) the right to give notice of an intention to refer a dispute or difference to adjudication and to refer a dispute or difference arising under the contract for adjudication under the procedure complying with Clause 36 and nothing in subsection c) below prevents a party from making such a reference. For these purposes dispute includes difference.
- b) A relevant party has the right to give notice at any time of his intention to refer a dispute to adjudication.
- c) Where this contract provides for the determination of a matter by the Architect, Engineer, Quantity Surveyor or other Specialist Consultant no dispute will have arisen until that matter has been so determined. The failure to determine the matter within the time scale established by the contract for the determination of the matter or within a reasonable time if no such time scale is established can give rise to a dispute about the failure to determine the matter.
- d) The parties hereby undertake to incorporate into all allied construction contracts with nominated and un-nominated construction sub-contractors, nominated construction suppliers and professional construction service providers such as architects, surveyors, engineers and specialist consultants, the terms and conditions set out in Clause 36

#### 36.1 Application of clause 36

Clause 36 applies where, pursuant to Article 8, either Party refers any dispute or difference arising under this Construction Contract or allied nominated or un-nominated Construction Sub-contract or nominated Construction supply contract to adjudication. A construction contract

- a) means an agreement with a person for the carrying out of construction operations.
- b) means an agreement with a person arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise.
- c) means an agreement with a person providing his own labour or the labour of others for the carrying out of construction operations.
- d) agreement includes an agreement to do architectural design or surveying work in relation to construction operations.
- e) agreement includes an agreement to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape in relation to construction operations.
- f) does not include a general contract of employment with workers and labourers.

#### 36.2 Identity of Adjudicator : The Adjudicator to decide the dispute or difference shall be either

- a) ..... (an individual agreed by the Parties) or,
- b) A person to be agreed between the Parties following notification of intention to refer a dispute or difference to adjudication, or
- c) on the application of either Party, an individual to be nominated as the Adjudicator by the Managing Director of Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd or such other person within the Directorate of Nationwide Academy for Dispute Resolution from time to time so empowered to make such nomination ('the nominator'). Provided that

##### 36.2.1 Requirement of compliance with NADR Adjudication Rules by nominated adjudicator

no Adjudicator shall be agreed or nominated under clause 36.2 or clause 36.3 who will not comply with the Construction Adjudication Rules (Malaysian Version) of the Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd.

##### 36.2.2 Time scale for agreement of appointment of an adjudicator and the deed of appointment.

where either Party has given notice of his intention to refer a dispute or difference to adjudication then

any agreement required by 36.2.b) above, by the Parties on the appointment of an adjudicator must be reached with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer (see clause 36.4.1);

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any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer.

Upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by the Parties from the nominator of the name of the nominated Adjudicator the Parties shall thereupon execute with the Adjudicator, upon the nominated Adjudicator's acceptance of the appointment, the NADR Adjudicator Deed of Appointment.

### **36.3 Death of Adjudicator - inability to adjudicate**

If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree upon an individual to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall, upon the nominated Adjudicator's acceptance of the appointment, execute the Nationwide Academy for Dispute Resolution Adjudicator Deed of Appointment with the agreed or nominated Adjudicator.

### **36.4.1 Dispute or difference - notice of intention to refer to adjudication - referral**

When pursuant to Article 8 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall, subject to the acceptance of the appointment by the adjudicator, refer the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice. If an Adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment. The said Party shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.

### **36.4.2 Delivery of referral documents and copies to the adjudicator and the other party.**

The referral by a Party with its accompanying documentation to the Adjudicator and the copies thereof to be provided to the other Party shall be given by actual delivery or by FAX or by special delivery or recorded delivery. If given by FAX then, for record purposes, the referral and its accompanying documentation must forthwith be sent by post or given by actual delivery. If sent by special delivery or recorded delivery the referral and its accompanying documentation shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting subject to the exclusion of Sundays and any Public Holiday.

### **36.5.1 Conduct of the adjudication**

The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm the date of that receipt to the Parties.

36.5.2 The Party not making the referral may, by the same means stated in clause 36.4.2, send to the Adjudicator within 7 days of the date of the referral, with a copy to the other Party, a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.

36.5.3 The Adjudicator shall within 28 days of the referral under clause 36.4.1 and acting as an Adjudicator subject to the Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; and that by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision.

### **36.5.4 The Adjudicator shall (\*\*delete as required)**

- a) not be obliged to give reasons for his decision.\*\*
- b) be obliged to give reasons for his decision.\*\*



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### 36.5.5 Powers and Duties of the Adjudicator

In reaching his decision the Adjudicator shall act impartially and set his own procedure; and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

- 1 using his own knowledge and/or experience;
- 2 opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issued, given or made under the Contract as if no such certificate, opinion, decision, requirement or notice had been issued, given or made;
- 3 requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up;
- 4 requiring the Parties to carry out tests or additional tests or to open up work or further open up work;
- 5 visiting the site of the Works or any workshop where work is being or has been prepared for the Contract;
- 6 obtaining such information as he considers necessary from any employee or representative of the Parties provided that before obtaining information from an employee of a Party he has given prior notice to that Party;
- 7 obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved;
- 8 having regard to any term of the Contract relating to the payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid.

### 36.5.6 Deed of Appointment of Adjudicator.

Any failure by either Party to finalise the Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd Adjudicator Deed of Appointment or to comply with any requirement of the Adjudicator under clause 36.5.5 or with any provision in or requirement under clause 42 shall not invalidate the decision of the Adjudicator.

### 36.5.7 Costs of the Parties

The Parties shall meet their own costs of the adjudication except that the Adjudicator may direct as to who should pay the cost of any test or opening up if required pursuant to clause 36.5.5.4.

### 36.6.1 Adjudicator's fee and reasonable expenses -payment

The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportions.

### 36.6.2 Costs of the Adjudication and Adjudicator's Fees.

The Parties to the adjudication shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the adjudication.

### 36.7.1 Effect of Adjudicator's decision

The decision of the Adjudicator shall be binding on the Parties, until the dispute or difference is finally determined by arbitration or by legal proceedings *[The arbitration or legal proceedings are not an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by an Adjudicator.]* or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given which can include an agreement by the parties to accept the decision of the Adjudicator as finally determining the dispute.

36.7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

36.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 36.7.1.



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### **36.8 Immunity of the Adjudicator**

The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator.

### **37 Dispute Management Scheme and Dispute Management Board.**

The conduct of this contract and allied contracts with nominated and un-nominated sub-contractors and nominated suppliers may / may not \* (delete as appropriate) incorporate a Nationwide Academy for Dispute Resolution Malaysia Sdn Bhd “Dispute Management Scheme”.

#### **37.1 Incorporation of Dispute Management Scheme / Board terms into allied contracts.**

The parties hereby undertake to incorporate into all allied contracts with nominated and un-nominated sub-contractors, nominated suppliers and professional service providers such as architects, surveyors, engineers and specialist consultants, the terms and conditions of this Dispute Management Scheme, including the submission of disputes by all relevant parties to the duly appointed Dispute Management Board, and to indemnify the other party for the consequences of failing to so incorporate the terms and conditions of this provision into relevant allied contracts.

#### **37.2 The Conduct of Negotiations between the relevant parties to the Dispute Management Scheme.**

Notwithstanding the provisions of Articles 8, 9 and 10 and Clauses 34, 35 and 36, negotiations between the Parties regarding any matter or thing of whatsoever nature arising under this Contract or in connection therewith that has resulted in a party given notice of concern or dissatisfaction should be conducted through the auspices of the Dispute Management Board duly appointed in consequence of the agreement pursuant to Clause 37 incorporating a Nationwide Academy for Dispute Resolution “Dispute Management Scheme”.

#### **37.3 Unresolved Matters**

In the event that the matter raised is not settled and a dispute or difference consequently arises either Party may refer that dispute or difference (\*\*delete as appropriate)

- a) to adjudication by the Dispute Management Board, in accordance with Clause 37 and the general adjudication requirements, excepting those requirements governing the nomination of the adjudicator, of Clause 36.\*\*
- b) to arbitration by the Dispute Management Board, in accordance with Clause 37 and the general arbitration requirements of Clause 34, excepting those requirements governing the nomination of the arbitrator and the governing arbitral rules.\*\*

#### **37.4 Nothing within the provisions of Clause 37 prejudices the Parties Rights to refer a dispute to Adjudication or Arbitration by the Dispute Management Board**

For the avoidance of doubt, should a dispute or difference arise either party to the dispute or difference may refer that dispute or difference to the Dispute Review Board for either adjudication or arbitration, as the case may be, even though the matter may not have been the subject of negotiations between the parties under the auspices of the Dispute Management Board, provided always that the referring party complies with all relevant notification requirements for the reference to adjudication or arbitration, as set out in the Dispute Management Scheme.

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**38 Entitlement to stage payments.** The following provisions (namely Clauses 38-47) in respect of payment due under any contract governed by this contract override and displace any other provision(s) in the contract which is/are deemed to contradict or conflict with them.

38(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless-

- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
- (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

38(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

38(3) In the absence of an agreement regarding either (a) or (b) below, or both (a) and (b)

- (a) the amount of any instalment or stage or periodic payment for any work under the contract, or
  - (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
- the relevant provisions of clauses 38(4)- 38(7) and Clause 41(4) below shall apply.

38(4) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with Clause 38(5) and the amount determined in accordance and Clause 38(6).

38(5) The aggregate of the following amounts

- (a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with Clauses 38(5)(b) & (c)),
- (b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and
- (c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.

38(6) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period

38(7) An amount calculated in accordance with this paragraph shall not exceed the difference between

- (a) the contract price, and
- (b) the aggregate of the instalments or stage or periodic payments which have become due.

38(9) References in the following Clauses (ie Clauses 39 – 46) to a payment under the contract include a payment by virtue of Clause 38.

### **39 Provisions regarding due dates for payment and final dates for payment.**

39(1) Every construction contract concluded in accordance with the provisions of this contract shall-

- (a) provide an adequate mechanism for determining the date(s) when payments become due under the contract, and
- (b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

### **40 Final date for payment**

40(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of Clause 40(2) shall apply.

40(2) The final date for the making of any payment of a kind, and specifically those payments mentioned in Clauses 38(3) – 38(7) and 41(5) – 41(7), shall be 17 days from the date that payment becomes due.

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### **41 Mechanisms for determining amounts of payments due under the contract.**

- 41(1) Every construction contract concluded in accordance with the provisions of this contract shall-
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
  - (b) provide for a final date for payment in relation to any sum which becomes due.
- The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
- 41(2) Every construction contract concluded in accordance with the provisions of this contract shall provide for the giving of notice by a party not later than five days before the date on which a payment becomes due from him under the contract, or would have become due if –
- (a) the other party had carried out his obligations under the contract, and
  - (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,
- specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.
- 41(3) If or to the extent that a contract does not contain such provision as is mentioned in Clause 39(2)(a) or 39(2)(b) or both, the following provision of Clauses 39(4) – 39(6) shall apply
- 41(4) Any payment of a kind mentioned in Clauses 38(4) – 38(7) above shall become due on whichever of the following dates occurs later
- (a) the expiry of 7 days following the relevant period mentioned in Clauses 38(4) – 38(7) above, or
  - (b) the making of a claim by the payee.
- 41(5) The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between
- (a) the contract price, and
  - (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,
- shall become due on the expiry of
- (a) 30 days following completion of the work, or
  - (b) the making of a claim by the payee,
- whichever is the later
- 41(6) Any other payment under a construction contract shall become due on
- (a) the expiry of 7 days following the completion of the work to which the payment relates, or
  - (b) the making of a claim by the payee,
- whichever is the later.
- 41(7) Payment of the contract price (which is not a relevant construction contract, that is to say any construction contract :-
- (a) which specifies that the duration of the work is to be less than 45 days, or
  - (b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days)
- under a construction contract shall become due on
- (i) the expiry of 30 days following the completion of the work to which the payment relates, or
  - (ii) the making of a claim by the payee,
- whichever is the later.

### **42 Notice of intention to withhold payment.**

A party to a construction contract shall, not later than 5 days after the date on which any payment becomes due from him, or would have become due, if the other party had carried out his obligations under the contract, and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

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- 42(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. The notice mentioned in Clause 39(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of Clause 42.
- 42(2) To be effective such a notice must specify-
- (a) the amount proposed to be withheld and the ground for withholding payment, or
  - (b) if there is more than one ground, each ground and the amount attributable to it,
- and must be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with Clause 40 above.
- 42(3) The parties are free to agree what that prescribed period in Clause 42(2) is to be. In the absence of such agreement, the period shall be 5 days.
- 42(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-
- (a) seven days from the date of the decision, or
  - (b) the date which apart from the notice would have been the final date for payment,
- whichever is the later.

### **43 Right to suspend performance for non-payment.**

- 43(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").
- 43(2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- 43(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due
- 43(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.  
Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

### **44 Prohibition of conditional payment provisions.**

- 44(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- 44(2) For the purposes of this section a company becomes insolvent-
- (a) on the making of an administration order against it under (Insert relevant Statutory Provision under Malaysian Law),
  - (b) on the appointment of an administrative receiver or a receiver or manager of its property under Insert relevant Statutory Provision under Malaysian Law), or the appointment of a receiver under Insert relevant Statutory Provision under Malaysian Law),
  - (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under Insert relevant Statutory Provision under Malaysian Law), or
  - (d) on the making of a winding-up order under Insert relevant Statutory Provision under Malaysian Law).

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- 44(3) For the purposes of this section a partnership becomes insolvent on the making of a winding-up order against it under any provision of (Insert relevant Statutory Provision under Malaysian Law) as applied by an order under (Insert relevant Statutory Provision under Malaysian Law)
- 44(4) For the purposes of this section an individual becomes insolvent on the making of a bankruptcy order against him under (Insert relevant Statutory Provision under Malaysian Law).
- 44(5) Where a provision is rendered ineffective by Clause 44(1), the parties are free to agree other terms for payment. In the absence of such agreement, the relevant provisions of Clauses 38-44 apply.
- 44(6) Where a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective as mentioned in Clause 44(1) – 44(5) above, and the parties have not agreed other terms for payment, the relevant provisions of Clauses 38 – 42 apply.

### **45 Service of notices**

- 45(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of Clauses 38-46
- 45(2) If or to the extent that there is no such agreement the following provisions apply.
- 45(3) A notice or other document may be served on a person by any effective means
- 45(4) If a notice or other document is addressed, pre-paid and delivered by post-
  - (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
  - (b) where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as effectively served.
- 45(5) Clause 44 section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.
- 45(6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

### **46 Reckoning periods of time.**

- 46(1) For the purposes of this Part periods of time shall be reckoned as follows.
- 46(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
- 46(3) Where the period would include State Holidays under the law of the State of Malaysia governing the construction contract, that day shall be excluded.

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**47 Interpretation :** For the purposes of Clauses 38 - 46

**"claim by the payee"** means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

**"contract price"** means the entire sum payable under the construction contract in respect of the work;

**"relevant construction contract"** means any construction contract other than one -

- (a) which specifies that the duration of the work is to be less than 45 days, or
- (b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

**"relevant period"** means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

**"value of work"** means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

**"work"** means any of the work or services in furtherance of a construction contract.

**"construction contract"**

- a) means an agreement with a person for the carrying out of construction operations.
- b) means an agreement with a person arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise.
- c) means an agreement with a person providing his own labour or the labour of others for the carrying out of construction operations.
- d) agreement includes an agreement to do architectural design or surveying work in relation to construction operations.
- e) agreement includes an agreement to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape in relation to construction operations.
- f) does not include a general contract of employment with workers and labourers.

**THE END**