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CONTRACTS TERMINATION: MAIN CONTRACT VS SUBCONTRACT BACK-TO-BACK PRACTICES

by
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ABSTRACT
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Contract termination is one of the rights to be exercised by employer or contractor whenever serviceable. However, opting to terminate the main contract by the employer is a serious issue that should be approached with utmost care and caution. In similar situations, contractors can open the chains of communication with employers to have this decision cordially revoked and the terminated contract reestablished. Regardless of the outcome of such negotiations, there is a number of ramifications that will emanate upon terminating the main contract, propagating 'back-to-back', affecting the lower tier participants, mainly subcontractors. The main objective of this study is to outline the possible means of action by contractors towards their employers and subcontractors upon the termination of the main contract or in the case when this decision gets amicably revoked. The followed methodology includes (1) drawing out and analyzing contract termination timelines from six different standard conditions of contract, (2) Reviewing caselaw databases extracting 24 cases that deal with wrongful contract termination to analyze causes and consequential liabilities and (3) investigating a case study that aims at validating a proposed hypothetical model of possible actions to be taken by contractors vis-à-vis their employers and subcontractors upon main contract termination or in case this decision gets revoked. By that, the spectrum of mechanisms yielded 4 different steps that termination processes include: notice of default/correction, notice of intent to terminate, notice of termination and termination certificate. Moreover, the updated version of FIDIC 2017 removed the ambiguity of effecting termination due to the addition of a 2nd notice to terminate. Moreover, the research identified and itemized the reasons of wrongful termination as not establishing the grounds of termination, failure in following notice requirements, acting in bad faith and breach by terminating party. Consequently, the liabilities of wrongful termination were payment for loss of profit, damages for wrongful termination, work executed, reasonable overhead, proven loss of tools, supplies and machinery and cost of repair. The research also revealed that ramifications of termination of the main contract

exceeds that specific contract and ripples to the lower tier participants, mainly subcontractor. For that purpose, a hypothetical diagram was established to understand the possible contractor's actions due to consequential back-to-back effects on the chain of participants having the main contract terminated. When the main contract gets terminated, the subcontractors are either terminated and reemployed under the umbrella of the employer or suspended in the hopes of revoking the decision by the employer where the main contract gets reestablished in consent. That said, the investigated case study in the UAE showed how the subcontractors were affected by the termination of the main contract that upon reinstating the main contract, the subcontract was still terminated. The sequence of events that took place in the tunnel of this contract termination validated the hypothesis in question and identified the possible options and outcomes of all decisions, the most important of which being the opportunity of revoking.

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CHAPTER I

INTRODUCTION

A. Background

Construction projects, in their vamping behavior, are getting more and more complex when buckled to the factors of contract price, time for completion and project scope, rendered in their nature, construction variables (Abdul-Malak and Khalife, 2017). The parties to such projects, hereafter addressed as owner and contractor, are bound to a legal agreement, called the construction contract (Totterdill, 2006). Accordingly, such contract administers the relation between the mentioned parties and sets-robust the responsibilities and obligations of both (Totterdill, 2006). To this end, delivering such projects in the efforts of preserving set quality and respecting time dates and dues funnels into the interest of both parties (Demachkieh and Abdul-Malak, 2019). That have been said, different conditions of contract have been recognized as means for assuring well-organized management practices and mechanisms setting forth the onus of risks to the parties to the construction project (Abdul-Malak and Khalife, 2017; William and Ashley, 1987). One of the risks called for is the ability to maintain the obligations under the contract (William and Ashley, 1987) and to effectively adhere to the uniqueness of such projects in terms of their lengthy periods, complex procedures, unpredicted behaviors, financial responsibilities and dynamic workflows (Elsawalhi and Abu Eid, 2012; Cheung and Pang, 2013). The practices within such approach, define the endeavors holding back the sequential events of

construction not to be led into one of the pitfalls of construction projects: Termination (William and Ashley, 1987).

Wilson (2009) discusses that the construction business, in the atmosphere of such economic climate, only leads to termination becoming more rampant. Podvezko et al. (2010), set the 9th criterion in the characteristics of construction contracts, subsequent to the obligations of both parties, insurances, payments and guarantees, as contracts termination. Of the most problematic threats within the field of construction is termination, argues Brumback (2006), simply because, opting to such decision without legal advice (Podvezko et al., 2010) and allowing improper practices to surface within the exercise of procedures will drastically weaken the righteousness to the legal position and renders the party susceptible to breaches of contract (Booen, 2000). As such, standard contract conditions were established to define the rights and responsibilities of both, owner and contractor, in any act of termination during the project lifetime (Terrell and Surace, 2016).

Termination, in the construction industry, is an act of right exercised by either the owner or contractor (Callahan, 2009). Intrinsically, termination of construction contracts can be subdivided into three categories: (1) Termination by Employer for Convenience; (2) Termination by Employer for Default; and (3) Termination by Contractor for Default (Callahan, 2009). In all cases, such stride should be approached with utmost care, because what seemed to be right at the time may no longer be (Calvey, 2005). To elucidate, owners must consider good consciousness, well established business judgements, project and equity in their decision to terminate, one that underscores negative consequences thereafter (Terrell and Surace, 2016). Likewise, contractors are asked to acquaint themselves with

provisions of their contract specifically targeting acts of termination and to interpret their approaches properly and cautiously (Brumback, 2006; Abu Dief et al., 2016). Indisputably, wrongful termination stands henceforth as an earnest matter to steer clear of by both parties (Siang. 2011).

Insofar as the owner is concerned, Terrell and Surace (2016) argue that "Construction contracts have evolved to recognize an owner's right to terminate a contractor before project completion without rendering the action a breach of contract." Firstly, convenience, that is to say, presenting a termination for convenience clause in the contract provides the owner with a unilateral right to terminate before hitting the completion date (Terrell and Surace, 2016). Business fluctuations, economic impacts, scope variations, project needs and organization's strategies: all recorded as factors affecting the convenience termination to be exercised by the owner (Abu Dief et al., 2016). "Before entering into any construction contract, an employer would typically do due diligence to ensure there are no matters that seem likely to prevent complying with the employer's contractual obligations" (Fawzy et al., 2018). Nevertheless, a clause addressing termination for convenience tops as an important tool that inoculates the owner against liabilities of different categories that would otherwise be at the availability of the contractors for the owner's breach (Terrell and Surace, 2016). In the same vein, owner can terminate for contractor's default where the latter presents with an unexcused failure vis-à-vis his ability or willingness to perform in accordance to what the contract calls for (Surahyo, 2018). Typically, termination clauses within a construction contract allow the owner to terminate for default if the contractor (1) breaches the contract, meaning hints of menace to

abandoning the work for inappropriate change orders; (2) fails to conform to his obligations under the contract provisions; (3) shows progress deficiency, refuses or fails to finish his work; (4) performs subpar, unsound or nonconforming work; (5) fails to pay suppliers and subcontractors; or (6) infringes applicable laws (Calvey, 2005).

On the other hand, Brumback (2006) marks the right of the contractor to terminate, through no faults, in one of the cases of: (1) no-work order issuance by government; (2) declaration of national emergency; (3) failure by owner of prompt payment or issuance of payment certificate with no righteous reason; or (4) failure to show financial capability if requested.

Contract termination is the last resort to wise and cautious owners and contractors, being a costly process for both parties. Rights and remedies linked to such process depend upon the suitable provisions set forth in the contract (Terrell and Surace, 2016).

B. Problem Statement

In the construction field, the contract remains the binding tool to both parties, addressing rights and obligations along the means to attain them. That have been said, termination is one of the rights to be exercised by both, owner and contractor, whenever serviceable. Termination is a costly decision to take, mostly ensuing conflicts between parties to the contract. As such, legal assistance and wisdom are immensely advisable. The literature addresses the termination forms entertained by the owner and contractor, however, nebulously discusses the proper mechanisms of such acts. Such processes should

be exercised with utmost care for they entail serious actions, considered as prerequisites to a rightful termination, such as notices. Although there are several types of standard conditions of contract and that such conditions constitute numerous clauses targeting different approaches and methods to attain termination, ambiguity still prevails in the endeavors to answer when and how such a resolution is made effective. Likewise, it is not clear as to whether such mechanisms stated within different contract languages, do have a universal and unified aspect, and as to whether flexibility is inherent in all or not.

Another serious concern adhering to the perilous path of termination, and not yet addressed in the literature, is the down-tiering effect of termination. Despite the fact that some mechanisms target the issue of termination between the owner and a contractor, nothing clearly addresses or answers the questions on the implications that contract termination induces on the subcontractors. In other words, nothing vividly calls for consequent actions facing the subcontractors whenever the general contract is terminated, bearing in mind that subcontracts form the bulk of the general one.

Moreover, one more issue would emanate in the case when the contractor faces a default termination decision by the owner. The contractor might find himself negotiating the owner for the favor of both, thus enabling the revoking of that choice and the contract being retracted. The literature does not seem to have addressed such topic and is not clear to what results of such a revoking situation in regard to the old contract, the general contractor’s old obligation and the existing subcontracts or work in progress.

C. Research Objective

Firstly, the objective of this study is to outdo the challenges spouting throughout the termination process. This necessitates thorough understanding of the available mechanisms of termination and clearing off all ambiguities within the specific standard conditions available. This allows the understanding of the full spectrum of mechanisms and as to whether such mechanisms are universally unified or not. On the other hand, pros and cons of such mechanisms within this spectrum are to be determined to establish points of strength, impediments and flexibility. Additionally, those standard conditions will enable the identification of the acts following termination critically to set the timeline actions of subsequent effects. Secondly, it is imperative to address the consequences in which subcontractors entail when the main contract reaches termination. That been said, termination exercised upstream will be affecting parties downstream leading to tiering effect of consequences emanating through such act. Thirdly, this research tends to summarize the responsibility of a terminating party, through highlighting the risks and damages if falling into the taboo of pitfalls termination gives rise to, i.e., unlawful termination. Fourthly, knowing that termination is not a done deal, revoking of such act is not impossible, and thus ramifications will be identified down the tiers of parties in the case of proceeding to terminate or not. Certainly, it is crucial to dig deeper through real case law targeting such objectives, where actions can be examined, and consequently analyses become more rational.

D. Methodology

To the extent of covering the scope of this study, well preparation and cautious planning is needed. Consequently, and to the purpose of the mentioned objectives, this methodology of action is expected to be established:

- To be well informed about the topic, a comprehensive and thorough reading of the literature review presented was conducted covering a wide spectrum of journals, books, etc.
- Equivalent to the literature review targeting the proposed topic, real case databases were reviewed as they were necessary to draw the actual facts, and accordingly, analyze such findings. Such archives reflected to how the mechanisms were put into operation by parties to contract, and as such, set-robust the headings to different modes of action. Most importantly, such cases highlighted the different grounds where termination was based on as well as reasons for wrongful termination. Also, the tiering effect of termination was dug into through such analyses.
- Alongside such readings, the study of standard conditions of contract was involved to bound the clauses targeting termination and to extract different timelines and mechanisms of such acts. Such study enabled to conduct a comparative analysis between such mechanisms identifying whether the spectrum of all those mechanisms shows universality and uniformity or not.

- A real case study was extravagantly investigated, validating a hypothetical model of actions upon termination and analyzing the ramifications experienced downstream due to termination exercised upstream.
- A unified summary of the work of study was proposed, in addition to conclusions and recommendations. Curbs of offered work contributions was also discussed in the eyes of practitioners and future work was suggested.

E. Significance of the Research

Termination is an issue where all participants of a construction project are faced with, i.e. owners, contractors, subcontractors, engineers, architects and what not. Thus, such study conveys several benefits especially to owners targeting the termination of their contractors for default. Certainly, the merit of this research led to devise a framework of challenges in case of wrongful termination and emanating ramifications those owners will face through their course of action. Additionally, this research delivers distinct worth to practitioners to oversee the termination process mechanisms and complications preventing them from falling off-limits the proper acts. Moreover, recommendations explored represent guidance for different parties and shall have effect on better approaching the issue of termination.

CHAPTER II

LITERATURE REVIEW

A. Preamble

Construction industry is considered to be one of the major contributors of the global industry sharing a large amount of the international production annually. This industry consists of a wide range of key players as owners, end users, contractors, subcontractors, suppliers, vendors, regulators, coding organizations, legal counselors, etc. The mentioned business, similar to all industries, holds risks, in which could be untroublesome or not. Such uncertainties require the need for skilled people to coordinate and avoid such troubles.

Construction projects are usually lengthy in time frame, complicated in progress and burdening in finance. The parties involved in the project are tied to a construction contract that manages the relation between them: their rights and obligations. One of the natural occurrences in any of the mentioned projects is termination, meaning the work gets ended. Termination is naturally a tedious process and should be carefully handed to overcome its pitfalls. In this chapter, several terms will be defined, termination will better be explained through a wide spectrum of directions: causes, effects, types, risks, etc.

B. Construction Contracts

1. *General Definitions*

a. Contract

In legal terms, and as illustrated by the legal dictionary, a contract is “an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a meeting of the minds; c) a promise to perform; d) a valuable consideration (which can be a promise or payment in some form); e) a time or event when performance must be made (meet commitments); f) terms and conditions for performance, including fulfilling promises; g) performance, if the contract is unilateral” ("Legal Dictionary - Law.com", 2020).

Cambridge dictionary defines a contract as a legal document stating and explaining a formal agreement between two parties, be it people or groups ("CONTRACT | meaning in the Cambridge English Dictionary", 2020).

b. Construction Contract

A construction contract is referred to as one for the sale of supplies, work done and labor force in exchange for a certain price for the delivery and instalments of the goods

mentioned as well as the hours worked. Along the way, several decisions are to be made such as variation orders, expenditures related to provisional and/or cost sums and orders for time extensions (Adriaanse, 2016). Adriaanse (2016), extends the definitions of the construction contract to any agreement for carrying out works related to architecture, surveying, design, engineering, interior or exterior decorations or landscape. Such contract construes several operations including:

- Civil engineering and building works containing operations such as painting, scaffolding, site clearance, as well as works of repairs and maintenance;
- Labor contracts;
- Consultant operations agreement; and
- Contracts of any other value.

c. Construction Project

A project is a chain of tasks delegated to specific parties in order to attain a goal or target. “Construction project means a project including planning, design, preparation, and performance of a new capital improvement, alteration, conversion, fitting out, commissioning, major renovation or repair, demolition or decommissioning of any structure or infrastructure. The project scope shall be inclusive of scope of work, timeline and budget. The term “construction project” shall also include any or all necessary materials, labor, and equipment, needed to complete the project if such are contracted for separately” ("Construction project | legal definition of Construction project by Law Insider", 2020). The scope of the construction project is defined through a process whereby a project is well-

defined and arranged to be executed. This helps to decide whether or not proceed with the project in hand. Likewise, the early definition of such scope is in the interest of early assessing the targets positively and negatively to all stakeholders. (Fageha and Aibinu, 2012). Moreover, Fageha and Aibinu (2012) suggest that construction projects permit different levels of changes and alterations not only on construction sites but also on the environment surround it and the people within.

d. Contract Termination

Terell and Surace (2016) explain that construction contracts recognize the right to terminate before the project completion without having considered that act as a breach of contract. A party to a construction contract or a separate design professional should consider opting to contract termination in case of the breach of contract by the other party, or if latter willingly stopped its obligations or responsibilities under the contract (MacEwing, 2004).

2. *Requirements of a Legit Contract*

According to the Association of Construction and Development (2012), there are six different elements for a contract to be effective:

- There should be an agreement, with an offer and its acceptance;
- Bargain in exchange for a promise;
- Parties must be legally able and have the proper capacity to be held for the contract;

- Parties must accept the terms of agreement of the contract;
- Subject of negotiating should be sound and legal; and
- The contract should be written to be enforced properly.

3. *Elements of a Legit Contract*

A contract is not considered valid until having compromised of several elements or aspects other than just signing a paper with a price figure. That been said, below are the essential elements of a legit contract, presented by Camarneiro (2018).

a. Offer and Acceptance

This offer occurs when a party presents something with value in exchange for something else with value, for instance, a client with money value in exchange for a built facility by the contractor. Such offer can be either accepted or rejected. Although acceptance may seem redundant in the offer-acceptance relationship, it still needs to prevail in order to assure that the offer was comprehended and fully accepted. One interesting aspect of the agreement is the fact that it should not be presented with written words or verbally, but it can be determined through conduct.

b. Consideration

In its essence, consideration is considered the benefits both parties receive for executing their obligations under the contract. Considerations can be money, service,

supply, object or simply anything with value. Although these considerations have value, law is not interested in the adequacy of that value.

c. Mutuality or Intention

This means that parties to the contract have decided and consented to create a valid contract between them. As such, special consideration should be taken when we look at promises between those parties. All uncertainties or discrepancies can be avoided through having the contract subject to writing.

d. Legality

Determines whether the subject matter of the contract is legal or not. Such an element in contracts prevent any party from going unlawfully through giving false promises or unrealistic intentions.

e. Capacity

Capacity comes in handy to verify the eligibility of parties to form a contract. In other words, capacity means that the part to accept the agreement has the legal right to sign the contract. It is key to note here that capacity has nothing to do with not understanding provisions of contract. Capacity can also refer to other forms of bankruptcy, current or past incarceration and personal age.

4. *Documents in a Contract*

Within the construction contract, there is a set of contract documents that describes the work to be performed by the contractor. These documents also set robust the basis of the contractual relationship between the owner and the contractor. Below are the elements the typically form the construction contract.

a. Owner-Contractor Agreement

This is the agreement to be signed by both, the owner and the contractor. It mainly explains the relationship between both parties including their identity, their legal stance with respect to the project in hand, important time milestones like commencement and completion, contract price, payment methods, etc. (Kelley, 2012).

b. General Conditions

The general conditions mainly contribute to giving more terms of contract highlighting the main delegations of the contractor. Such conditions may include insurance information, bonds and surety conditions, scope of work changes permitted and ways to doing so, procedure for payments, safety of site as well as procedures for termination. Such conditions highlight the role of the consultant who is to provide engineering services on site during construction. These conditions also acquire the right of the consultant as an authorized party to judge the contractor's progress (Kelley, 2012).

c. Supplementary Conditions

Unlike the general conditions, that mainly define the standard mode of action within a contract, supplementary conditions are placed when practices may be different according to differing type of project, delivery method, location, etc. such conditions are to be added to allow modifications to the general conditions whenever serviceable (Kelley, 2012).

d. Drawings

Drawings usually depict the graphical representation of the tasks to be performed. They show construction design, map and locations, dimensions, measurements. Drawings mainly include several plans, sections, elevations, detailing figures and schedules of works. Drawings can be issued for bidding and can be found in construction changes directed by owner, change orders by contractor, addenda and for contractor's information requests (Kelley, 2012).

e. Specifications

Specifications are the technical aspect of the contract. They show the materials and equipment needed, working systems, and quality of work to be achieved. Such specifications follow the divisions system, illustrated in the master format which is created by the Construction Specification Institute (Kelley, 2012).

f. Addenda

They represent corrections, additions or omissions to the specifications included or the drawings. Addenda are usually issued before the construction contract is signed. They are binding to all bidders, where the latter should acknowledge the receipt of all addenda issued (Kelley, 2012).

g. Modifications

Unlike addenda, these modifications in the forms of additions, corrections or omissions are issued after the signing of the contract between different parties. Modifications may include variation order, directed changes and many other forms (Kelley, 2012).

5. *Key Participants*

The design and the progression of efforts in building construction projects is due to the collective forces of many stakeholders. Such business is said to be people-oriented; Those who are working in design and contracting are the ones to get the project to the profitable end (Clough et. al, 2015).

a. Owner

The legal unit with the ownership of the project and working permit to facilitate the works on site with plot lease and entitlement to construction. Owners and clients could be subdivided into several categories:

- Individual client: being the owner and the end-user of the facility. Although such types of clients seem to be simple, a good understanding of his needs and expectations is to be established.
- Corporate Client: including all companies not managed by a sole investor or owner. The structure of such type of clients can range from small partnership companies to massive organizations with complicated interlinks. This wide spectrum possesses its own type of care that should be practiced by the construction teams.
- Public Client: including structured organizations owned and orchestrated by the public authorities whose financial strategy is to commission public construction works. Such projects are usually financed through taxation practices. The hinders for constructors when working with public clients is their day-to-day engagement with public authorities whose type of engagement is not clearly defined. (Winter, 2003).

b. Designer or Architect-Engineer

Such party can be represented with a specialized individual or a company hiring a team of people. Designer, if assigned by the owner, early on in the project, can be the one to handle the research and preliminary investigations. In the design phase, such entity is supposed to perform the designing of the works and the matching drawings. During construction, and if authorized by the owner, should look for working compliance and execution by the contractor. With such authorizations, design follow thoroughly the

contractor's progression, assess and issue instructions whenever serviceable (Clough et. al, 2015).

c. Prime/General Contractor

The main business entity, having the contract privity with owner, whose job is to handle the construction of the project, either entirely or portions of it. What the general conractor mainly do is to supervise, manage and coordinate the tasks of the construction process, having the title of main entity in charge of the field. Procurement processes, labor forces, materials and equipment are all the responsibility of the contractor. The general contractor also engages in contracts with subcontractors allowing them to perform parts of the works thus being in the lead of their coordination and management. The prime contractor should have the capabilities to handle all resources and reallocate them whenever needed to compete for the best efficiency in targeting time and cost schedules (Clough et. al, 2015).

d. Consultant

Consultants may be part of the design team, in turn consisting of architects, structural engineers and engineers of various specialties in different fields be it sounds or acoustics, landscape, lighting, etc. Consultants oversee the commencement of works lawfully, ensuring the construction works are done completely and correctly according to consented protocols. Moreover, Consultants must keep an eye on any probable contract

breaches or technical imperfections. Additionally, they are requested to issue instructions upon contractor's request or for directed changes (Winter, 2003).

e. Subcontractor

A private entity, signing with the general contractor to obtain a subcontract for portion of the works entitled to the responsibility of the general contractor. Subcontracts are obtained due the to the fact that general contractors do not have all extensive craftsmanship needed to fully cover the scope of the project. Through hiring subcontractors, the general contractor is reducing costs and mitigating risks through employing a better service of specialty at a lower total risk during the project lifetime. It is to be noted here that a subcontract between the party and the general contractor establishes no contractual relation between the mentioned party and the owner, thus, the general contractor is the one to assume the full responsibility towards the actions and faults by the subcontractor. One special type of subcontractors is the nominated subcontractor where this subcontractor is nominated by the client or his personnel. This type of subcontracting do allow a direct relationship between their end and the owner (Clough et. al, 2015).

The list of stakeholders incorporated in construction project is enormous and what was mentioned earlier is only the main focal participants. Stakeholders in construction projects can be subcategorized to external and internal stakeholders. For instance, clients with the authority and managerial power over the project are said to be internal participants. On the other side, external stakeholders could include, and not limited to, localities,

communities, regulators, environmental specialists, media, government, etc. (Xiaohua Jin et al, 2017).

6. *Contract Types*

There are certain mechanisms for drafting and pricing the contract thus economically allocating risks between parties to the contact, owner and contractor. The most commonly used methods are fixed price, cost-plus and unit price.

a. Fixed Price

Also called lump sum contract, where the value of the whole of the works to be performed by the contractor is to be controlled by a specific fixed price. Such contracts are mostly preferred in scenarios where the scope of the project is boldly achieved with the schedule of works and payments successfully agreed on upon negotiations. The owner thus has no right to question the costs and payments to contractor where all the values are to be incorporated within the fixed amount. Fixed contracts are usually used with DBB type of projects where design is fully mature and ready for bidding. In such types of contracts, the challenging element is the inability of the owner to credit back from the contractor any unperformed jobs or tasks (Kelley, 2012).

b. Cost-Plus

In cost plus contracts, the value to be covered is for amounts of actual costs incurred, i.e., acquisitions and all other costs incurred during the exploitation of the

construction activities. Upon the negotiations between the owner and the contractor, both do set a certain value for expenses representing some percentage of costs of labor force and materials. As such, the continuous functioning costs incurred by the owner as well as the profits intended are to be achieved. Costs by contractor here can be referred to as direct or indirect costs. Special care should be given to the overhead pricing and evaluation where it was found to be one of the main sources of owner-contractor disputes in such contract formation (Kelley, 2012).

c. Unit Price

These contracts are established on the foundations of estimating the quantities and unit prices of items needed to perform tasks on site. Such rates can be per hour, per unit work of volume covered, etc. This implies that the overhead of the contractor would be part of those rates. That been said, the contract price can be computed having evaluated all the amounts and quantities needed for all the construction tasks. Such contracts are most advantageous when the types of items to be purchased are clearly stated, whereas the quantities of those items are to be successively provided throughout design progression towards maturity (Kelley, 2012).

7. *Contract Lifecyle*

Through its lifecycle, the contract usually goes through several phases and can have various leading times. In fact, the subsequent steps or stages can be recognized throughout the lifecycle of the contract.

a. Precontractual Stage

This stage is the preliminary one, incubating all the research and investigations needed as well as marketing and tender invitations. The first phase within this stage is the sales and marketing, where the contractor outreaches to all employers and firms showing his company's capabilities, working experience, designated specialists and allows his reputation to introduce itself for future offers. The second phase is the invitation to tender by the owner. The latter here outreach to the market for the interest of either private or public/governmental associations. Public firms have more restrictions than that of private firms and is to assure meeting public needs and interests as well as the community's policies before applying to the project. On the other side, private firms are free to apply, and accordingly, should be given adequate amount of time to prepare their bid proposals. This includes calculating values, risk mitigation scenarios, building their communication networks towards banks and suppliers and reach out to suppliers (Puil and Weele, 2013).

b. Contractual Stage

This stage is characterized by few contractors getting it to the next stage, where most of the other contractors will not make it. This stage is also called landing the contract.

The owner here, upon various competitive bids by the contractors, will select several contactors to negotiate with them for later stages. This stage can be lengthy depending on the time it takes to reach agreeing to a base price. The outcome of this phase is establishing the contract (Puil and Weele, 2013).

c. Post-Contractual Stage

This is the stage where the collaboration between parties prevails, and includes, according to Puil and Weele (2013), the following sub-stages:

- Engineering and Design: Post obtaining the contract, engineering takes place in preparation for technical works as drawings and specifications. Upon the established details, budget values will be evaluated in terms of labor force, equipment and materials needed. Moreover, the amount and specialties needed of subcontractors will be determined. Following is resolving client needs and challenges and landing permit from government. To prepare the technical files needed and plan for the project ahead, effort and time are needed bearing in mind that the date for starting cannot be changed contractually. This shows that employers do face time problems early in the project.
- Subcontracting and Procurement: When the owner and main contractor reach contract agreement, the general contractor in turn should finalize his agreements with the subcontractors. At this stage, the contractor is faced with one of several decisions: either going back-to-back so that whatever is

performed under the main contract is to be reflected in the subcontract, go with the lowest or most competitive bid or have a mix of those choices.

- Scope of Work: Working on the project does not require signing all contracts between different stakeholders. Realistically speaking, construction projects are not idealistic, and as such, do acquire a level of care for changeable matters. That been said, such issues are to be considered and resolved early on, so that all disputes can be avoided daily.
- Testing and Delivery: Throughout the progression of works, works are to be assessed and certified by the consultant upon testing. As such, payment certificates are to be issued in line with such tests that can be tedious and lengthy depending on the readiness of consulting staff team.
- Maintenance and Guarantee Period*:* The contractor is to remain accountable for any uprising defects or failures after handing out the project to the empoyer.
- Claims: Claims are inevitable in all construction projects and are to surface in law courts even after years of ending the projects. Such process includes all participants depending on the issuer of the claims. Pitfall here, is that the end result of this process is having all the profit generated be transformed to unexpected loss.

C. Performance in Construction Projects

Construction projects in any country is one of the main economic drivers. According to Takim and Akintoye (2002), "the pace of the economic growth of any nation can be measured by the development of physical infrastructures, such as buildings, roads and bridges ... The level of success in carrying out construction project development activities will depend heavily on the quality of the managerial, financial, technical and organizational performance of the respective parties, while taking into consideration the associated risk management, the business environment, and economic and political stability."

1. *Performance Success Influences*

The project is said to be successful if it meets the major goals of construction as budget, schedule and quality with a high level of satisfaction of all stakeholders in regard to the project end result (Kog and Loh, 2012). According to Sanvido et.al (1992), there are several functions that permit rendering the construction project successful, including, and not limited to:

- Facility team: The owner should have the needed experience in his project ensuring the early engagement of the construction manager in the project lifetime and in selecting the construction developer.
- Contracts: The type of contract to be chosen is a critical factor to establish a successful project. For example, cost-plus-fee type of contract with the key designers insures their staying for the whole length of the project.

- Experience of Developer: The general contractor should have the relative experience in the scope of the project in hand.
- Resources: The most important resource would be the staffing level, and it should not suffer any deficiencies. In additions, all equipment, material and supplies should be always readily available to avoid delays.
- Product Information: There should exist a unified common understanding of the project scope in terms of frame of reference, philosophy behind it and the program specifications. This helps in keeping the momentum of the contractor especially upon changes and variations.
- Optimization information: Value engineering is a key factor in getting to land a successful project. In order to attain good value engineering practices, the mindset of the contractor and the operator later on should be optimized.
- Performance Information: There should always be an excellent level of control by the owner and his management team, as well as the employed consultant.

2. *Project Outcome Evaluation*

There has always been the need to evaluate the outcome of a construction project, especially at the end of the owner. Nevertheless, there are several issues that are intrinsic in the evaluation process:

- Defining the objectives regarding the purpose of the evaluation, example social benefits versus economic ones;

- Criteria for measurement, either by raters who could be occupiers not early included in the realization of the project, or by ratees, the project participants;
- The uniqueness of the evaluator; and
- Time frame construed for measurement (Liu and Walker, 1998).

Williams et. al (2012) suggest many approaches to project assessments, sorted and characterized by frequency of utility, the team responsible for the review process and the focal aspect of the review. Below is a sample of such assessments:

- Project Reviews: It is usually attached to some sort of governmental or organizational framework to be used in the decision-making process. This formal approach is supposed to be mandatory is usually phased out through the project life cycle as to establishing realization of the project.
- Project Health Checks: Could be considered more formal than the first assessment type. Using this method, the reviewer is looking for fraud or ad hoc activities at any stage during construction. Key performance indicators are a great deal to be attached to reports, that in turn, should be analyzed.
- Benchmarking: This method helps the project in hand through determining aspects of comparison with other projects. Time, cost and quality models will be built and compared to establish similarities and differences. In the light of this, all similar problems can be detected and avoided.
- Post-Project Evaluations: One of the evaluation processes that takes place after the project has completed. The objective behind it is to establish the learnt lessons or help resolve claims and disputes.

- Project Audits: The word audit entails many meanings, one of which is attached to law obligations. With such audits, there could be stablished unity between the work executed and regulations, for example, when detecting against fraud.

To be able to establish the overall evaluation of the project outcome, there should be presented an outline of the individuals who are likely to have the same mindset. Thus, there can be established a proper degree of comparison between different approaches to such evaluations, on the micro and macro levels (Liu and Walker, 1998).

3. *Management of Early Warnings*

Many turbulences and variations happen throughout the execution of construction projects, for such projects are considered complex ones. As such, project evaluations and assessments are always exercised to help participants make their decisions regarding any uprising matter. Project professionals are not always perfect at identifying such signs, which are mandatory because they possess game-changing capabilities (Williams et. al, 2012).

Early warnings relate to many problems faced during construction projects development. Project managers should be able to behave properly with what is considered changeable or unforeseeable. As a matter of fact, such signs if utilized, could help early anticipation of problems and managing them thereafter. Nikander and Eloranta (2000) categorize those early warning to several groups:

- Gut Feelings: enabling PMs to detect early traceable problems; also called intuitive feeling.
- Personnel or Project Group: related to non- verbal messages in meetings, personnel behavior, mood, attitudes, conflicts, disputes, making unnecessary excuses, lack of resources, frequent changing in personnel, etc.
- Management and Project Manager: style of the management used and the qualities or traits of the project manager.
- Project Planning: quality of plans and drawings, discrepancies in execution plans, contract inadequacies, poorly budgeting, inability to acquire materials in advance, etc.
- Project Control and Reporting: monitoring and controlling progress of works, schedules and budgets.
- Working within the Project: inefficiencies in mobilization and work initiation, lack of information without requesting it, repeated errors and mistakes, work inefficiently organized throughout the project, etc.
- Communication: usually apparent in tone of voices and messages, letters, conflicting sources and content of information and the unwillingness to talk or open freely.
- Documents: could be badly reported, as well as the level of delivering and receiving them, improper technical drawings, wrong corrections or revisions with unclear responsibility handlings.

- Expressed by parties: lack of trust, missing decisions, delays in procurement, miscommunications with suppliers, etc.

4. *Management of Risks*

Risk could be defined as any event that might have a negative effect on one or any combination of construction project parameters (Young, 2009). Risks in construction projects are inevitable, and as such, the ability and willingness to manage those risks is highly important. These risks or ambiguities could be the result of reaching invalid information or incomplete ones and improper procedures of work. Risk can either be calculated in many cases and avoided thereafter. More often than none, the effect of risks is the leading factor to identification of their type and the modes to correction (Akinrinade, 2018). Usually, the project employer should have established a risk management strategy to depend on. Such strategies could be either implemented in future prospects, that is after the event occurrence, or effectively in a precautious manner by prediction of changes (Smith et. al, 2014).

Although risk could be argued to be a complicated element of having a successful project, it is likely to happen a lot during project development. So, risks should be identified early on during plans execution, so that the management of risks becomes more approachable. This will allow the reducing, distributing, fairly allocating, relocating or waiver of risks (Akinrinade, 2018).

D. Termination of Construction Contracts

According to research, grounds of terminating construction contracts can be contractual and non-contractual. The non-contractual rights to terminate could be the established under several circumstances. For example, frustration of one of the parties to the contract. This happens when none of the parties exercised wrongfully under the contract. However, some events have occurred to prevent the normal progression of works. Such events may cause frustration to any of the parties, especially when execution of works becomes impossible. Upon frustration, the contract comes to an end automatically, and as such, parties hold no more obligations under the contract. It is important for the party to declare frustration as a cause for termination, to insure and complement such an act, otherwise it will result in wrongful termination due to breach of contract (Termination and Suspension of Construction Contracts, 2019).

On the other hand, documents presented within construction contracts set forth the ability to end the contract or the project contractually in many ways, having the most suitable one to be the full execution of obligations of both parties. Nevertheless, there are certain circumstances that, upon happening, push any of the parties to exercise their right to termination of contract. Such reasons or circumstances should be mentioned in the contract so that the terminating party is entitled the eligibility to such act. Below are some of the reasons, illustrated by Clough et. al (2015), allowing parties to exercise termination.

- **Material Breach**
    - Failure to proceed with payments
    - Delaying the project unnecessarily

- Performance gaps
- Failure to properly coordinate the work
- Failure to provide access to site
- Collapse of the financial structure

- **Default**
  - Failure to perform duties and obligations under the contract
  - Nonperformance of faulty one
  - Failure to meet financial obligations
  - Continuous disregard of laws and regulations
- **Mutual Agreement**
  - Unexpected contingencies
  - Financial overturns
  - Troubles with labor force
  - Loss of personal, considered key for proper performance
- **Public Projects**
  - Governments can terminate for their best interest
- **Impossibility of Performance**
  - Circumstances are beyond the control of both parties
  - Unexpected site conditions
  - Operation of applicable law
  - Cost of performance is disproportionate to agreed-on cost
- **Destruction of Subject Matter**
  - Damage of facility (fire, floods, earthquake, etc.)

1. *Termination by Employer*

Termination of the construction contract by the employer may be, in most of the cases, the last resort of action, implicating many consequent actions. Termination by employer mainly is due to a default by the contractor or for his own convenience.

a. Termination for Convenience

The right for the owner to end his contract for convenience is allowed in many conditions of contracts and is not supposed to be carried out due to failure or breach by the other party. If the employer is to exercise this right, the conditions of contract should be properly visited to ensure allowing such act and the means to proper termination (Berg, 2008). The owner may exercise this right when he changes his mind to the land acquisition or utility. At-will termination happens also if the owner is faced with financing burdens that he decides to stop the works or if the project is not meeting needs or interests of tenants to the extent where revenues are not expected to be generated.

Termination by employer for convenience could be the consequence of several things:

- The employer understands that his project could no longer be properly financed, especially revenues generation and financing plan.
- When the time taken to obtain all proper documents and building/environmental permits is considered more than what could be handled.

- When there is unanticipated changes in the conditions of the land. Geological-related information most of the times lead to changes in design, and thus, in scope.
- If the employer is no more willing to continue with the project for any reason that he thinks is valid, other than a breach or default by the other part (Calvey, 2005).

When a contractor is terminated for convenience, he is to be covered for payments of completed works, costs incurred due to act of termination and profit and overhead reasonable compensation for the portions of work that were not yet executed. Such termination is usually easier with less burden to the owner. The latter does not suffer the onus of proving any breaches or defaults under the contract by the other party. As such, no wrongful termination risk could prevail (Kelley, 2012).

Even though the contractor has the right to challenge such termination by the employer, he is supposed, upon such decision by the owner, to:

- Stop the progression of works;
- Give no orders to subcontractors;
- Terminate all subcontracts and allow their rights to the owner;
- Transfer the inventory of termination to the owner;
- Finish any portion of works not subject to termination;
- Make sure to protect and preserve the works; and
- Reach out to the client with a proposal to settle termination (Terrell and Surace, 2016).

b. Termination for Cause or Default

Unlike the termination at-will or termination for convenience, the employer is entitled to terminate the construction contract for default by contractor when the latter fails to fully perform as mentioned in the contract. The employer hereafter has the right to terminate for default if the contractor fails to deliver materials or supplies or to act as stipulated in the contract within the provided time frame or further decided extensions (Manuel, 2015).

There are many circumstances that justifies the owner's intent to terminate the contract due to default by the contractor, especially when:

- The contractor refuses to perform his obligations under the contract and threatens to abort the works on site if faced with an inappropriate change order. This item applies to the intention to work prevention of the contract in general or parts of the work.
- The contractor fails to comply with the provisions stipulated under the contract. This mainly related to the conditions of contract, where such breaches define the roots of the contract.
- There is an obvious deficiency in the progress of work done, or upon refusal or failure to complete the tasks.
- The contractor is performing defective works, different than what the needed quality calls for under the contract.
- The contractor is not paying the subcontractors under their subcontracts, or the suppliers or is showing the intention of his unwillingness to pay.

- The contractor violates any of the laws and regulations mentioned in the prevailing contract (Wilson, 2008; Calvey, 2005).

Even though the owner at many times can establish his grounds to terminate the contract for contractor's default, there are a lot of business considerations that should be established for such decision especially when talking about the good mentality and conscience, the wholistic view of the project and equity. FAR, or Federal Acquisition Regulation, sheds the light on several factors to be considered by the owner whenever faced by a termination decision. The owner should be able to understand the contract and its conditions as well as the applicable prevailing laws. Moreover, he should be able to vividly identify the default and defend the excuse properly. Additionally, the employer should consider the availability of any of the needed services to be reached and the appropriate sources as well as the urgency to attain them. The employer should finally be concerned about the contractor's ability to overcome the effects of payments and liquidated damages (Terrell and Surace, 2016).

Whenever the contractor is liable under the contract to termination due to his default, he is to be accountable to costs in excess incurred by the owner due to the termination act. The contractor is also going to face the anu bad effects related to his records of performance. Additionally, the contractor might be liable to liquidated damages due to delays as stipulated in the contract. In the event where the owner is to suffer any damages due to the default by the contractor, the latter should be liable to cover foreseeable injuries, might sometimes include any costs of administrative practices (Terrell and Surace, 2016).

c. Risk of Continued Performance

Sometimes, the risk of progressing more in the project is riskier than opting to the decision of termination. This happens when the performance of the contractor is very poor pushing the owner to exceed the costs of going to termination, that would for any reason, be considered wrongful (Berg, 2008).

d. Risks of Termination

Termination is a risky decision, and the terminating party should be aware of such probable consequences before stepping into such decision. In fact, there are is a number of threats that prevail whenever opting to termination, most important of which are:

- Incurred Costs: Termination is a costly process where in almost all cases, settlement between parties is highly favorable. When the owner terminates the contractor and reaches out to a new contractor to finish the remaining portions of work, the costs turn out to be much more than the original plan. Moreover, this new contractor is not to abide by the old schedules, where the owner is going to suffer new delays with different costs linked to such delays. Additionally, if an owner terminates wrongfully, the cost of completing such works is to be non-reimbursable and he could be sued for the losses of the contractor, especially profits (Fagg, 1995).
- Substantial Completion: If the owner terminates the project with the contractor post substantial completion, he will carry the risk of continuous payment

issuances to the contractor. Once the contractor has substantially completed the works, he cannot be held liable to breach of contract if failing to complete the project. Thus, the owner will not be able to terminate the contract for default by contractor. In other words, once the substantial completion of the project has reached, the contractor can no more be valued against damages due to defaults (Thomas et. al, 1995).

e. Alternatives to Termination

Due to the fact that termination is a decision that entails many risks, there prevail many alternatives that can replace the tough decision of termination. Such options should always be looked into before opting to termination. That said, openness in thinking is always advisable in such situations.

i. Back-charge

When a contractor decides to cease proper performance on works and obligations under the contract or defaults regarding his obligations under the contract, in most contracts, the owner will have the right to terminate the contract. Yet, management practices have shown that there is less severe measure to take, which consists of aiding the contractor through labor force and supplementary needs to complete the tasks (Berg, 2008). As such, the owner has the right to warranty his end their rights through back charging the contractor for the necessary actions made to complete the timely tasks (Hinze and Tada, 1993). Moreover, many contracts allow the owner to provide alternative

contractors to act and fix defective work by the main contractor where the latter is to be back charged for the incurred costs. If the contractor is not paying his subcontractors, the owner may defer termination and decide to pay them directly while omitting such values from payment certificates to the owner. Although back charging protects the owner from the risks of termination and allows for proper actions in terms of tasks and their quality of delivery, he should be careful in approaching such measures because many owners fail to collect such back-charging values either by not notifying properly before taking the action or through improper track of costs and records (Gilbreath, 1992).

ii. Continued Performance

This is so important in contracts ensuring that performance is to be continued by all parties even if the arbitration due to any dispute has started. As such, one party can have the chance to negotiate any matter of dispute be it any ground for termination without having to resort back to this drastic action. Even if the contract provisions do not mention such right, arranging this matter between the parties could be very desirable (Berg, 2008).

f. Pre-Termination Practices

When contract termination is likely, there are many factors to be considered to help establish the proper knowledge towards a rightful termination. Following are some actions that should be taken before approaching the act of contract termination:

- Contract termination should be communicated properly if the decision is likely to be made. This is best assured through sending proper notices, certifying correspondences, etc.
- When the contractor is linked to bonds and sureties, such provisions should be carefully read and reviewed. Then, proper notices should be sent to allow their proper engagement in timely manner. This is critical to the owner, because those bonds will be on board to complete the work (Terrell and Surace, 2016).
- The contract should be revisited carefully to understand matters corresponding to dispute resolution. There are several mechanisms used for this matter: litigation, arbitration, etc.
- The rights under the contract should be clearly interpreted and preserved. For instance, should the architect be given the chance to give his opinion regarding an advisory matter? Also, how is the contractor act in case he disagrees with that opinion? (Berg, 2008).
- One important consideration before contract termination is taking the time to review the contract carefully. This is due to the tricky aspect of termination and its capability to turn the table on the owner in case he wrongfully goes around it. That said, it is crucial to understand how termination clauses are set

or expressed in their legal context. Approaching such clauses should be itemized and structured where the owner should understand the immediacy of contract termination, prospective damages and how to recover them and how to avoid wrongful termination of contract and unintended repudiation (Randall, 2014).

g. Owner's Considerations Post-Termination

Some of the considerations that the owner might think of after taking the decision for terminating the contract:

- Revoking: In many cases, taking the decision of termination allowing the start of the process resembles "splash of cold water" that pushed the contractor to act properly. Under many circumstances, both parties would want to revoke the termination decision when faced with all costs and damages that were unexpected if due diligence was not practiced properly. In this situation, Berg (2008) suggests that law is forced to develop a solution for their unilateral decision to re-shake hands. As such, "uniterminating" the contract and revoking the decision to cut off the progress of the contractor should be properly drafted, documented, signed and exchanged between both parties.
- Good Faith: The owner upon termination should reach out to the bonding corporates or sureties to clear out any bad faith intentions regarding their obligations to complete the work of terminated contractor in accordance with the provisions of the contract. Some contracts dictate that bonding companies

are supposed to act in good faith when taking the lead in progressing with the works.

On other hand, the importance of good faith lies in the fact that it helps fill the gaps within any discrepancies with the common law or rethinking any interests to the employer. As such, good faith serves as good boundaries to dishonesty, impropriety of purpose, arbitrariness, irrationality and capriciousness (Courtney, 2019).

2. *Termination by Contractor*

So far, we have discussed the termination by employer: decision, implications, causes, etc. However, termination of construction contracts is a unilateral right and can be exercised by any of the parties regarding a breach by the other party.

a. Termination for Cause

There are many circumstances that gives the contractor the right to exercise termination of the contract:

- If the local authorities, be it government or court, issues an order that prevents the progression of works on site, commonly stated as a stop-work order.
- If the government declares national emergency, and such, all businesses are to shut down.
- If the owner fails to pay the contractor upon the expiry of the time bar post the issuance of the payment certificate by the consultant.

- If the owner is unable, or willingly refuse, to show his financial capabilities whenever requested by the contractor (Calvey, 2005).

Moreover, Brumback (2006) discusses that the contractor can terminate for owner's default if the former experiences continuous suspensions by the latter or any form of work interruptions or delays. However, when the contractor takes the decision to terminate the construction contract, he is to carry the burden of proofs, notices, and documentation of the default by employer (Calvey, 2005).

Even though the owner is given the right to suspend contractor's progression of work, upon a notice sent to the latter, the contractor is allowed, if not held liable to any sort of breaches or defaults under the contract, and upon a period's notice specified in the contract, terminate the agreement with the owner and seek to recover damages such as compensation for work performed, any additional costs or expenditure due to termination (Hinze and Tada, 1993).

b. Risk of Continued Performance

There are some cases in which the contractor finds himself questioning the option of terminating the construction or not. As such, there seems to be many risks tangled to the decision by the contractor to continue his performance under the contract instead of opting to termination.

- Cash Flow: In many cases, the contractor's decision to terminate the contract with the owner has fewer negative consequences than to continue with the obligations under the contract specially in regard to the losses incurred in his cash flow (Puil and Weele, 2013).
- Labor Force: When the employer is one of the important sources of supplementing labor force, the difficulties felt by the contractor allows termination to seem favorable. This is due to the problems arising in defining the scope of costs related the laborers. Also, the integrated type of tasks to be performed on site, makes it hard for the contractor to identify responsibilities and disrepute risks accordingly (Berg, 2008).
- Waiver of Rights: Some contractors decide to continue with their job and not opt to termination. In such event, these contractors have to make sure to waive their right under the contract upon the breach of the owner even if their termination right was waived. In other terms, if the contractor is to continue his job under the contract, this should be negated as basis to waiver the rights to recover any damages due to breach by owner (Kelley, 2012).

c. Risks of Termination

Similar to any other party opting to terminate the construction contract, such decision entails many risks that the contractor, in this case, will have to deal with. As such, the risks that prevail due to the termination of the construction contract by the contractor are the following.

- Costly Process: Upon the termination of the construction contract by the contractor, the owner suffers various costs, all related to the fact that a new contractor is to join the game. With having a new contractor on board, time dues and costs are going to change, and with that, the owner is to incur extra burden of interest rates regarding his loans. The risk to contractor becomes, in the case where his termination, is to be deemed wrongful. Then, he will have to suffer paying the employer his extra costs (Brumback, 2006).
- Reputation: Contractor's decision to terminate depend highly on the effect of this decision on their reputation and future work. In almost all projects, the good marketing strategy to land a contract to the contractors is their reputation in delivering the project. As such, many contractors have attained competitive advantage during bidding of projects due to their good reputations and their proven commitment to completing the project with the needed quality (Clough, 2015).
- Surety: When the contractor ceases performance regarding his obligations under the contract, the surety bonded to the client is to step in for reimbursing the owner. The surety is to pay the difference in bid values between their client and their next lower bidder. When the project is completed, the bonding company is to cover the extra costs of completion. When such companies incur costs due to termination, there is a risk carried by the contractor to be able to obtain documents for protection against what arises from demand on the performance bond (Calvey, 2005).

d. Alternatives to Termination

When the contractor decides to terminate the main contract with the owner, many threats will follow such act. Although the contractor has the right to exercise contract termination under the provisions of the construction contract, some alternatives still appear to be an exit to this risky decision.

- Suspending temporarily: Most of the times, the contractor stops working and seek out for termination due to payment default by the owner. One of the ways to force the owner to pay his certificated is through having timed suspensions of work based on default by the owner. But, sometimes, it is riskier to keep suspending and not resort to termination if withholding payments by the employer is going to put the contractor on the verge of bankruptcy (Berg, 2008).
- Referring to sureties: In many cases, having to resort back to sureties and bonding ends can solve one of the main causes of termination by the contractor, i.e., default in payment (Gilbreath, 1992).
- Contract requirements: This is so important in contracts ensuring that performance is to be continued by all parties even if the arbitration due to any dispute has started. As such, one party can have the chance to negotiate any matter of dispute be it any ground for termination without having to resort back to this drastic action. Even if the contract provisions do not mention such right, arranging this matter between the parties could be very desirable (Berg, 2008).

e. Avoid Being Terminated

When termination is almost bound to happen by the employer, the contractor has to try all the possible means to avoid being terminated, as the former will have the right to damages when such termination is deemed lawful under the main contract. There are several ways for the contractor to avoid such a course:

- Acting in good faith: When the contractor defaults, the best way to avoid this is by showing the intent of good faith and will to commit to correct. This can be done through working double shifts, skipping weekends, working after hours, etc. at the end of the day, the cost of doing this for a short period of time can overcome the costs to be paid to the employer upon termination (Silberman, 2016).
- Negotiation: If the contractor is on the verge of getting terminated, one of the ways out can be negotiations with the owner. Such negotiations could be to convince the owner that he is not in default, through reaching out the experts. As such, the matter to dispute can be properly comprehended. Also through negotiations, comes the emotional aspect with a compromise that can significantly turn the table (Kelley, 2012).
- Understand the process/documentation: It is key important to understand the contract and the clauses related to dispute resolution. Being well informed about the contract makes it easier to ensure remedies to the solution to negotiate with the owner other than option to termination. This also means that the contractor is expected to well document the case after proper investigation.

As such, the contractor will be able to hold his position effectively and might steer of termination with the employer (Berg, 2008).

3. *Notice of Termination*

"An important aspect of the conditions of a construction contract relates to notices—that is, the obligation of a party to notify the other party (and/or the engineer), in conjunction with the right of the other party to be notified, concerning either events that regulate the processes used for accomplishing the works or occurrences that arise during the course of construction" (Abdul-Malak and Khalife, 2017).

Notices are considered one of the common elements relating to conditions within a contract. These notices are usually time barred, and as such, there is a specified time frame for any of the parties to act accordingly. Termination under the contract is in no way different than what we are addressing, where the notice of termination is to be sent at a specific time and according to a certain protocol (Abdul-Malak and Khalife, 2017).

In termination procedures called for under the provisions of contracts, the notice to termination stands out as one of the core requirements to ensure that proper termination is achieved (Silberman, 2016; Berg, 2008). Such procedures, especially notices, are beneficial to widen the time frame for action for the terminating party. This extended time frame helps the party to exercise termination to ensure its willingness to this decision, establish the stance of the relationship with the other party, especially if it might have the chance to be mediated and most importantly to avoid in sudden changes in the portions of work or services that are supposed to be unincluded in the termination decision (MacEwing, 2004).

With no regard to whether termination is by owner or contractor, or what the reason was, notification for such decision should stand clear and be sent in writing. However, if a contractor has defaulted under the contract, and the owner is to terminate him for a breach of the provisions of contract, the latter is bound by a time bar specified in the contract after receipt of the notice by the contractor. But, if the termination was for convenience by the owner, the termination is usually deemed effective upon the receipt of the notice by the contractor (Hinze and Tada, 1993).

4. *Impact of Termination – Damages*

The party to terminate the contract rightfully is to be entitled for damages as per the termination procedures. Upon any breaches to the contract, the non-breaching party is to levy actual damages on the basis that actual damage should be shown as the consequence to termination. Research defines damages incurred by both the owner and contractor in regard to several events and in accordance with different termination approaches.

a. Contractor's Damages

In the case where the contractor terminates for default by the owner, the former is entitled to levy payment for the completed portion of work as well as proven losses regarding equipment, material and supplies. In addition, the contractor is to be compensated for reasonable overhead as well as damages and profits. Additionally, in the case where the contractor is terminated for the convenience of the owner, the contractor is entitled to portions of work completed and additional costs due to termination, as well as overhead and profit in reasonable terms to the portions of work that were not yet completed.

Moreover, if a contractor is terminated wrongfully by the owner, he it to be entitled to the amount of contract price that is earned or unpaid, in addition to proven lost profit, that is the agreed-on contract price minus the costs needed to complete the project. In order for the contractor to recover lost profits, he should be able to provide evidence that proves his arguments. Moreover, all figurative numbers stated within his arguments should be certain and adheres to reason (Brumback, 2006).

b. Owner's Damages

In the case where the owner terminates the construction contract for cause, or due to breach by the contractor, the owner will be able to recover the cost of fixing or repairing such breach or the cost of completion of project. In other terms, the owner can recover up to the difference between executing the work post termination and the value that was agreed on. Usually, in cases where the contract is terminated for breach by contractor, the damages could not be evaluated up till the execution and finishing of works, so that such value can be benchmarked to the one originally contracted. If the cost to finish the works turns out to be less than the original one, the contractor is to be recovered with the difference. However, if the finishing of the work turns out to be most costly than the value of the remaining balance, then the contractor is to be responsible for covering this difference (McDonald, 1984).

c. The Right to Liquidated Damages

One of the issues to be tackled in the matter of termination is Liquidated damages. Liquidated damages are not to be recoverable in any event without proper due diligence. In *Triple Point Technology Inc v PTT Public Co Ltd*, PTT was in question of claiming liquidated damages in reference to parts of the work that were not finished upon termination. On the other side, PTT rejected such saying as the former did not acknowledge or accept any work. However, the judge in the Court of Appeal of *British Glanzstoff Manufacturing Co Ltd v General Accident Fire and Life Assurance Corp Ltd* stated that "…Whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, must depend on the wording of the clause itself. There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss." So in return to the previous case, it could be argued that the issue at stake to what the actual completion was in comparison to contractual completion date, levying liquidated damages is related to the clause itself and not to the benchmarking of the works relative to those dates.

In *Greenore Port v Technical & General*, the contractor was not able to complete his works because of his bankruptcy. After judgement, it was decided that the employer has the right to levy liquidated damages for the delays from the date where the contractor stopped his works until the date of termination. Moreover, the claimant was entitled to general damages out of the termination process. On the other side, in some contracts like the one in *Shaw and another v MFP Foundations and Pilings Ltd*, damages were not to be compensated for in cases of delay post termination.

It is therefore confirmed by Sir Edwards that liquidated damages as per the requirements of the contract can be enforced until the termination date and that the percentage per contract is cancelled after termination. “If the contract is brought to an end by determination or otherwise, then prima facie all future obligations cease, and no claim can be made for liquidated damages accruing after determination. But there may be some special clause which has the effect of keeping the provision for payment of liquidated damages alive although the work has been taken out of the hands of the contractor”, states Keating on Construction Contracts. Likewise, Hudson states that the general contractor is to be levied liquidated damages against until he finishes the work, and post termination only general damages can be enforced.

In *GPP Big Field LLP v Solar EPC Solutions SL,* the contract was signed under EPC conditions. GPP, the Claimant, asked for LDs for the late portion of works and those that were not completed. It was then acknowledged by the respective judgement that LDs can be levied up to the date of commissioning the plant, though termination of the construction contract was earlier than this date. In a similar case, *Hall & Shivers v Van der Heiden,* Coulson J said that he does not accept that the obligation to pay LDs by the defendant was ceased upon termination. Simply because, if the default of the contractor caused the owner to terminate, then the contractor is to be held liable for his own default. In an additional case in *Greenore Port v Technical & General,* the judged held the contractor liable for delays in contract until the termination date, caused by the former bankruptcy before the work was commissioned. Likewise, in *GPP Big Field LLP v Solar EPC Solutions SL,* the judge ruled that LDs can be enforced even after the date of termination

where the work could be settled by either a new contractor or the employer personnel himself.

In *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd*, in the project of the medical facility in Jurong, a subcontract was signed for the works of designing, making, and installing hollow core slabs using precast concrete units. This contract followed the Letter of Intent which stated the conditions to be found later in the Letter of Acceptance. Nevertheless, the letter of acceptance was never signed by the mentioned subcontractor. As such, judgement acknowledged that the general contractor has the right to terminate because he did not benefit from the subcontract due to the breaches by the subcontractor. The contractor claimed that CAA did not perform his work with due diligence and expedition and had breached the submittals of the contract in terms of schedule delivery. Newcon, the contractor, authenticated his argument by referring back to one of the conditions of LOI stating that CAA, the subcontractor, has "to follow the site progress and including any revisions to construction programme schedule for [the] Sub-Contract Works." The High Court then accepted the contractor's terms in implicating the due diligence and essence of time in contract which mentions that Newcon has the right to terminate in the case where "CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract." However, the Court of Appeal rejected granting the contractor the right to levy LDs that the general contractor had paid to the employer post the breach of the subcontractor indicating that the main contractor

had to provide evidence ensuring that his payment to the owner was the reason of the subcontractor's breaches.

As per the judgement in the case of *British Glanzstoff Manufacturing Co Ltd v General Accident Fire and Life Assurance Corp Ltd*, the clause related to liquidated damages applies when the general contractor completed working. To the judge, it continues as follows "The contractor is gone. He has got no more power, so to speak, to stop the running of the time…this particular clause, which provides for a penalty per week for delay in completion, seems to me, upon the face of it, necessarily to apply—and to apply only—to a case where the works are finished by the original contractor."

5. *Factors Allowing Proper Termination*

When any party to the construction contract is willing to exercise termination, it must assure any breaches of contract against the other party to avoid any wrongful acts. Although many parties do establish their rightful grounds to exercise termination, they do not consider proper acts.

According to McEwing (2004), there are many considerations that a terminating party should understand when approaching towards such a critical decision. The following are the reflections discussed earlier:

- The principles of common or prevailing law covering the grounds of termination procedures stand out even if the provisions of contract which is binding to both parties do not include termination processes.

- Even if the contract does not show vivid procedures for termination, almost all include provisions relating to events that allow termination to take place, for example if any of the parties goes bankrupt, refuses to work, rejects to pay or falls in default, etc. These procedures usually allow termination according to a specific structure of steps to be followed, such as notices.
- In order to escape any issues arising from a claim structured against the wrongful termination procedures under the contract, the terminating party should be following the proper procedures under the contract. In case such procedures are not directly stated in the contract, termination could be exercised in light of common law mechanisms.
- Claiming for non-compliance with termination procedures specified in the provisions of contract against the terminating party can “turn the tables” even if the latter has the rightful merits to the grounds of termination. Non-compliance in this context becomes one of the breaches of contract where the other party can claim against.
- If a party is wrongfully terminated or terminated without justifiable cause, this party can reject the basis of this termination and ensure that the other party is to remain liable for its duties under the contract. Moreover, even if the terminating party is acting wrongfully, it will not accept the continuous performance of the other party under the contract. As such, accepting this non-correctness of performing termination under the contract will relief the terminated party from its obligations in compliance with the proposed termination and further duties concerning the contract.

- It is important to note that even if a party is injured by the other party, it should remain bound to its obligations under the contract in terms of continuous performance. This should remain until the terminating party is properly dismissed from further acting under the contract. In other words, if one of the parties to the contract breaches, this does not justify breaches from the other party.

6. *Lawful Termination*

Termination is usually expressed as a right under the provisions of contract, common law or both. The terminating party, whenever looking to terminate the contract, should focus on the contract provisions and see whether or not this right is expressed. When it is not mentioned in the contract, the party is to seek the general law. However, going to termination without due diligence, threatens the terminating party of falling into wrongful termination. What follows the right grounds of termination is following the proper mechanism to termination through defining the breach or default, issuing proper notices, etc.

In *Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC)*, the employer was able to successfully terminate the contract through establishing proper grounds and following the notice provisions. The employer and the contractor went into a project to build and develop a plant that is capable of producing 400 k-tons of LDPE annually. The owner was not satisfied with how the work was done and claimed that the contractor is failing to proceed with the Engineering works with due diligence. The

employer then warned the contractor of his default, and for that grounds, terminated the contract later on. The contractor rejected this claim of reasoning and claimed that the notice sent to his end was defaulted. The court held that the notice was properly sent and as such the employer did follow the termination procedure as stipulated in the contract stating that "the Warning Letter was sufficient and effective as notice pursuant to Clause 27.2.10 of the EPC contract." That said, since the contractor failed to comply with the notice and failed to proceed with his works properly, the owner was entitled to termination under such ground; The court thus held "I therefore find myself driven to the conclusion that SCL substantially failed to proceed with the Works with due diligence during the Warning Period. Its failure persisted to 3 November 2008 so as to entitle SABIC to terminate its employment under clause 27.2.10 of the EPC contract on that day on the grounds that SCL was persistently in material breach of its obligation to proceed with due diligence."

In another case of *Tan Hock Chan v. Kho Teck Seng[1979] 1 LNS 110; [1980] 1 MLJ 308*, the contractor was able to terminate the contract with the employer due to the latter's failure to give possession to site. In this case, the contractor was the respondent who entered into the project of building 6 different shop houses for $223,000. The contractor was working and payment was given on several stages. After finishing the 5 houses, and while working on the 6th one, the third party, the land occupier, claimed tenancy rights and the contractor was not given permission to site. He claimed the full amount of contract remaining as well as costs of supplies and materials. Judgement was held that the employer had failed to give possession to site to the contractor on the 6th house and as such, he was in breach of the contract. Judge held "(1) by his failure to give effective possession of the lot

for the sixth house, the appellant had broken his covenant and the respondent could rescind the contract; (2) in this case, the respondent had rescinded the contract when he served the writ and the statement of claim on the appellant; (3) the claim for quantum meruit for work done and for cost of extras must succeed but the claim for loss of profits could not succeed." The contractor's grounds were as such accepted and was awarded $5,540 on a quantum meruit and $6,500 assessed as the reasonable profit which the respondent contractor could expect to make on that sixth house.

When terminating for convenience, the terminating party should act in good faith to the reason behind which it is terminating. For example, in *Harris Corp. v. Giesting & Assoc., Inc. [2002],* manufacturer terminated the contract rightfully for his own convivence and in good faith towards his representative, where it was held that "In this case we have two private, sophisticated parties who voluntarily entered into a contract. The record indicates that Giesting knew of the termination for convenience clause, what it meant, and requested that Harris remove it. Harris refused, and Giesting agreed to the contract anyway, even though it had successfully negotiated the provision out of one of the previous contracts." Also, in *Edo Corp. v. Beech Aircraft Corp., 715 F. Supp. 990,* the contractor terminated the subcontractor for convenience and was manage to properly follow the procedure in the implication of good faith; Held: "Cancellation of the contract in this case was in good faith and did not constitute a breach of the contract. Therefore, judgment will be for defendant on this aspect of the breach of contract claim."

7. *Wrongful Termination*

Termination is not an easy process; it can be tricky. If termination is to be done, it should be as per the proper terms and in adequate legal atmosphere. Although research tries to itemize a framework of action for the terminating part, yet, wrongful termination happens more often than none (Siang, 2011).

a. Owner Wrongful Termination

This happens in case the owner states that he terminated for cause, when in reality, the contractor was terminated without cause. The contractor then can sue against the employer for the wrongful termination. In addition, he would be entitled to compensation for portions of work that were completed before termination took place as well as the profit that was to be generated by the contractor from unperformed work had the contractor not been terminated.

Moreover, the employer cannot terminate the contract with the contractor in light of time considerations if the contract does not state that time is of essence. In other words, the contractor cannot be terminated if he fails to perform the work within specific time frames if it was not clearly stated in the contract language that “time is of the essence”. Without having such clause within the provisions of contract, non-compliance to time schedules is not considered a breach of the contract by the contractor, nor is considered a rightful basis to termination by the owner.

Additionally, the owner has no right to terminate the contract after the contractor has reached the substantial completion of the works. As such, breaches that are considered

immaterial cannot stand as grounds for termination by the owner is the contract has reached the substantial completion (Brumback, 2006).

b. Contractor Wrongful Termination

The contract wrongfully terminates if the cause he is referring to is not in accordance with those stipulated in the contract as allowing him to claim termination against the owner. In this case, the contractor will be held liable for the value in difference between the remaining balance to the contact and the cost incurred by the owner to completion of project. Moreover, he is to pay, in reasonable amounts, costs that are linked to delays faced especially when hiring new contractor (McDonald, 1984).

8. *Contract Closeout*

Termination is not an easy decision to any party and having to opt to it means proper planning and reviews of their stance and situations were done. However, if such planning did take place or termination was practices in an unplanned fashion, the closeout of the contract should be monitored perfectly to avoid more arising issues. Such process must be well structures specially to protect the terminating party's interest. Research by Gilbreath (1992) suggests that the party opting to termination should consider many points when going through the closure of the contract to properly pass it through:

- Performance of all completed tasks should be properly considered and reviewed. As such, assessment will be made to approve the quality and delivery or to send a notice if otherwise.
- Documents submitted and received at this stage should be monitored and assessed for adequacy in relevance to what the contract called for.
- Deliverables that are expected to be received should be observed closely.
- Ensure that there no damages post-termination took place. To maintain this factor, joint effort of all parties is needed. Such efforts should also be coordinated in order to maintain the consent towards the final payment.
- Allow for information about the performance of all contractor's so that to be kept in archives for future work.

9. *Recommendations for Termination in the Eyes of Practitioners*

"Prudent practitioners are advised to consider some redefined items which may work as the vehicle to successful termination processes as set out in the contract conditions" (Abu Dief et. al, 2016).

- The party to exercise the right to termination should be able to identify reasons and justifications to such act.
- To be granted the termination right by the contract, the party should be looking for any material breach.
- When the breach is properly identified and interpreted, the party to terminate will avoid opposition by the other party.

- The terminating part should be able to identify any intentions to abandoning the contract by the prevailing law.
- When reasons to termination are branched and numerous, they should be properly itemized and differentiated.
- It is less complicated when termination is exercised under the common law rather than conditions stipulated in the contract.
- The terminating party should be able to understand its contractual rights regarding termination, such as those related to recoveries and compensation.
- The view of common law towards the terminating party is always wholistic, i.e., considers the project is completed, and accordingly, allows for recoveries.
- In case of termination post the contractual completion date, the employer is not to be entitled to levying any liquidated damages.
- The compensation for the parts of works accomplished in full prior to the act of termination of contract should prevail, as stipulated in the contract and in accordance with the contract price. The pricing of such parts should also follow the same operations used to evaluate the contract price.
- The procedure stated in the contract for termination should be followed properly by the terminating party, especially when it comes to notices and time bars.
- If the terminating party missed the time bars stipulated within the contract through proper mechanisms, it loses its right to terminate (Abu Dief et. al, 2016).

E. Conclusions

The construction industry is vamping with the construction projects being one of the main elements to the economy of countries. The main participants to the project, the owner and contractor, are linked to a contract, in turn can come in different forms ensuring the best practices and monitoring the relation between them. Not all projects are deemed successful, because simply, many of them fail due to poor performance or breaches and defaults. One of the ways to end a construction project is through terminating the contract by either one of the parties. The previous chapter discussed the different forms a construction contract can look like, as well as the factors of success of a construction project, especially when having a proper management of risks. The chapter also reviewed different types of termination associated to different stakeholders, i.e., causes, effects, impact, damages, alternatives and avoidance techniques.

CHAPTER III

OPERATIONAL MECHANISMS FOR EFFECTING CONSTRUCTION CONTRACT TERMINATION

A. Preamble

Contract termination is a severe decision taken by the party to the construction contract whenever it considers itself innocent. There are several events that allow either party, owner or contractor, opting to termination decision. As such, this party should be well-versed about such processes, taking into consideration its dynamism. Standard conditions of contract provide clauses allowing the innocent party to exercise termination in a predefined and specified order or sequence of events against specific breaches of contract. Likewise, these mechanisms provided for in the standard conditions of contract represent the proper guidance ensuring safe and successful termination process allowing the terminating party to its legal rights without causing claims due to wrongful termination (Dief et. al, 2016). In this chapter, a thorough examination will be made for different termination processes provided in 6 standard conditions of contract: International Federation of Consulting Engineers (FIDIC), New Engineering and Construction Contract (NEC), Joint Contracts Tribunal (JCT), Consensus Docs, Engineers Joint Contract Documents Committee (EJCDC) and American Institute of Architects (AIA).

In table 1, the language used to terminate the contract by the Employer's party due to a default by the contractor is highlighted. It shows the different clauses taken verbatim from six different standard conditions of contract.

Table 1 Termination Clauses in Standard Conditions of Contract

Book	Clause No.	Statement
FIDIC	15.2	"In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site."
AIA	14.2.2	"When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor…"
Consensus Doc	11.3.1	"Upon expiration of the second notice period to cure pursuant to 11.2 and absent to appropriate corrective action, Owner may terminate this Agreement by written notice…"
EJCDC	16.02.B	"If one or more of the events identified in Paragraph 16.02.A occurs, then after giving Contractor (and any surety) ten days written notice that Owner is considering a declaration that Contractor is in default and termination of the contract, Owner may proceed to: 1. declare Contractor to be in default, and give Contractor (and any surety) notice that the Contract is terminated…"
JCT	8.4.2	"If the Contractor continues a specified default for 14 days from receipt of the notice under clause 8.4.1, the Employer may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor's employment under this contract."
NEC3	90.1	"If either party wishes to terminate the Contractor's obligation to Provide the Works he notifies the Project Manager and the other party giving details of his reason for terminating. The Project Manager issues a termination certificate to both Parties promptly if the reason complies with this contract."

B. Termination Under Various Standard Conditions of Contract

1. *International Federation of Consulting Engineers – FIDIC (2017)*

FIDIC 2017 is the last issue of these conditions with new establishments related to termination processes, for instance:

- Non-compliance with the engineer’s determination (Sub-Clause 3.7) or with the DAAB decision (Sub-Clause 21.4) and such failure amounts to a material breach of the contractor's contractual obligations.
- Employer’s eligibility to collect delay damages that go beyond the maximum amount of delay damages specified in the contract (Sub-Clause 15.2.1(c)).
- For the employer's convenience (Sub-Clause 15.5). The employer may also exercise termination under Sub-Clause 11.4 [Failure to Remedy Defects] and both parties (i.e., the employer and contractor) may terminate under Sub-Clause 18.5 [Release from Performance under the Law].

The termination process by the employer realized from FIDIC 2017 standard conditions of contract is illustrated in fig.1.

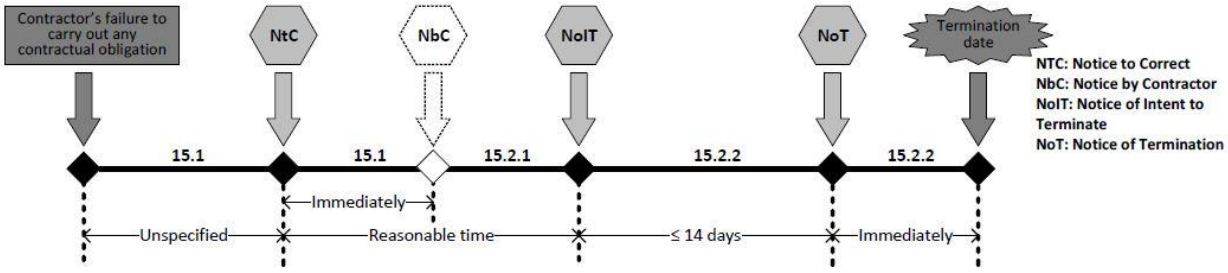

Figure 1 Termination Timeline for FIDIC 2017

Upon the default or failure by the contractor to carry out his responsibility towards contractual obligations, the Engineer shall, pursuant to Sub-Clause 15.1 [Notice to Correct], send a notice to the contractor specifying his default. The engineer has the right to request from the contractor to make good the failure and remedy the default within a specific time

frame as set to be reasonable, knowing that different defaults or failures are associated with different modes of actions towards correct solutions. Sub-Clause 15.2 [Termination for Contractor's Default] calls for several causes allowing the owner to exercise his right to terminate. To that, the contractor is to send a notice, under Sub-Clause 15.1 specifying the ways and means to remedy the defect. However, in almost all of those situations, the employer is to issue a notice, 14 days in advance, stating his intentions. However, the employer can, through issuing a termination notice, terminate the contract immediately, as per Sub-Clause 15.2, Sub-Parts (f), (g) and (h). The date of termination thereafter becomes the date when the contractor is to receive this notice. Afterwards, the contractor must leave the construction site and deliver any required goods by the employer, all contractor's documents, and other design documents made by or for him to the engineer.

If the contractor does not correct what is specified in the notice delivered under Sub-Clause 15.2.1 [Notice] within 14 days of the receipt of this notice, the employer can immediately terminate the contract by issuing a second notice to the end of the contractor. The date of termination thereafter becomes the date of the receipt of the notice by the contractor. It is important to mention that it is not clear whether the owner loses his right to terminate or not upon the expiry of the 14 days specified in the first notice without issuing the second one or in the case where the contractor resolves the issue. However, the distinctive change in the 2017 conditions lies in the new Sub-Clause 15.5 [Termination for Employer's Convenience], allowing the employer to terminate the contract at any time for the employer's convenience, by issuing a notice of such termination to the contractor.

Termination under this Sub-Clause shall be effective 28 days after the later of the dates on which the contractor receives this notice or the employer returns the performance security.

2. *Joint Contracts Tribunal – JCT (2016)*

JCT (2016) standard conditions of contract call for termination of the contractor's employment rather than the contract itself. The employer, under JCT (2016), can terminate the contract in the event of default, as mentioned in clause 8.4, or insolvency, as mentioned in clause 8.5, both by the contractor. Provisions of contract calling for termination under JCT are stated to be "without prejudice to any other rights and remedies". When such clause is stated in the contract, the right under the common law to accept a repudiatory breach and opt to terminate the contract is then protected. The employer can terminate the project before the practical completion of the works, in the event where the contractor:

- Suspends the progression of works or the design package of the Contractor's Designed Portion, without a reasonable cause;
- Fails to proceed with the works or the design package of the Contractor's Designed Portion regularly and diligently;
- Does not comply with a notice or work instruction issued by the architect or contract administrator calling for removal of work, materials or supplies not in accordance with the contract in hand, whereby such neglection by the contractor, the works become materially affected;

- Fails to comply with what clauses 3.7 or 7.1 call for, meaning in the case where the contractor sub-contracts part of the works or wholly or any contractual rights without the consent of the employer;
- Fails to comply with clause 3.23, as such failing to meet the terms of requirements of the construction regulations related to Management and Design; or
- Has become insolvent under the contract.

Fig. 2 illustrated below describes the termination mechanism by the employer.

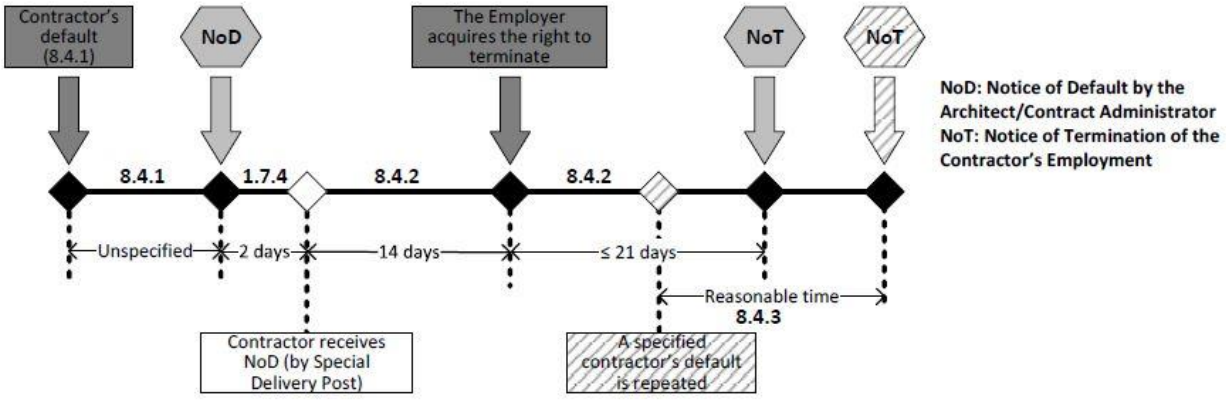

Figure 2 Termination Timeline for JCT 2016

As depicted in fig. 2, termination by employer should follow a specific sequence of events and shall be exercised pursuant to the provisional conditions of contract. As such, upon the default by the contractor, the architect/contract administrator (A/CA) shall issue a notice of default alarming the contractor that the contract might be terminated in the case

where the default continues to a period of 14 days. Likewise, upon the expiry of the 14 days post receipt of the notice of the A/CA by the contractor, without curing the default, the employer acquires the right to terminate the contractor's employment. If the employer then opts to terminate, he shall send a notice of termination post the expiry of the 14 days-notice of default pursuant to Sub-Clause 8.4.2. However, if the termination decision was waived by the employer for that specific default, and in case of a repetition of a default of the same nature, the employer then can terminate the contractor's employment within a period of time as he may see reasonable. The employer then shall issue a notice of termination to the contractor directly whereas the A/CA shall require no further actions. Notices are common in the form of delivery, that is by hand and signed for special delivery, but the party to issue them may be different according to events. For example, Sub-Clause 8.4.1 calls the A/CA to issue the notice of default whereas Sub-Clause 8.4.2 calls the employer to send the notice of termination.

3. *Engineers Joint Contract Documents Committee - EJCDC (2017)*

The owner can opt to terminate the contract for contractor's default in the EJCDC conditions of contract under paragraph 16.0.2.A. There are many events that call to such action, especially if the contractor:

- Insistently fails to progress with the works as requested or in accordance with the documents of the contract, for example failing to supply proper workforce, materials or supplies;
- Fails to adhere to the terms and conditions of contract documents;

- Ignores laws and regulations in case of jurisdictions by any public party; or
- Repeatedly neglects the authority of either the Owner or the Engineer.

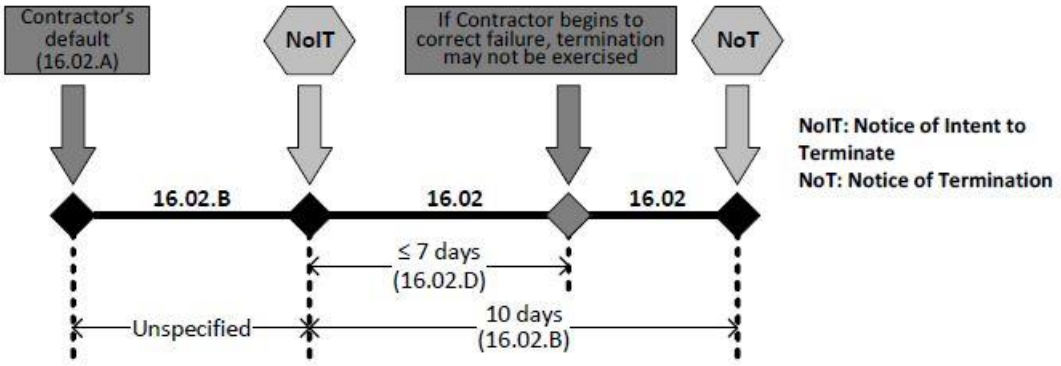

Figure 3 Termination Timeline for EJCDC 2017

As seen in fig. 3, and as paragraph 16.0.2.B calls for, if any of the events identified in paragraph 16.02.A happens, the owner must give the contractor and any other surety related to him, 10-days-notice in writing, assuring that the contractor is in default and calling for termination of the contract. The owner hereafter can advance to:

- State that the contractor is in default and as such issue a notice of termination to the contractor and the surety, and
- Assure the owner's rights relevant to the performance bond.

However, under paragraph 16.02.D, and in the event where the contractor starts to cure his failure in work progression and proceeds diligently with the works within 7 days of the employer's notice of intent to terminate, the contractor will not be terminated.

4. *American Institute of Architects – AIA (2017)*

Under Sub-Clause 14.2.1 of the AIA standard conditions of contract, the employer is allowed to terminate for cause by contractor, if the latter:

- Frequently rejects to provide enough workforce or materials and supplies needed to perform under the schedule of works;
- Fails to pay his subcontractors or suppliers in accordance with the agreements between the contractor and those parties;
- Continually neglects to resort to applicable laws, codes, regulations, statutes or legal public orders;
- Substantially breaches any of the provisions of the contractor documents of the contract.

Under Sub-Clause 14.2.2, and in the event where any of the reasons demonstrated earlier happens, the employer can terminate the contract, “without prejudice to any of the rights or remedies”. As illustrated in fig. 4, and upon the default caused by the contractor, the architect shall certify that sufficient cause exists for the employer to acquire his right for termination. The employer then must send a notice of termination to the contractor and the surety where the termination date is considered to be 7 days post the receipt of the notice by the contractor.

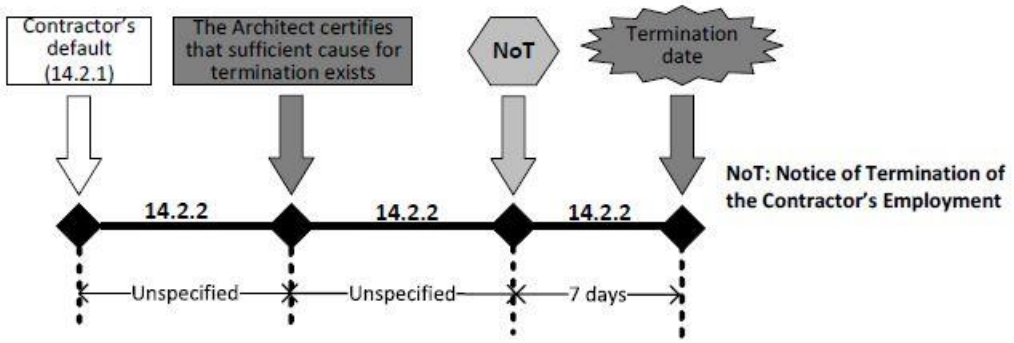

Figure 4 Termination Timeline for AIA 2017

Upon termination by the employer, the latter acquires the right to:

- Eliminate the contractor from the site and possess all the construction materials and supplies as well as machinery used by the contractor;
- Pursuant to Sub-Clause 5.4, accept the subcontractors' assignments; and
- Use any method to continue the works and shall deliver the incurred costs to the contractor in the event where the contractor requests it by writing.

5. *ConsensusDocs (2017)*

Under the 2017 version of the ConsensusDocs standard conditions of contracts, the employer had the right to terminate the contract for cause in any of the events where the contractor:

- Fails to furnish proper quantity of qualified workforce, material or supplies needed to proceed with the works in accordance with the schedule of work agreed on in the contract;

- Fails to pay his subcontractors;
- Intentionally neglects laws, regulations or public orders; or
- Performs a material breach under the contract.

The employer, in any of the mentioned events, acquires the right to terminate the contract for contractor's cause pursuant to Sub-Article 11.2. As seen in fig. 5, upon the default by the contractor, the owner should issue the first notice, in writing, to proceed promptly and diligently with curing the works. If the contractor fails within 7 days after his receipt of the owner's written notice to correct, the owner shall send a second notice to correct the failure with a period of 3 business days. An important note is that the second notice, upon the owner's willingness, can mention the intention to terminate if the contractor fails to cure the default within the new specified time limit pursuant to Sub-Article 11.2.1. In the event where the contractor fails to proceed in accordance with the second written notice by the owner, the owner may upon the expiry of the 3 business days, terminate the contract, by issuing a written notice to terminate pursuant to Sub-Article 11.3.

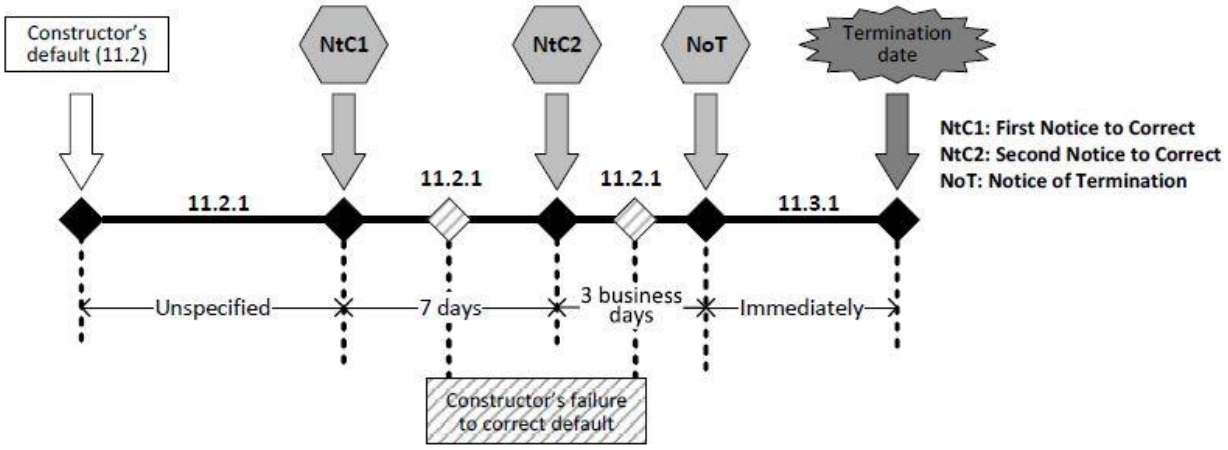

Figure 5 Termination Timeline for Consensus Docs 2017

The owner hereafter is entitled, pursuant to Sub-Article 11.2.2, to:

- Expel the contractor and acquire possession of site;
- Using reasonable means, complete the works;
- Withhold any payment due to the contractor to be accounted for in future incurred costs; and
- Provide for any equipment, machinery, skilled workforce or materials necessary to finish the works as deemed reasonable and charge the contractor accordingly.

6. *New Engineering and Construction Contract – NEC3 (2017)*

The New Engineering and Construction conditions of contract allow the employer to terminate the contract for contractor's default in two cases. The first ground of termination by employer for cause is acquired when the contractor:

- Fails to comply with his duties and obligations under the contract;
- Did not provide guaranteed or bonds whenever required by the contract;
- Accepted a subcontractor on board without the consent of the Project Manager;
- Hindered the work of any of the stakeholders including the employer; or
- Broken any regulation related to health or safety measures.

Under Sub-Clauses 91.2 and 91.3, the employer is allowed to terminate for cause in any of the identified cases. As seen in fig. 6, and upon the default by the contractor, the project manager should send a notice of default for the contractor to stop defaulting within a period of 4 weeks. Pursuant to Sub-Clause 90.1, if the contractor fails to cease his default as per the notice of default by the project manager, the owner has the right then to send a notice to termination for the project manager and the contractor specifying the reasons of action and giving enough evidence. Upon this notice of termination by the owner, and if proper reasons where demonstrated and happens to comply with the contract, the project manager promptly issues a termination certificate making the owner's termination effective.

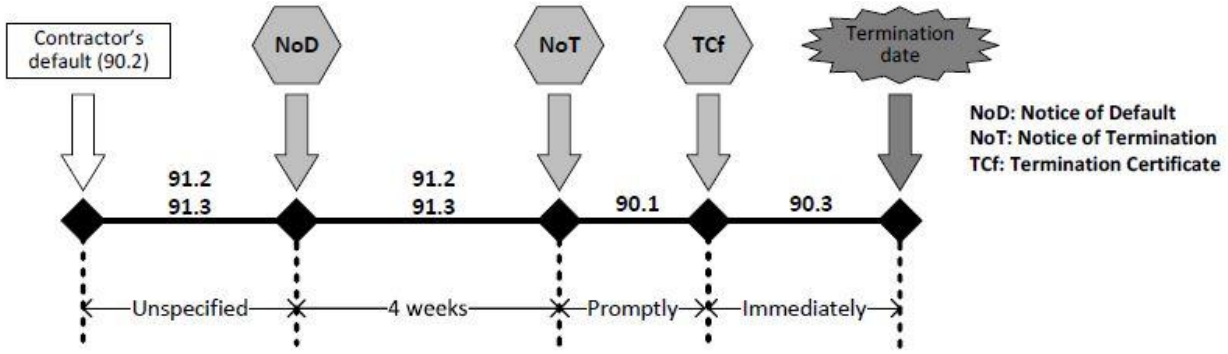

Figure 6 Termination Timeline for NEC3 - Ground 1

The second ground of termination for cause by the owner is related to suspension of works. Pursuant to Sub-Clause 91.6, if the project manager had requested the contractor to stop continuing works or not to start a new portion of the works, due to a default by the contractor, and upon the expiry of 13 weeks without the project manager asking the contractor to resume his work progress, the right of termination by the owner is then acquired.

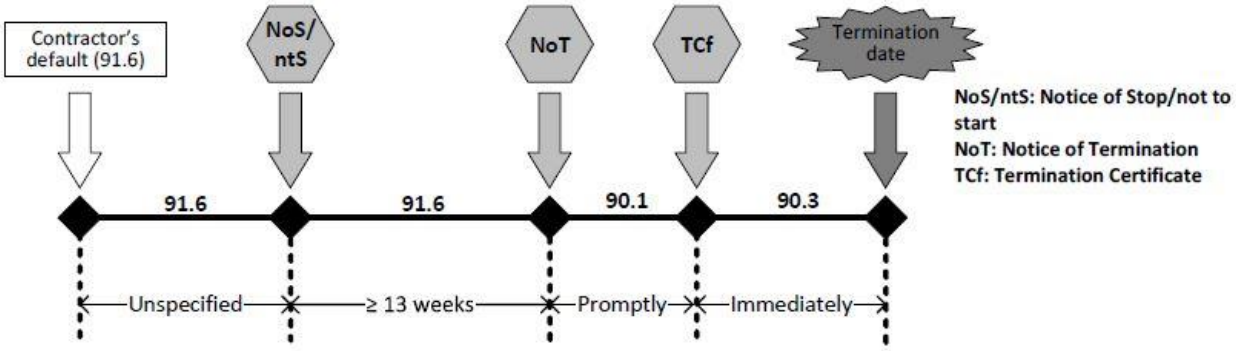

Figure 7 Termination Timeline for NEC3 - Ground 2

As illustrated in fig. 7, the project manager issues a notice to stop or not to start any of the works upon a default by the contractor. If 13 weeks then elapses without the project manager issuing a notice to recommence the works, the owner can send a notice of termination to the project manager explaining the reasons behind his decision and providing sufficient evidence. If such notice and reasons comply with the contract provisions, the project manager promptly issues a termination certificate and the contract is then deemed terminated.

C. Comparative Analysis

Conditions binding construction contracts are numerous. Parties to construction projects assume hundreds of conditions, either self-put or standardly available, to set robust the right and obligations of each. Even in the cases where the contract is construed under the conditions of one of the available standards, many parties still tend to amend some of the conditions to their own favor and to the better relations due to uniqueness of some projects. In this chapter, an in-depth investigation was made for different standard conditions of contract used to bind the parties to construction contracts. The aim of this inspection is to highlight the different measures used to guide owners upon their decision to terminate their contracts with their general contractors. As will be seen in table 2, there is no one definite way to terminate under the several standard conditions, and as such, owners will have to approach such action with utmost care and upon referring back to legal personnel. Table 2 below represents a full summary of the termination processes deduced and analyzed from the different standard conditions of contract

Table 2 Summary Comparison of Different Termination Steps and Milestones for Standard Conditions of Contract

Conditions of Contract	**Step 1** *Notice of Default/Correction*		**Step 2** *Notice by Contractor*		**Step 3** *Notice of Intent to Terminate*		**Step 4** *Notice of Termination*		**Step 5** *Termination Certificate*	
	Description	**Time Given**	**Description**	**Time Given**	**Description**	**Time Given**	**Description**	**Time Given**	**Description**	**Time Given**
FIDIC (2017)	Engineer sends notice to correct specifying the default	Reasonable time	Contractor sends a notice to the engineer specifying means of correcting the default	Immediately	Employer sends notice of his intention to terminate the contract	14 days	Employer sends notice of termination	Immediately	N/A	N/A
JCT (2016)	Architect or Contract Administrator sends notice of default to contractor	14 days from receipt of notice	N/A	N/A	N/A	N/A	Within 21 days, Employer sends notice of termination	Immediately	N/A	N/A
EJCDC (2017)	N/A	N/A	N/A	N/A	Employer sends notice of his intention to terminate the contract	10 days, inclusive of 7 days to correct	Employer sends notice of termination	Immediately	N/A	N/A
AIA (2017)	Architect certifies that there is sufficient cause for termination	Unspecified	N/A	N/A	N/A	N/A	Employer sends notice of termination	7 days	N/A	N/A
Consensus Docs (2017)	Employer issues first notice to correct the default	7 days	N/A	N/A	Employer issues second notice to correct and intent to terminate	3 business days	Employer sends notice of termination	Immediately	N/A	N/A
NEC3 (2017)-1	Project Manager sends notice of default	4 weeks	N/A	N/A	N/A	N/A	Employer sends notice of termination	Promptly	Project Manager issues a termination certificate	Immediately
NEC3 (2017)-2	Project Manager sends notice to suspend works due to default	13 weeks	N/A	N/A	N/A	N/A	Employer sends notice of termination	Promptly	Project Manager issues a termination certificate	Immediately

In a nutshell, the major reason behind the contractor's right to terminate is impartiality. Whenever the owner thinks that the breach by the contractor is serious to adopt termination decision, then it becomes a matter of fairness to allow the contractor to have the leverage to this right of correcting what the owner might use against him in the future. There are also some other pros to such right, one of which is the economical side where the contractor is already indulged in the work and is already fully mobilized. The clauses allowing termination are numerous; some contracts do allow such right, others do not.

The party issuing the notice to correct or remedy differs from one part to the other, as well as the necessity to issue a notice for such right. For example, the Engineer issues the notice to correct in FIDIC 2017, while in NEC3 2017, the Project Manager issues a notice of default to the contractor to highlight the default and set the time bar for correction.

It is very important to follow the provisions of contract calling for termination practices in construction projects. This perfectly applies to issuing a notice of termination whenever it is necessary. The notice of termination, if mentioned in the contract, provides as a precedent that must be fulfilled before filing termination. Not like any usual letter between parties, this general letter describes the undo of the contract where parties cannot terminate except when they abide by the guidelines of this letter.

D. Discussions

As illustrated in the previous section, there is no one definite answer to how the owner should approach a termination of the construction contract due to contractor's default. Referring to the six different standard conditions of contract, there exists a wide spectrum of precedents and prerequisites to a proper termination practice by the owner. Generally, there is no one common set of procedures to such decision. Likewise, the provisions of each contract should be the guideline for the owner's party to highlight the reasons and measures for terminating the contract successfully. Whenever the owner is to terminate for contractor's default, the material breach should be one that exists clearly in the subclauses under the contract. This is an important rule for the owner, whenever opting to termination, clearly building the case on proper roots vividly stated in the contract. Such root-causes differ from one contract to the other, so it is imperative for the owner to look for what a default in his case constitutes.

One of the most illustrated differences between the termination mechanisms in the set of standard conditions is related to issuing notices. Whether it is a notice by the employer to the contractor to remedy the defect or a termination notice, the procedure and time bars should be respected. For instance, the notice to make good the defect by the contractor is not always a mandatory for the employer to issue the notice of termination. For example, in FIDIC, issuing a notice to correct under 15.1 is not a notice precent to the notice of termination under 15.2. It is also important to identify which party related to the owner is sending the notice to the contractor. Failing to issue the specified notice by the proper party leads to wrongful termination under the contract. for example, in NEC3, the

Project Manager is the one to send the termination notice for the contract to be terminated. If the employer is the one sending this notice assuming that the contract is terminated, then he is considered to have breached the contract. The contractor then has the right to revert this termination for Employer's breach.

Notices are said to be of the main components within a construction contract. Such notices differ in their purpose, and accordingly, in their form and mechanism. Consequently, no notice requirement resembles the other. The notice of termination is one of the notices to deal with at utmost level of care and professionalism, as it resembles the building block of one of the most lengthy and costly decisions in the construction lifestyle, termination. This notice differs between different standard conditions of contract in its language, the way it is issued and the party to issue it. For a termination process to be righteously achieved, the termination notice is considered to be the first right key.

Of the interesting proceedings with respect to such a termination notice under different standard conditions of contract lies in the same book of conditions but with respect to two different updates, FIDIC 1999 and FIDIC 2017. Although these include the same set of conditions, the updated version always induces some modifications to technicalities usually faced in projects construed under the older version by practitioners. The notice of termination was one of the entries to be updated between 1999 version and 2017 one.

In FIDIC 1999, the notice of termination was to be issued after a reasonable time from having the contractor informed about the default with no apparent intention to make good what he had defaulted. In 1999 version, clause 15.2 states that the employer has the

right to terminate the contract post the expiry of 14 days-notice of termination. There is no specific mechanism that shows what happens after such 14 days. Is the contract terminated automatically? Does the employer have to imply again that he insists on termination? What happens in the case that throughout those 14 days, the contractor started his defects' remedy and negotiated the employer for such decision? The employer may find that it is to his favor to undo such a decision and revoke the act of termination after the contractor showing good faith towards the project. In such circumstances, the conditions of contract give no evident proof to how to act in accordance with such situation. Moreover, if the contractor reaches the borderline of a successful negotiation, what is it that happens after 14 days? Is it that they have to just document an agreement between both of them to reinstitute the original contract? Has it not yet been terminated? Are they supposed to sit down to a new contract?

In the FIDIC 2017 version, one extra step was added. The employer still has to notify the contractor and set him aware of the default, then follow this, within a reasonable time, by a 14-day notice of termination if he insists on terminating the contract for contractor's default. However, the twist here is that the new version of the book calls for the employer to send a new notice of termination post the expiry of the 14 day-notice to set the termination effective immediately. This dual notice setup resolves the ambiguity to what happens post the expiry of 14 days first notice of termination. In other words, after the expiry of the 14 days period called for under the first notice by the employer, termination is set effective clearly through issuing a second notice of termination. At this stage, both the owner and the contractor are aware that the construction contract is terminated, and the

proceedings forward are to be made. However, there still prevails the issue of revoking such act; What happens in the case the employer issued the second notice of termination and then with open communication chains becoming more effective, reached the consent of resolving the issues and reestablishing the relationship between them?

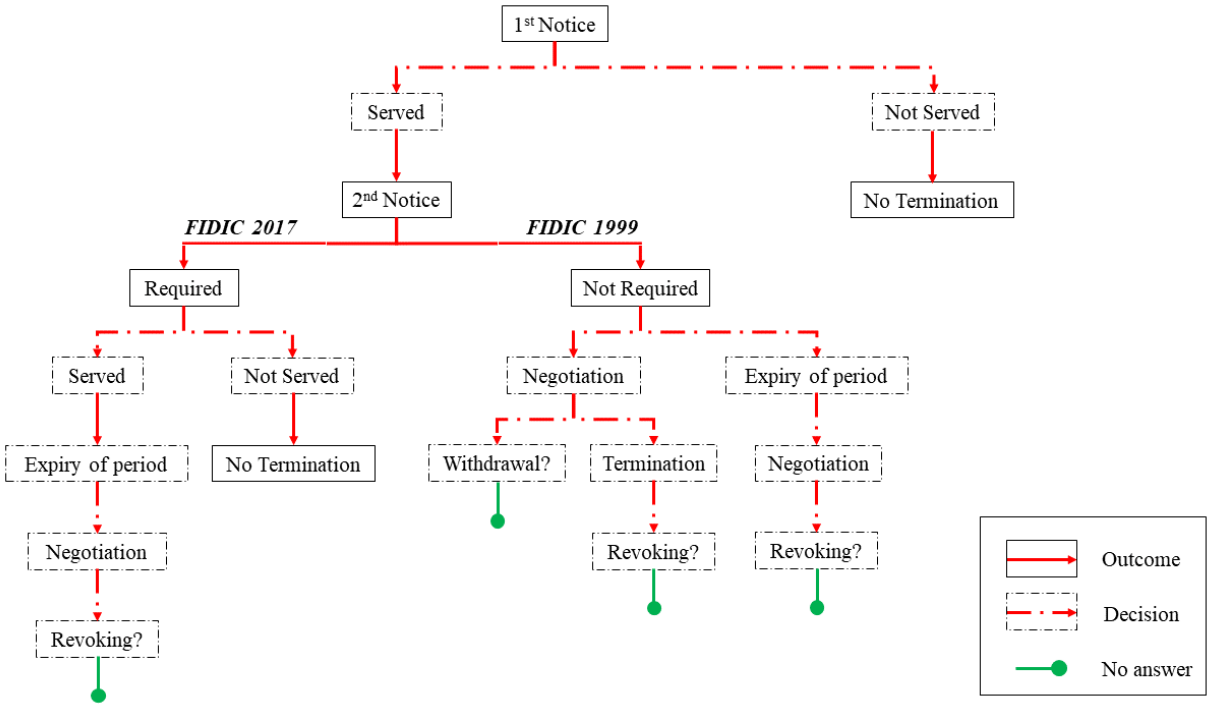

Figure 8 Revoking Termination Decision in FIDIC 2017 vs FIDIC 1999

As seen in fig. 8, termination process does not continue unless the first notice is issued. Upon the issuance of the first notice, two paths then prevail, depending on whether the contract calls for the second notice to be issued or not. FIDIC 2017 requires the issuance of the second notice for termination to be deemed effective while FIDIC 1999 does not call on the second notice, and thus, ambiguity arises to whether the termination is effective post the expiry of the period stipulated in the first notice or not. In this case, can

the owner withdraw his decision before the expiry of the 14 days notice? Moreover, if he decides to terminate, can he revoke his decision and thus the act of termination?

In FIDIC 2017, however, the contract does call for the issuance of the second notice which removed some of the ambiguities to what happens post the expiry of the first 14 days-notice. If the second notice is not served, then the termination decision is not effective, and the contract still holds. In the case where the second notice is issued, and the contract is terminated, can the owner upon negotiation with the contractor, revoke the termination decision and reinstitute the contract between them?

Going back to the full spectrum, referring back to table 2, FIDIC (2017) represented the standard conditions of contract that entails the widest spectrum of steps to be taken by the employer throughout the termination process. The steps included revealed flexibility and ensured that all intentions are clear along the termination timeline. On the other side, AIA (2017) Showed abrupt transitions in the phases of termination, this will permit the employer to act in bad faith and sets the contractor in ongoing thoughts regarding the employer's intentions. Moreover, the analysis of the timeline of actions of NEC3 (2017) discovered the empowering of the project management as the only authority acquired the right to effect termination and set it in place through issuing the final termination certificate and sending it to both parties, while in other books of conditions like FIDIC (2017), the employer is the one who effects termination by sending his second termination notice.

CHAPTER IV

CONSTRUCTION CONTRACT TERMINATION IN PRACTICE

A. Preamble

There is not one perfect set international construction contract because of the different factors governing each project, and thus, assuring its uniqueness. That is why, international contracts for construction address not all, but most of the usual glitches and mitigate their risks accordingly. In the field of construction, filing claims by either employer or contractor against the other party is almost inevitable. Such claims can funnel to a destined termination. Due to the fact that termination is a tedious process (MacEwing, 2004), it might at many times along the pipeline of works, lead to arbitration or litigation, and sometimes, both. In any legal scheme, the system bounding the parties enforces some implications within the construction contract. As such, this contract will state the law which shall govern the modes of relationship between the ends to the contract and defines the possible consequences. This chapter focuses on the analysis of case law extracted from a wide spectrum of litigation cases along a wide time frame ranging from 1971 to the current years, as depicted in fig. 9. That said, the key focus in this chapter will be on the analysis of wrongful acts of termination practices of construction contracts.

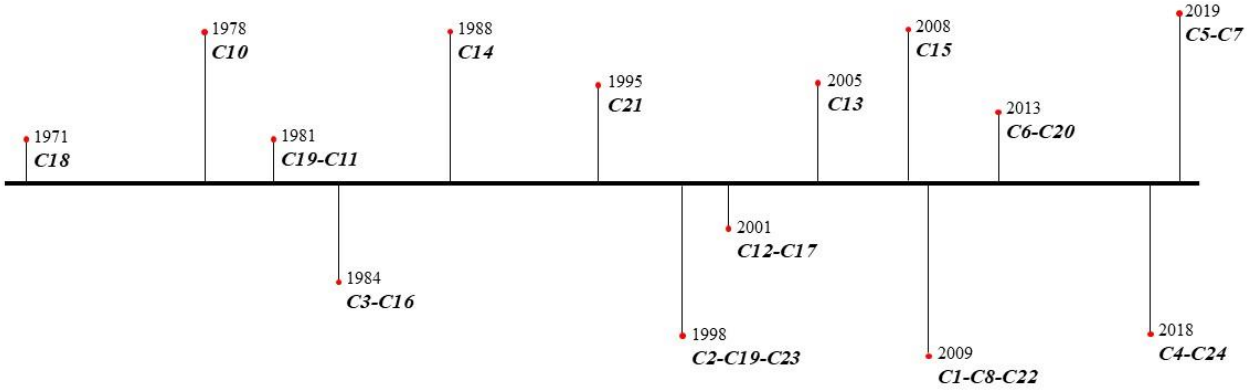

Figure 9 Timeline of Cases in Study (Years)

B. Summary of Cases

As mentioned earlier, the goal of this case law research is to highlight the detrimental effects of going through a bad termination in Law. The ramifications emanating are painful that all parties willingly seeking termination should be aware of. The table below is a summary of a wide spectrum of cases that we be latter discussed and analyzed

Table 3 Summary of Wrongful Termination Cases Proceedings

Case no.	Case Title	Year	Claimant vs Defendant	Case Description	Reason for Termination	Court Ruling	Deduction	Case in Favor of	Remarks
C1	*Diploma Constructio n Pty Ltd v Marula Pty Ltd [2009] WASCA 229*	2009	Subcontra ctor vs Contracto r	"The proceedings arose out of a subcontract for plastering work to be carried out by the respondent at a development being constructed by the appellant in Joondalup. It was common ground that the subcontract was terminated before the plastering work had been completed. The appellant contended that it had terminated the subcontract by reason of the respondent's breach. The respondent denied that it was in breach and said that by purporting to terminate the subcontract the appellant had repudiated it."	Subcontracto r was in default of a 'direction' given by contractor	"His Honour concluded ([101]) that as the respondent was not in breach of the subcontract on either 14 July or 15 July 2003, the appellant was not entitled to give notice of default under cl 8.1(a). It followed that the appellant was not entitled to terminate the subcontract."	The notice should be unequivocal in order to convey what is amiss so as to identify the default.	Subcontractor	Wrongful Termination – failure to follow notice requirement (unclear default description)

C2	*Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80*	1998	Contractor vs Employer	"The plaintiff as the contractor and the defendant as the employer had entered into a standard building contract for the construction of a housing scheme. The defendant's architect by way of a letter dated 19 July 1988 gave notice that in the architect's opinion, the plaintiff had failed to proceed regularly and diligently in execution of the works. The notice was hand delivered to the plaintiff. By a subsequent letter dated 11 August 1988, a fresh notice was issued to the plaintiff requesting that the plaintiff proceed regularly and diligently with the works. This was also delivered by hand to the plaintiff. Finally, by a letter dated 30 August 1988, which was delivered by hand and received by the plaintiff, the defendant gave notice of termination of the contract. The matter then proceeded to arbitration."	Contractor failed to proceed regularly and diligently in execution of the works	"...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…"	notice of determination under the equivalent PAM form of contract must be sent by registered post	Contractor	Wrongful Termination – failure to properly deliver the notice of determination and for not establishing grounds of termination

C3	*A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR [1984] SC 1703*	1984	Contractor vs Employer	The tender of the appellant was accepted on July 6, 1954 as per the letter of the Executive Engineer, Road Development Division, Rajkot. As agreed to between the parties, the appellant furnished security deposit in the amount of Rs. 24, 885/- and the Contract documents were executed between the parties. The only term of the contract which at present needs nothing is that the work was to be executed within a period of 14 months from the date fixed by the written order to commence the work. Indisputably, the appellant commenced the work, and completed sub-grading of the road in a distance of 5 miles and 5 furlongs and furnished cement concrete surface in the length of 2 miles. Certain disputes arose between the parties as a result of which the respondent rescinded the contract imputing that as the time was of the essence of the contract and as the appellant failed to execute the work within the stipulated time he was guilty of committing breach of contract.	Contractor failed to complete the work within the stipulated period of 14 months from the date of the commencement order	"…respondent Government was guilty of breach of contract having unjustifiably rescinded the contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. In the facts and circumstances of the present case, the appellant should be awarded Rs. 2 lacs under the head "loss of expected profit" for breach of contract by the respondent.	Employer wrongfully terminated the contract, and the Contractor was granted 15 % of the value of the remaining work, as damages for loss of profit	Contractor	Wrongful Termination - Not establishing the right for convenience termination

C4	*Redbourn Group Ltd v Fairgate Developments Ltd [2018] EWHC 658 (TCC)*	2018	Project Manager vs Employer	"RGL's contract was terminated as a result of a notice of default dated 24 February 2016, served by FDL. This made allegations of breach of contract by RGL and required that the alleged breaches be remedied in 14 days. RGL considered the allegations to be unjustified. RGL accepted this action as a wrongful repudiation of its contract, and later commenced proceedings."	Breaches of contract	"…I consider that FDL has no realistic prospect of defending this claim in principle or making any counterclaim on its own behalf. The most I am prepared to do is to accept that there may be arguments about quantum, both in relation to RGL's fee claim, and their claim for damages for wrongful repudiation. Those can be dealt with at a quantum hearing…"	Project manager was compensated for damages for wrongful termination excluding fees for services that would not have been performed	Project Manager	Wrongful Termination - Not establishing the right for termination

C5	*Hodgkinson v K2011104122 (Pty) Ltd and another [2019]*	2019	Employer vs Contractor	"… The contractor was required to remove the existing roof of Plaintiff's house; manufacture wooden modules and to install these as the second floor; and to construct and install internal walls and a new roof system… First Defendant had allegedly failed to acquire all the materials needed and to provide any supervision, labour, plant, materials and equipment required to produce the modular system… the Plaintiff delivered a written notice ("**the first notice**") to the First Defendant recording First Defendant's defaults and informing First Defendant that unless it took practical steps to remedy those defaults, the Plaintiff would cancel the project agreement… First Defendant failed to take the required practical steps to remedy its defaults within the 7-day period… ten days after the first notice was sent to the First Defendant, the Plaintiff notified the latter that he was cancelling the project agreement ("**the second notice**")… Plaintiff issued summons against the First and Second Defendants, claiming damages under various heads."	Failing to remedy defects while notified by employer	"…the provisions of clause 12.1 of the project agreement were peremptory and that the cancellation notice did not comply with those provisions. In particular, the First Defendant was not afforded the contractually agreed time period within which to remedy the alleged breach (it was afforded 7 days instead of 14) and the purported cancellation by the Plaintiff was consequently premature and ineffective."	The two notices issued by the employer did not comply with the requirements of the termination clause stipulated in the agreement	Contractor	Wrongful Termination – Notice provisions not followed correctly with respect to time bars

C6	*Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd ibid [2013]*	2013	Contractor vs Employer	"These proceedings concern a contract dated 31 March 2010 ("the Contract") by the Claimant ("Vivergo") for the Defendant ("Redhall") to carry out mechanical and piping work at a new biofuel plant for Vivergo in Saltend, Hull ("the Project"). In March 2011 there was a termination of the Contract either by Vivergo under the terms of the contract or for repudiation by Redhall or by Redhall for repudiation by Vivergo. These proceedings concern the correctness of that termination and also require consideration of Redhall's entitlement to extensions of time."	Contractor failed to submit the programme of works	"Redhall was not in repudiatory breach of the Contract on 11 March 2011 and Vivergo's letter of 11 March 2011 was not, in any event, an acceptance of that repudiation, neither was Vivergo's conduct in barring Redhall from site on the morning of Monday 14 March 2011 such an acceptance. Vivergo was accordingly in repudiatory breach of the Contract by barring Redhall from site on the morning of Monday 14 March 2011 and Vivergo's repudiatory breach was accepted by Redhall's letter of 14 March 2011 and the Contract was thereby terminated."	Contract was terminated by the Contractor for repudiatory breach by Employer	Contractor	Wrongful Termination – Employer did not establish the grounds for termination (Employer repudiation through wrongly sending notice of termination and expelling contractor from site)

C7	*Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited [2019] NSWCA*	2019	Contactor vs Employer	Cenric Group Pty Ltd (Cenric) entered into a head contract with TWT Property Group Pty Ltd (TWT), which included excavation works at TWT's development site in Pyrmont, and the harvesting of natural sandstone within the site boundaries. Cenric engaged a sub-contractor Bundanoon Sandstone Pty Ltd (Bundanoon) to perform the work. Pursuant to the sub-contract, Bundanoon was entitled to retain the proceeds of the sales of the sandstone, less royalties that were payable to Cenric at an agreed rate. Pursuant to the head contract, Cenric was entitled to retain part of the royalties it received up to a capped amount and obliged to pay the balance of all monies received to TWT. After delays to completion of the work, and disputes between the three parties regarding the payment of royalties, TWT issued a show cause notice and took the work out of Cenric's hands. Subsequently, Bundanoon terminated its sub-contract with Cenric and was engaged directly by TWT to continue harvesting the sandstone. Cenric commenced proceedings against TWT and Bundanoon alleging that both the head contract and the sub-contract had been varied by oral agreement to allow for an extension of time, and that TWT's show cause notice and termination of the contract were invalid. Cenric sought damages from both defendants for breaches of contract, and	Slow progress of works	"The inference that I would draw from the whole of the evidence, were it necessary to do so, is that TWT regretted the bargain it had made with Cenric on 19 February 2018. It decided, instead, to get entirely for itself the benefit of royalties in respect of the level 4 sandstone. That was the true motivation for the show cause notice, and provides the true explanation for Mr Zhang's closed mind. I do not propose to set out the detail of the evidence that supports the drawing of that inference, since it is at most a further alternative reason for concluding that the show cause notice was invalid. I will simply note that Cenric's written submissions include a detailed chronology referring to all the evidence on this point."	Employer was afraid of the high opportunity cost of the benefits and terminated in bad faith	Contractor	Wrongful Termination: Employer did not establish the grounds of termination and terminated in bad faith

				judgment against Bundanoon for unpaid royalties for the sandstone."					
C8	*Questar Builders, Inc. v. CB Flooring, LLC [2009]*	2009	Subcontractor vs Contractor	"contractor took bids from three subcontractors to install carpet in an apartment complex and entered into a contract with one of them. The contract provided that the contractor could terminate the contract for "convenience." When a dispute arose between the parties, the contractor terminated the subcontractor and hired one of the other bidders. As grounds for termination, the contractor alleged that it had cause - based on a failure to perform - as well as the right to terminate for convenience. The subcontractor objected, stating that it had not breached the contract and the contractor did not have an unfettered right to terminate."	Convenience for the Contractor and Breach of contract by Subcontractor	"CB Flooring did nothing to jeopardize timely performance of the Subcontract. While this finding is significant in assessing whether Questar acted in bad faith, we reiterate that the trial court's role in reviewing Questar's actions under the implied obligation of good faith and fair dealing is not to determine whether CB Flooring actually could or would have fulfilled its obligations, but whether Questar's determination that CB Flooring posed a risk of not fulfilling them was commercially reasonable under the circumstances."	Contractor sought termination in bad faith and subcontractor did not breach the contract	Subcontractor	Wrongful Termination – Did not establish the grounds for proper termination for convenience in good faith
C9	*Haji Abu Kassim v Tegap Constructio n Sdn Bhd [1981] 2 MLJ 149*	1981	Contractor vs Employer	"In this case, the appellant had entered into a contract with the respondent whereby the respondent agreed to construct shop houses for the appellant. The appellant terminated the contract. At the material time, the shop houses were not fully completed and two progress payments for the works as certified by the architect had not been paid. It appeared that the appellant was not satisfied as to the correctness of the valuation made by the architect and he had obtained a valuation report from a firm of valuers. The respondent claimed the sums certified by the architect."	Breach of Contract: use of inferior goods	"…termination of the contract by the appellant was bad in law and that the appellant had himself committed a breach of the agreement in that he failed to honour the architect's certificates. He also found that there was no proof that the respondent had used inferior materials, goods or workmanship as alleged and he rejected the report of the valuers and accepted the valuation given by the architect."	Employer was in breach of contract and wrongfully terminated the contract	Contractor	Wrongful Termination – Employer breached the contract in not honoring the payment certificate of the Engineer

C10	*Sim Siok Eng v Government of Malaysia [1978] 1 MLJ 15*	1978	Contractor vs Employer	"The appellant appealed against the decision of the High Court which had given judgment against him on two suits for breach of contract. The appellant had undertaken to build some buildings for the respondent but did not complete on the completion date. There had been an arrangement for the respondent to supply certain building materials to the appellant, as he had found difficulty in getting them. Subsequently the supply was stopped but no adequate notice was given to the appellant."	Suspension of works	"in this case, the appellant was clearly induced to believe that certain essential materials would be supplied to him. The respondent promised to supply the materials to the appellant whenever the latter asked for them and a considerable amount of materials were so supplied. Relying on the promise or assurance, the appellant had altered his position and his responsibilities to supply those materials had been suspended or kept in abeyance. For the respondent to reimpose the contractual provision, adequate notice should be given; (2) as the learned judge himself had held that the notice given was not reasonable, it should have been held that the respondent was in breach in terminating the contract and judgment given in favour of the appellant."	Employer failed to supply labour and material to the Contractor	Contractor	Wrongful Termination – Employer breached the contract by not supplying Material and Labour

C11	*Central Provident Fund Board v Ho Bock Kee [1980-1981] SLR 180; [1981] SGCA 4*	1981	Contractor vs Employer	"Ho Bock Kee was a contractor which agreed to erect a large building for the CPFB, which later purported to terminate the contract. The contractor challenged the termination, saying that the employer had failed to comply with mandatory requirements of the contractual determination clause."	Failing to work regularly and diligently	"The method of service was specified in the contract to prevent future disputes and had to be complied with, and The superintending officer was not the correct person to serve the notice on the respondent."	Notice of termination send by Employer was in not compliance with contract requirements	Contractor	Wrongful Termination – Employer failed to properly send notice of termination

C12	*AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd [2001] SGHC 243*	2001	Subcontractor vs Contractor	"At all material times the Plaintiff AL Stainless Industries Pte Ltd ('AL') was the sub-contractor of Wei Sin for the supply, delivery and installation of metal work in respect of the N2 and the N6 contracts…In due course, AL submitted progress claims for payment. Wei Sin was often late in payment and also did not pay the entire sums claimed. As a result, AL was chasing for payments to be made. In the meantime, Wei Sin alleged that that there was delay in AL's works and also defects…Eventually, AL's solicitors B T Tan & Company ('B T Tan & Co') sent a fax dated 4 September 1999 to Wei Sin on both the sub-contracts to allege that Wei Sin was in breach of contract and to require that arrears in payment under both contracts be paid in full by 9 September 1999, failing which AL would terminate the sub-contracts. In response, Harry Elias Partnership ('HEP'), who were the then solicitors of Wei Sin, replied on 10 September 1999 to deny any breach by Wei Sin. They alleged severe delay and numerous defects in AL's work and purported to terminate the two sub-contracts under Clause 7(a), (b) and (c) of the Standard Conditions. 10. B T Tan & Co then replied also on 10 September 1999 to, in turn, purportedly terminate the two sub-contracts."	Delays and defective works	"In summary, the termination of the sub-contract for N2 by HEP on behalf of Wei Sin is not valid. On the other hand, B T Tan & Co have validly terminated the sub-contract on behalf of AL." "In the circumstances, I find that Wei Sin was also in repudiatory breach of contract for N6 in withholding payment of Progress Claim No 4 and also in respect of HEP's invalid notice. The repudiation has been accepted."	Contractor failed to comply with Notice provisions	Subcontractor	Wrongful Termination – Contractor failed to respect the notice time bar and was in breach of non-payment

C13	*Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd [2005] SGHC 227*	2005	Subcontractor vs Contractor	"The Defendant subcontracted the whole of the works to the Plaintiff by a letter dated 30 July 2004 for a lump sum of $543,400… Alleging a repudiatory breach by non-payment of Payment Certificates Nos. 2 and 3, the Plaintiff terminated its subcontract and abandoned the works on 10 January 2005. The Defendant alleged that the Plaintiff had repudiated the contract by stopping work without justification on 10 January 2005 and accepted their repudiatory breach. In addition, the Defendant alleged that the Plaintiff was in breach of their subcontract by failing to carry out their works diligently and with due expedition, resulting in the Defendant having to take over parts of their works; failed to have a competent project manager; and failed to rectify their defective works."	Non-payment of Contractor	"(a) the Plaintiff had wrongfully terminated the subcontract; (b) the value of work done by the Plaintiff up to the date of termination was $130,522.87 and after deducting therefrom, the 1 st Progress Payment of $20,947.50, the sum owed to the Plaintiff for this was $109,575.37; (i) Cost & Expense to Complete the Project: $768,290.51 (ii) Loss of Profit (5% of Main Contract Sum): $ 28,600.00 Subtotal: $796,890.51 (iii) Less Value of Subcontract works not carried out by Defendant: ($419,092.50) Total: $377,798.01 (c) the Defendant succeeded in its counterclaim for having to rectify the Plaintiff's defective works, taking over the Plaintiff's works and finishing the project by appointing other subcontractors, thereby suffering loss and damage."	Subcontractor failed to continue with the works and was held liable	Contractor	Wrongful Termination – Subcontractor suspended the works with no reason

C14	*Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261*	1988	Subcontractor vs Contractor	"The plaintiff was the sub-contractor for certain roadworks. The defendant was the main contractor who sub-contracted the work to the plaintiff. The consideration for the defendant sub-contracting the works to the plaintiff was 2% of all payment received for value of work carried out by the plaintiff, with the plaintiff taking 98% of the same. Thereafter the defendant wrote to the plaintiff and terminated the contract between them. The main complaint of the defendant was that the work was not done diligently and regularly."	Failing to work diligently and regularly	"the conditions necessary for a Mareva injunction were satisfied in the present case. There was no ground at all for sending the said notice of termination in the first place, and even if there was some ground for it, it was unreasonable in the circumstances. The defendant was in any event itself in breach of contract for failure to pay over to the plaintiff 98% of each of the several progress payments. There was also solid evidence that the probity of the defendant could not be relied on."	Contractor wrongfully terminated the contract	Subcontractor	Wrongful Termination – The Contractor was himself in breach of the contract for not being able to certify the payments or to specify the default in the termination notice
C15	*Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others [2008] SGHC 201*	2008	Nominated Subcontractor vs Domestic Subcontractor	"The plaintiff, Compact Metal Industries Ltd ("Compact") commenced this present action against the first defendant, Enersave Power Builders Pte Ltd ("Enersave"), on 29 March 2006, claiming payment for work done and damages for alleged wrongful termination of a sub-contract between them. Enersave, on the other hand, maintained that its termination of Compact was fully justified, and counterclaimed in respect of delays in Compact's works."	delay in the sub-contract works and deployment of insufficient manpower	"In conclusion, and after weighing the evidence and considering counsel's submissions, I find that: (a) Enersave had breached the Payment Terms in the Sub-contract and the Settlement Agreement by consistently under-certifying and under-paying Compact throughout the Subcontract Works up to the date of purported termination on 23 March 2006; and (b) Enersave had wrongfully terminated the Sub-contract on 23 March 2006."	Nominated Subcontractor was in breach of contract for underpayment and having delayed payments	Domestic Subcontractor	Wrongful Termination – Nominated Subcontractor breached the contract and wrongfully terminated the contract

C16	*Goh Kian Swee v Keng Seng Builders (Pte) Ltd Suit No 9126 of 1984*	1984	Subcontractor vs Contractor	"D were the main contractors under a building contract dated 21 September 1979 made between them and one YSL for the construction of a house for a lump sum of S$312,500…P was the subcontractor of D under a subcontract dated 27 September 1979 under which P undertook to carry out the construction of the house… Progress payments were made to P for the first eight months but a sum of S$10,000 was deducted by D and paid to the architect. After the eighth progress payment, D did not make any further progress payment to P but instead on diverse dates, paid to P various amounts. On 5 August 1980, D, pursuant to an alleged supplemental agreement, gave notice of termination of the subcontract to P on the ground that P was tardy in proceeding with construction of the house, as a result of which D was in breach of the main contract with YSL."	Subcontractor not meeting the quality requirements, rendering the Contractor in breach of Main Contract	"there is no evidence of tardiness on the part of P for the first six months; the evidence that D on 8 August 1980 terminated the subcontract and ejected P from the work site is not accepted; D has also not adduced evidence of any mistake in respect of any payment made by them to P."	Contractor wrongfully terminated the contract and was not paying the Subcontractor properly	Subcontractor	Wrongful Termination – Contractor was in breach of contract for not paying the Subcontractor and for not establishing proper grounds of termination

C17	*Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd [2001] SGHC 68*	2001	Subcontractor vs Contractor	"The plaintiff, Mr Shia Kian Eng, who carries on construction work under the trade name Forest Contractors, was one such sub-contractor…Forest was employed by Nakano to undertake various types of work at the project. These works included block wall construction, internal and external wall plastering works, skim coating works, tiling works, steel-lintel works, floor screeding works, solid brick wall works, the supply and installation of wire mesh above door frames and the supply of Smartplas Cement. The relationship between the parties started in July 1998 and ended, badly, in January 2000 when Nakano terminated Forests plastering works and ordered Forest off the site."	Slow progress and defective works	"In respect of Forests claim, I have found that it is entitled to recover $1,670,177.96 as the balance due in respect of the works performed by it and the sum of $7,264.24 as damages for wrongful termination. As against this, I have found that Nakano is entitled to counterclaimthe sumof $734,450 in respect of the costs of rectifying the defective plaster works. This must be set-off against the amount of Forests claim. Forest is therefore entitled to $942,992.20"	Contractor was unable to properly build his termination reasoning	Subcontractor	Wrongful Termination – Contractor did not establish the proper grounds of termination

C18	*Hounslow LBC v Twickenham Garden Developments Ltd [1971] Ch 233*	1971	Employer vs Contractor	"The defendant, a building contractor, had been allowed into occupation of a site owned by the plaintiff council under a building contract. The council had sought to determine the contract by notice under its terms. The contractor refused to vacate the site. The council brought proceedings for injunctions restraining the contractor from 'entering, remaining or otherwise trespassing' on the site."	Poor progress of work	"(1) A licence to enter land is a contractual licence if it is conferred by a contract; it is immaterial whether the right to enter the land is the primary purpose of the contract or is merely secondary. (2) A contractual licence is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract. (3) The willingness of the court to grant equitable remedies in order to enforce or support a contractual licence depends on whether or not the licence is specifically enforceable. (4) But even if a contractual licence is not specifically enforceable, the court will not grant equitable remedies in order to procure or aid a breach of the licence."	The plaintiff had not shown that the contract had been validly terminated	Contractor	Wrongful Termination – Employer was in breach of contract for not allowing possession of site
C19	*Malayan Flour Mills Sdn Bhd v Raja Lope & Tan Co & Anor (1998)*	1998	Contractor vs Employer	"…pursuant to Cl.63 of the contract for the construction, completion and maintenance of civil and building works for a boiler breeder farm, the applicant terminated the services of the respondents and the dispute went before an arbitrator…"	Falling behind schedule and defective works	"Since the applicant had exercised his remedy under the contract, the applicant was bound by its terms. Accordingly, the applicant cannot resort to common law to govern the termination…"	Termination was bad in law, and thus, it was rendered unlawful	Contractor	Wrongful Termination - Employer terminated the contract with a premature notice

C20	*Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd [2013] EWCA Civ 577*	2013	Contractor vs Employer	Telford, a developer, agreed to build and develop and grant long leases of commercial units to Ampurius. Although work started promptly on the construction, in March 2009 Telford decided that it would be necessary to put work on blocks A and B on hold because of funding difficulties. Work on those blocks did not resume until early October 2010. Ampurius sought to terminate the contract in October 2010 on the basis of repudiatory breach by Telford. Telford itself terminated the contract on 9 November 2010 following non-payment by Ampurius of monies said to be due. There was no termination clause in the contract, although Telford had agreed to use its reasonable endeavours to procure completion of the Works by the Target Date or as soon as reasonably possible thereafter. The Judge, at first instance, found that Telford was in repudiatory breach because it had stopped work, something which was contrary to the obligation to proceed with due diligence.	Suspension of works and delay in works	"…it seems to me that (absent any attempt to make time of the essence) delay, even with its attendant uncertainties, will only become a repudiatory breach if and when the delay is so prolonged as to frustrate the contract."	Interruption of work was indeterminate and The delay and damage suffered by Ampurius, when considered in the context of 999-year leases, did not deprive Ampurius of substantially the whole benefit of the contract or even a substantial part of that benefit so could not be classified as repudiatory	Contractor	Wrongful Termination – Employer did not establish the proper grounds of termination

C21	*Brani Readymixed Pte Ltd v Yee Hong Pte Ltd and another appeal [1995]*	1995	Supplier vs Contractor	"The plaintiffs were suppliers of ready-mixed concrete and the defendants were building contractors… in September 1990, the defendants entered into an agreement with the plaintiffs for the supply of ready-mixed concrete… Clause 13 of the agreement provided that the defendants were to provide a casting schedule for the whole project and that 24 hours' advance notice must be given for orders exceeding 50m3. In the event that the plaintiffs failed to supply despite due notice having been given, the defendants were to have the right to obtain its concrete requirement from an alternative supplier and the plaintiffs were to be liable for any costs difference… on 7 June 1991 stating that the failure of the defendants to provide the casting schedule and to make payment constituted a repudiation of the contract and that this repudiation was accepted by them. The defendants failed to pay for the sum demanded and the plaintiffs brought this action for the recovery of this sum and for damages for breach of contract…"	Not serving the schedule of works and failing to make payment	"(1) the plaintiffs did not repudiate the contract either by their letter of 30 May or that of 7 June 1991. Instead, the evidence supported the conclusion that the defendants had evinced an intention not to be bound by the contract and that this repudiation was accepted by the plaintiffs in their letter of 7 June 1991; (2) the failure of the defendants to provide the casting schedule did not amount to a repudiation of the contract. As for payment of the demanded sum, mere failure or delay in making payment per se would not amount to a repudiation. However, the defendants here were not merely stalling for time to make payment to the plaintiffs, they did not intend to pay the plaintiffs at all and perform the contract; (3) the trial judge's assessment of the quantum of damages was correct and accordingly judgment was entered for the plaintiffs in the amount so assessed; (4) as the defendants themselves were in breach of contract…"	Contractor showed that they are not to be bound by the contract	Supplier	Wrongful Termination – Contractor did not establish the grounds of termination and was in breach of the contract

C22	*HDK Ltd (t/a Unique Home) v Sunshine Ventures Ltd & Ors [2009] EWHC 2866 (QB)*	2009	Contractor vs Employer	"The case concerned three separate building contracts. HDK (the contractor) sought payment of outstanding sums and Sunshine (the employer) was claiming damages for non-completion and defects in the works. In a nutshell, the contractor was late in completing his works. The employer was becoming increasingly frustrated with progress, and on 26 September 2006 wrote to the contractor requiring him to *"complete the work ... as soon as possible"*. He then wrote again on 30 September 2006 requiring the contractor to *"complete the outstanding works as a matter of urgency"*. On 24 November 2006 a letter was issued to the contractor terminating the contract."	Defective work and delays	"In her oral evidence Miss Thakar told me that the reasons she had terminated the contract in relation to the Home Works were her concerns about the incomplete works and about the impact of those works on the residents in the Home. That may be so. However, the real issue is whether Miss Thakar or Sunshine was entitled to determine the contract, and no sensible legal justification for termination was advanced."	Employer established no grounds for termination	Contractor	Wrongful Termination – Employer through termination repudiated the contract

C23	*Bedfordshire County Council v Fitzpatrick Contractors Ltd. [1998] EWHC*	1998	Contractor vs Employer	These proceedings arise from the termination of a highway maintenance contract awarded by the Bedfordshire County Council ("the Council") to Fitzpatrick Contractors Limited ("FCL"). The contract was for the period of 4 years 1995/96-1999/2000, and was to take effect from the agreed date of commencement, which was 1 June 1996. The work was to be carried out pursuant to Works Orders for the construction, maintenance and clearance of all directly maintained highways in Bedfordshire for which the Council was responsible. The Council contends that FCL repudiated the contract by wrongfully refusing to start work. FCL admits that it refused to start work on 1 June 1996. It asserts, however, that (i) it was entitled not to start work on that date and/or was prevented from doing so by reason of the Council's failure to make sufficient work available to it; (ii) in any event, it did not repudiate the contract; and (iii) the Council repudiated the contract by giving notice of termination by letter dated 13 June 1996."	Refusal to carry on the works	"I conclude, therefore, that FCL did not repudiate the contract by not taking up its obligations under the contract on 15 June and starting work 2 days later. I have reached this conclusion by considering whether it was reasonable in all the circumstances to require FCL to start work on 17 June, failing which, the contract would be terminated. Another approach to the question whether, by not starting on 17 June, FCL had committed a repudiatory breach of contract is to ask whether that breach was such as would deprive the Council of substantially the whole of the benefit which it was intended that the Council should obtain from the further performance of the contract…In my view, it is clear beyond argument that this breach did not come anywhere near to satisfying that test. I suspect that it is for this reason that Mr Harvie was so anxious to establish a fundamental implied term of trust and confidence.	Contractor did not repudiate the contract by postponing the commencement of works	Contractor	Wrongful Termination – Employer did not establish the grounds of termination and was in breach himself

C24	*Atos IT Solutions v Sapient Canada Inc.* [2018] ONCA 374	2018	Subcontractor vs Contractor	"In early 2006, Enbridge Gas Distribution Inc. ("Enbridge") embarked on a major project to replace its many legacy customer information software systems with a single new system using enterprise resource planning software on a single IT platform (the "Project"). Sapient was the successful bidder and became the Project's prime contractor. Sapient entered into a fixed price subcontract with Siemens Canada Limited ("Siemens") dated June 4, 2007, which was amended as of September 30, 2007 (collectively, the "Subcontract"). The Subcontract required Siemens to provide two services for the Project: (i) data conversion ("DC") services, which would convert data from the legacy systems into the new system's format; and (ii) application management support ("AMS") services to Enbridge personnel for a period of time after the new system went into operation. The respondent, Atos, is the corporate successor to Siemens. Since the trial judge's reasons refer to Siemens, for ease of reference I will refer to Atos as Siemens. The Project involved extensive planning and implementation. Installation of the software began in June 2007 but was not completed until September 2009, five months behind schedule. On June 29, 2009 Sapient terminated the Subcontract with Siemens for cause…"	Falling behind schedule	"The trial judge concluded that Sapient wrongfully terminated the Subcontract."	Contractor terminated in bad faith without establishing grounds of termination	Subcontractor	Wrongful Termination – Contractor established no grounds of termination

Below are the descriptive summaries of the cases mentioned earlier in table 3. The information listed hereafter are complementary to the entries in table 3.

1. ***C1: Diploma Construction Pty Ltd v Marula Pty Ltd [2009] WASCA 229***

The appellant was a contractor who entered the project with the subcontractor, the plastering entity, as the defendant. The project was commenced in April 2003 to build a 3-story multi-unit development in Joondalup. The total sum of the subcontract was $239,000 and dated back to April 3, 2003. The works of the subcontractor involved two parts: float and set, i.e., outer and inner layers.

The respondent commenced his works on April 14, 2003. However, there seemed to be many struggles on site early on. As a result, the defendant complained about having an unorganized site with rubbish and materials just lying around everywhere. It also complained about having many trades working together making it impossible for them to complete their works properly.

However, the appellant was frustrated with the progress of works, especially after having the respondent irregularly working and abandoning the site. As a result, the contractor sent a notice to the respondent terminating the contract on the basis of what is mentioned in the notice “You have failed and defaulted as required by clause 8.1 of the Sub Contract to carry out the obligations under the Sub Contract referred to in our letters of 14/7/03, 15/7/03 and 15/7/03 including: (a) your failure to perform the works: (i) in

accordance with the subcontract; (ii) in accordance with the above directions; (iii) to our entire satisfaction; (b) your failure to exercise due skill, care and diligence in the performance of the works as explained in the above mentioned notices. 2.0 You have failed to carry them out and rectify such defaults within 3 days of becoming aware of such default. 3.0 As a consequence of the above, notice is hereby given that we terminate the subcontract under Clause 8.1 and otherwise, according to our rights, without prejudice to any other rights or remedies available to us under the subcontract or otherwise."

However, the judge held that the contractor had wrongfully terminated the contract because it failed to identify the default in the notice sent to the subcontractor. Judgment held the following "1. A notice of default must bring sufficiently to the attention of the recipient what the default is alleged to be. The notice must "direct the contractor's mind to what is said to be amiss. 2. In order to be a valid notice under the present contract, all that was required was for the Appellant to inform the respondent subcontractor "of the details of the default" alleged. The appellant had to clearly direct the Respondent's attention to the alleged default with sufficient specificity that the default was capable of being readily identified by the Respondent."

2. ***C2: Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80***

In this case the claimant was the contractor, whereas the employer was the defendant. The project they signed to, was a house construction. In July 1988, the employer's architect sent a notice to the contractor accusing the contractor of not

proceeding regularly and diligently in his progress of works. The issue was is that this notice was sent by hand to the contractor asking the latter to proceed with the works as stipulated in the contract. Later in August, the employer sent a notice of termination to the contractor, also being in hand delivery.

This issue then escalated to arbitration where two questions were raised as per the Act of Arbitration, section 22(1/a): (1) the issued notices by the employer and the architect were wrongful in shape because they were invalidly sent by hand and not as stipulated in the provisions of the contract where the notice is to be sent by a registered post; and (2) the sent notices were also wrongful on the basis that the architect set his opinion only.

Judgement was held for the first matter as to whether the delivery was proper or not. The provision 25 of the contract calls for the notice to be sent by the employer or the architect through either a recorded delivery or a registered post. This clause was not followed by the employer's party although it was mandated.

As for the second matter in question, the same clause mentioned earlier directed that the architect is to specify the default in the notice to be issued. The architect was not allowed to send the notice based on his opinion but rather specify one of the defaults illustrated in that provision. As such, the architect was unable to follow the mechanism of the clauses to issue the notice.

3. *C3: A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR [1984] SC 1703*

In this case, the state, being the defendant, entered into a contract with the contractor Brij, the appellant, to perform civil road works. The contractor had submitted the lowest price and was accepted to commence the work as of July 6, 1954. In fact, the Executive Engineer in the Road Development Division sent the letter of acceptance to the contractor. Both parties agreed that the contract is to be completed in the duration of 14 months from the day of commencement that was already fixed and stated in the letter to the contractor.

The contractor started the works as stipulated and agreed and was able to complete the sub-grading of 5 miles within the road along 5 furlongs and was able to furnish the surface with cement concrete in a length of 2 miles. Later on, some disputes arose between the parties, in which consequently, the respondent terminated the contract on the basis that time is of an essence in this contract and that the contractor failed to deliver the work in the time stipulated under the contract. In the State's opinion, this contributed to a breach of the contract and the termination was therefore valid. As a result, the contractor filed a claim against the employer for damages, goodwill, prestige and loss of expected profit. However, the employer rejected such grounds claiming that the contractor had breached the contract failing to abide by the accepted time frame of works.

It was then opposed that since time was of essence, the appellant, or the contractor, failed to complete the works properly in the stipulated time under the contract (14 months). As a result, all the claims by the appellant on the grounds of loss of profit were all rejected. The appellant appealed.

However, in the High Court, upon the appeal, the employer was in breach of the contract and was not able to establish the proper grounds for his termination. Judgement was held as the following “Once is it held that the respondent was guilty of breach of works contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. One of the heads of damages under which claim is made is 'loss of expected profit in the work'. The claim under this head as canvassed before the High Court was in the amount of Rs. 4,30,314/-.”

4. *C4: Redbourn Group Ltd v Fairgate Developments Ltd [2018] EWHC 658 (TCC)*

In *Redbourn Group Ltd v Fairgate Developments Ltd*, there needed to be a decision to whether the wrongful termination appointed led to the project manager’s entitlement to recovery. Redbourn was the party set by Fairgate to hold the responsibility of a project manager constructing a residential block in Wembley. Fairgate opted to termination wrongfully due to an alleged repudiatory breach by Redbourn. The latter claimed against this argument and went to a successful arbitration. As such, Redbourne asked to recover all the fees that were to be earned had the contract not been terminated. The fees decided upon at that time included a fee that is fixed of £400,000 to be paid on 2 months. The first part of this payment was to be paid during the design and planning stage whereas the 2nd one to be paid after the actual execution. In addition, there was a project management extra fee of a percentage of 2 to 100, in ratio to the cost of building at the time when the contract was signed. However, Redbourne also purported another fee for performance, as of £250,000,

as a right if the building was ended. In conclusion, judgement held that the project manager was not to be recovered the second part of the dual payments of £200,000 as well as the 2% project management fee. In fact, the agreement did dictate that if the project turned out to be nonsensible, the employer has the right to cancel it. The Court also added that although the tender phase had not reached its end, but the performance of Redbourne was worthy the entitlement of its right.

5. *C5: Hodgkinson v K2011104122 (Pty) Ltd and another [2019]*

A contractor was hired by Hodgkinson, the claimant, to be responsible for some works of construction. The contract set forth between the parties, ensured the issuance of a notice by the employer to define the default by the contractor. Post such notice receipt and after 14 days of failure of the contractor to make good the default from the day of receiving the notice to correct, the employer can declare his right to a second notice of a 7-days' timeframe, preceding termination. Few months down the road of construction, and upon the default of the contractor, the employer (Hodgkinson) elected to terminate the contract with the contractor. The dual notices condition, as called for in the contract, were not properly practiced by the employer as for 14 days window for the contractor to correct and then 7 days to declare termination. So, the question here was the eligibility of the employer to consider the repudiation by the contractor as a contractually fair excuse to opt for termination disregarding the termination provisions as stipulated by the contract. In this manner, the court looked after the employer's righteousness in terms of his termination bases rather than the repudiation of breach of contract by the contractor especially because

the employer had referred to the terms of the termination clause in his issuance of the notices. The former declared that the 14 days-notice was not properly stated, and the employer should have revisited his notice referring back to the 14 days stated in the contract. moreover, the language used in both notices, 14 days and 7 days termination notice, was unclear because they were sent on the basis of the termination clause obligations, but the time frames are not set according to the latter.

6. *C6: Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd ibid [2013]*

In this case, Vivergo is the employer contracting Redhall to carry out mechanical and piping works of the north side of the site. The work was to start on January 4, 2010. The completion date was February 11, 2011. Then contract also called for the works to get enlarged to include the south side of the site as well. As such, the original contract was caried to meet such variations.

Reaching June 2010, it would undoubtedly clear that Redhall will not meet the duration stipulated in the contract. When the end date of the original contract was reached, and by February 2011, Vivergo issued a notice to Redhall explaining that if the latter does not proceed in reaching the end of the contract in proper period of times, the contract will be considered terminated.

The position of Vivergo is that Redhall did not try to complete the milestones and was not performing regularly and diligently under the contract provisions. As such, Vivergo

alleged that this amounts to a breach of contract by Redhall and as such, the contract is terminated lawfully.

However, judgement held that the employer had wrongfully terminated the contract and was unable to establish the proper grounds of termination. The Employer was not allowed to send the notice of termination not to bar the contractor from entering the site. The judgement came as follows “Redhall was not in repudiatory breach of the Contract on 11 March 2011 and Vivergo's letter of 11 March 2011 was not, in any event, an acceptance of that repudiation, neither was Vivergo's conduct in barring Redhall from site on the morning of Monday 14 March 2011 such an acceptance. Vivergo was accordingly in repudiatory breach of the Contract by barring Redhall from site on the morning of Monday 14 March 2011 and Vivergo's repudiatory breach was accepted by Redhall's letter of 14 March 2011 and the Contract was thereby terminated.”

7. *C7: Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited [2019] NSWCA*

In this case, TWT and Cenric entered into a contract for the works of demolition, shoring and excavation on June 20, 2017, in Pyrmont. Cenric, after taking the approval of TWT, signed a subcontract with Bundanoon who approved on paying the accumulated revenues of selling the excavated materials. On the other side, Cenric approved on paying 50% of that amount to TWT under the main contract. later, on June 30, 2017, both Cenric and TWT agreed that Cenric is to give 50% to TWT until retaining itself $3M, after which,

the amount goes directly from the subcontractor to the employer. This variation was signed on in a new agreement between the contractor and the employer.

Through an amendment to the subcontract, Cenric and Bundanoon held a meeting on February 19, 2018 and accepted the following: (1) the main contract should include the new variations in accordance with the subcontract; (2) employer is not to levy liquidated damages due to delays from the contractor until February 19, 2018, (3) Cenric, contractor, is to be given an extension of time of seven weeks and (4) amount retained from the 4th bench of the works is to be equivalent to \$1,200/m^3.

However, the ties between the parties start to weaken. The employer became in doubts concerning the contractor's slow progress of works. Consequently, TWT, employer, served a notice of default to the contractor alleging that the contractor is failing to meet his deadlines and to work diligently; Thus, the employer was entitled to terminate the contract. Later, on March 19, 2018, the employer served a termination notice and terminated the main contract with the contractor. Likewise, Bundanoon, the subcontractor, took the same decision and terminated the subcontract with Cenric. On the 23rd of March 2018, TWT asked Bundanoon to continue with carrying the works under his umbrella directly.

Cenric filed a lawsuit against the employer for wrongful termination of the main contract and claimed for damages. Judgement came in his favor where his honour held that the employer terminated the contract in bad faith to be able to reclaim the revenues of all excavated materials alone. The court stated the following "The inference that I would draw from the whole of the evidence, were it necessary to do so, is that TWT regretted the bargain it had made with Cenric on 19 February 2018. It decided, instead, to get entirely for

itself the benefit of royalties in respect of the level 4 sandstone. That was the true motivation for the show cause notice and provides the true explanation for Mr Zhang's closed mind. I do not propose to set out the detail of the evidence that supports the drawing of that inference, since it is at most a further alternative reason for concluding that the default notice was invalid. I will simply note that Cenric's written submissions include a detailed chronology referring to all the evidence on this point."

8. *C8: Questar Builders, Inc. v. CB Flooring, LLC [2009]*

Quester Builders was the contractor and the defendant in this case. The defendant entered into a subcontract with the claimant, CB flooring, to carry out the installation of carpets in a Quester building. The contract which dated back to September 29, 2005, included a provision that allows the contractor to terminate the contract even without cause against the subcontractor, or termination for convenience.

During the duration of the works, there was a conflict in determining the proper type of carpeting that was mentioned and consented in the contract as opposing to the drawings and designs attached. Both were in discrepancy to one another. Moreover, after the works had started as in December 2005, the designer responsible for the interior works altered the carpeting styles and chose a more expensive one. Before the claimant having the chance to react to this change, the defendant reached out to Creative Touch Interiors which was another company already outbid by the claimant. They were requested to rebid for the project.

On the 23rd of February 2006, the claimant reacted to that change in the design and request an extra amount of $33,566 to finish the works. On February 27, 2006, the defendant delivered to the new bidders, CTI, an unsigned contract based on their new bid. On March 3 of the same year, claimant revisited their calculations and fixed an error where their requested amount was changed to $103, 371 beyond to what the contract called for. 20 days later, the defendant terminated the contract. Defendant later mentioned that it was terminating for default by claimant, where the latter was refusing to act under the contract. Also, defendants added that even when giving no regards to the default by the claimant, it was entitled to terminate for convenience under the contract.

By transferring the case to law by the claimant, The Circuit Court for Baltimore County held that the contractor had wrongfully terminated the contract when it was not able to properly perform under the provision of the convenience termination, where is stated "CB Flooring did nothing to jeopardize timely performance of the Subcontract. While this finding is significant in assessing whether Questar acted in bad faith, we reiterate that the trial court's role in reviewing Questar's actions under the implied obligation of good faith and fair dealing is not to determine whether CB Flooring actually could or would have fulfilled its obligations, but whether Questar's determination that CB Flooring posed a risk of not fulfilling them was commercially reasonable under the circumstances."

9. *C9: Haji Abu Kassim v Tegap Construction Sdn Bhd [1981] 2 MLJ 149*

The appellant, employer, and the respondent, contractor, established a contract for constructing house shops. The employer sought to terminate the contract. When termination

took place, the project was not completed yet and the employer had failed to respond to the engineer's certificated of two payments due to the contractor. An issue occurred between the parties to the value of works certified by the architect and the number certified by the external end adopted by the contractor.

However, judgement held that the termination act by the employer was not righteous, where the contractor himself was in breach of the contract for withholding the amounts already certified by the engineer. In addition, no evidence empowers the claim by the employer that the contractor is using materials other than those accepted under the contract. The employer appealed on the grounds that the claim of $140,191 to be paid to the contractor was not righteous but the High Court rejected the appeal stating that "judge had rightly arrived at the decision he did."

10. *C10: Sim Siok Eng v Government of Malaysia [1978] 1 MLJ 15*

In 1969, the contractor, the appellant, signed a construction contract with the employer, the respondent, to construct in Sarawak the Sibu Infantry Battalion Complex. In March of that year, the contract was signed deciding on the duration of 18 months of execution. Post signing the contract, the contractor discovered that the analysis done by its head office were wrong and there was an omission of $1.3M. The basis of the error was computing expenses on only two blocks of construction rather than 4. However, the contractor did not seek the ending of the contract because he thought he could still obtain a decent amount of profit and that risking his reputation would be a high cost.

While the contractor was executing the works, he was allowed an extension of time of about 4 months with a new contract date being the 28th of December 1970. The contractor had to procure and supply proper materials and allocate labor pursuant to the 4th clause of the contract. However, the contractor found himself incapable of supplying such resources so he refereed back to the department of Public Works in Sarawak. That said, the owner accepted (orally) to supply the contractor with a number of materials and deduct its cost from future payments. Thereafter, the contractor managed to write the owner whenever he needed any sort of materials.

Water-proof plywood was one of the items to be procured by the owner, where the latter ordered 25,000 parts. Two shipments and a total of 7400 items arrived on site, where later, 3400 pieces were used. However, the remaining amount was taken away and the contractor was asked not to use them again, without giving proper reasoning. By the time the contractor was done with the exteriors in December, he had to obtain plywood to start on the internals. As a result, the contractor ceased his works on the first of April the following year, 1971.

Then, the contract was terminated pursuant to subclause 34(a/ii) on the 28th of the same month. Consequently, the owner set a new contractor in action, Alex Tong, to step in and complete the works. To this extent, two issues rise: (1) is the government, being the owner, in breach of the contract; and (2) did the owner establish the proper grounds when terminating the contract accusing the contractor for not proceeding with the works diligently under clause 34(a/ii)?

The contractor appealed against what was held by the High Court accusing him of having breached the contract on two different grounds because of not meeting the contact duration. The owner, however, was aware of his liability in obtaining the resources and that he dismissed this obligation without notifying the employer. This appeal was accepted and the judgment accordingly held the following: "(1) in this case the appellant was clearly induced to believe that certain essential materials would be supplied to him. The respondent promised to supply the materials to appellant whenever the latter asked for them and a considerable number of materials were so supplied. Relying on the promise or assurance the appellant had altered his position and his responsibilities to supply those materials had been suspended or kept in abeyance. For the respondent to reimpose the contractual provision adequate notice should be given; and (2) as the learned judge himself had held that the notice given was not reasonable it should have been held that the respondent was in breach in terminating the contract and judgment given in favor of the appellant."

11. *C11: Central Provident Fund Board v Ho Bock Kee [1980-1981] SLR 180; [1981] SGCA 4*

The contractor, respondent, and the employer, appellant, entered into a contract to construct a large building in Singapore in June 1971. Later on, some modifications took place in the contract, and both parties signed an agreement. When the contractor was executing the works, the employer terminated the contract pursuant to subclause 34(a). However, the contractor rejected this act of termination being wrongful on the basis that the mechanism followed under the termination clause mentioned was not right.

Towards the end of October 1974, the superintending officer sent a notice to the contractor, claimant, under 34(a) mentioning that the latter was unable to perform his works regularly and diligently. He added that if the mentioned default continued without remedy for another seven days, then the superintending officer will establish the right to terminate the construction contract in place. As such, a notice of termination was issued on the 2nd of November and received by the contractor. Both, the notice of default and the notice of termination were sent by hand.

The matters in this case are numerous: (1) was the superintendent allowed to send notices? (2) was the delivery of the notice proper as per the provisions of the contract? and (3) was the ground of breach mentioned in the notice of default valid?

The court held the following judgements on the issues raised: (1) the superintendent office was not allowed to send the notice, and it was the obligation of the chairman only as per subclause 34(a); (2) the notices are to be sent via a registered post in protection of the contractor. As such, he will be notified and warned that termination is to be effective if no steps to remedy prevail; and in answering the issue (1) affirms the answer of issue (3).

12. *C12: AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd [2001] SGHC 243*

Wei Sin was the main contractor responsible of constructing two different projects at Jurong West. AL Stainless Industries Pte Ltd was the subcontractor responsible for procuring, supplying and installing all works of metal. The contractor had always been late

in his payments, and as such the subcontractor claimed several times for not having received his progress payments. However, contractor intended not to pay the due sums and was paying in interims on the basis that the subcontractor was behind schedule and the works were delayed.

> Consequently, BT Tan& Company, the solicitors of AL, sent a fax on the 4th of September, on behalf of the subcontractor, asking the contractor to pay all the amounts due in full by September 9, otherwise, the contract will be terminated. In reply, Harry Elias Partnership, the solicitors of Wi Sin, the contractor, replied one day after Sep 9, on Sep 10, ensuring that the contractor is free of all alleged breaches. In addition, they made it clear in their opinion that AL, the subcontractor, is in delay of the works and the performed portions had numerous defects that they were to seek termination of the contract. As such, the subcontractor also terminated the contract.

The court found that the notice sent on behalf of the contractor was invalid because it failed to allow 3 days' notice to subcontractor as stipulated in the contract and as such, the termination by the contractor was deemed wrongful. The Court had held the following "In summary, the termination of the sub-contract for N2 by HEP on behalf of Wei Sin is not valid. On the other hand, B T Tan & Co have validly terminated the sub-contract on behalf of AL … In the circumstances, I find that Wei Sin was also in repudiatory breach of contract for N6 in withholding payment of Progress Claim No 4 and also in respect of HEP's invalid notice. The repudiation has been accepted."

13. *C13: Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd [2005] SGHC 227*

In this case, the contractor is the defendant and the plaintiff is the subcontractor. The contractor entered a subcontract with the subcontractor through a letter on July 30, 2004, with the contract's price being a lump sum of 543,000. Throughout the course of work, the subcontractor alleged that the contractor is not certifying the payments due to his ends, especially payment certificates numbered 2 and 3. As a result, the subcontractor decided to terminate the contract on the basis of having the contractor committed a repudiatory breach under the contract. consequently, on Jan 10, 2005, the subcontractor wholly suspended the works and abandoned the site.

On the other side, the contractor said that when abandoning the works, the subcontractor has repudiated the breach and that the contractor was accepting such repudiation. As a matter of fact, the contractor added that the subcontractor himself was in breach of the subcontract on the basis of the following (1) failing to carry out the works diligently and with due expedition, (2) failing to have a project manager who was considered 'competent', and (3) failing to make good the defective works.

The court held that the subcontract was terminated in bad law by the subcontractor, and that the latter was liable for abandoning the works. That said, the court held that: "(a) the Plaintiff had wrongfully terminated the subcontract; (b) the value of work done by the Plaintiff up to the date of termination was $130,522.87 and after deducting therefrom, the 1 st Progress Payment of $20,947.50, the sum owed to the Plaintiff for this was $109,575.37; (i) Cost & Expense to Complete the Project: $768,290.51 (ii) Loss of Profit (5% of Main

Contract Sum): $ 28,600.00 Subtotal: $796,890.51 (iii) Less Value of Subcontract works not carried out by Defendant: ($419,092.50) Total: $377,798.01 (c) the Defendant succeeded in its counterclaim for having to rectify the Plaintiff's defective works, taking over the Plaintiff's works and finishing the project by appointing other subcontractors, thereby suffering loss and damage."

14. ***C14: Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261***

The subcontractor, the plaintiff, entered with the contractor, the defendant, a contract to complete a project of road works. The contractor's reflection was to obtain 2% of the total payments due for the subcontractor for works done, whereas the latter takes 98% of the same amount. However, the contractor decided to terminate the contract and thus sent a notice to the subcontractor, on the basis that the subcontractor is not progressing in his work diligently.

As such, the court held that the contractor was not able to establish the proper grounds of termination. Although the contractor might have established some grounds of his basis, yet the circumstances of sending the notice of termination were deemed unreasonable. However, the contractor himself was in breach of contract for failing to pay his subcontractor his amounts due of 98% of all certified payments.

15. *C15: Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others [2008] SGHC 201*

In this project, the defendant was the nominated subcontractor by the main contractor. Compact Metal Industries was a domestic subcontractor, and the claimant, under the nominated subcontractor. Under this subcontract, the claimant was to carry out the works of cladding. However, many disputes arose between the parties leading to the termination of the subcontract by the defendant.

Defendant's position is that the claimant was in delay of the project and that its work was defective. Even when the new team of Compact joined, when Enersave hoped that progressing would improve, delays still prevailed. They had submitted two revised schedules as per the defendant's requirement but failed to meet any of them. As such, Enersave's claim is that Compact had breached clauses 17.1.2 and 17.1.3 failing to proceed with the works regularly and diligently. As a result, termination was justified.

On the other side, Compact claimed for losses and damages due to wrongful termination by the defendant. In its claim, Compact ensures that the defendant has breached the subcontract in the following provisions (1) failed to certify the amounts due to the claimant on a monthly basis, (2) failed to regularly pay the amounts for work completed in terms of the claims submitted, (3) failed to pay the full sums of the completed and certified works under the main contract and as such (4) had wrongfully terminated the contract.

Court held judgement in favor of the claimant on the basis of having the defendant breached and thus wrongfully terminated the contract. Judge concluded stating "(a) Enersave had breached the Payment Terms in the Sub-contract and the Settlement

Agreement by consistently under-certifying and under-paying Compact throughout the Subcontract Works up to the date of purported termination on 23 March 2006; and (b) Enersave had wrongfully terminated the Sub-contract on 23 March 2006."

16. *C16: Goh Kian Swee v Keng Seng Builders (Pte) Ltd Suit No 9126 of 1984*

Contractor was the defendant entering a building contract with the owner, YSL, on the obligation to build a house of a budgeted amount of $312,500. The contract mentioned the end date to be on May 2nd, 1980. The subcontractor, the plaintiff, had the obligation to carry out the works of a lumpsum amount of $260,000 with a 5% deduction commission to be paid to the contractor. Contractor was supposed to pay his sub every month on the basis of 'assessment' to be made by the architect who is in charge of evaluating the work done. During the first 8 months, the contractor was regularly paying the subcontractor with an amount of $10,000 deducted and paid to architect. However, after the 8 months, the contractor stopped paying the decided-on progress payments but rather different payment sent diversely. Later in August 1980, the contractor decided to exercise termination and sent a notice to the subcontractor alleging that the latter is being 'tardy' in progressing in the works under the contract.

The court held that the contractor was not able to establish the proper grounds of termination and was in breach of contract for not paying his subcontractor. The subcontractor then claimed for an amount of $250,952 for the amounts of work and materials that had already been supplied. Consequently, the contractor appealed the sum of

$35,088.35 as a value being overpaid and a compensation of liquidated damages of amount $6,960 paid to YSL by the contractor due to the alleged breach by the subcontractor.

As such, the court held the following: " awarding P S$55,902.40: (1) it was only after that date that the state of progress worsened; (2) it has not been established that the signature on the supplemental agreement was forged; (3) P was still there and was involved in the construction works; (4) the S$10,000 deduction from the progress payments were made with P's consent and therefore cannot be recovered; (5) on the evidence, it is not possible to pinpoint what part of the delay was caused or attributable to P. The counterclaim for an indemnity in respect of the payment of liquidated damages therefore fails; (6) there is no evidence of tardiness on the part of P for the first six months; the evidence that D on 8 August 1980 terminated the subcontract and ejected P from the work site is not accepted; D has also not adduced evidence of any mistake in respect of any payment made by them to P."

17. *C17: Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd [2001] SGHC 68*

In this case, the subcontractor was the claimant and the contractor was the defendant. Both parties entered the contract so that the subcontractor carries the works of block walls, interior and exterior plastering, tiling and other various works. The contract was established in July 1998. As alleged by the contractor, termination, in January 2000, was sought from his end due to the subcontractor having defective works and incurred delays.

Nakano argued that it had established the grounds of termination when the claimant was in default. As such, it went to claim different amounts from the claimant due to having defective work, delays and the obligation to employ alternative contractors to complete their work. However, Forest's position was that the termination was wrongful and as a result, it was unable to earn the profit expected from the work that was not yet completed.

Court held that the contractor did not establish the proper grounds of termination and that the subcontract was wrongfully terminated. The subcontractor, Forest, was thereafter entitled to the payment of the remaining of the works completed and an amount for anticipated loss of profit. Judgement came as the following "In respect of Forests claim, I have found that it is entitled to recover $1,670,177.96 as the balance due in respect of the works performed by it and the sum of $7,264.24 as damages for wrongful termination. As against this, I have found that Nakano is entitled to counterclaim the sum of $734,450 in respect of the costs of rectifying the defective plaster works. This must be set-off against the amount of Forests claim. Forest is therefore entitled to $942,992.20." However, due to having some defective amounts of work, judgement held the following ". As regards costs, although Forest has succeeded on its claim, it has lost on one major issue ie that relating to defective works and I think that there should be some adjustment in the costs order to reflect that. I will therefore hear the parties on costs."

18. *C18: Hounslow LBC v Twickenham Garden Developments Ltd [1971] Ch 233*

Hounslow LBC, the plaintiff, signed a contract with the contractor, being the defendant, to carry out the works of constructing a number of dwellings. The contractor

was granted site possession on a duration of 4 years. While carrying with the works, the architect of the council was dissatisfied with the progress of works and as such, the employer took the decision to terminate the contract. however, the contractor decided alleged that such termination is invalid in their perspective, and as such, carried on with their works under the contract. consequently, the employer requested to be granted the possession to his site.

The contractor claimed that they obtained a license allowing them to stay on site and that this license was secondary to how the contract was established. Moreover, contractor declared that the termination in those terms was wrongfully terminated under the provisions of natural justice and were not given the opportunity to discuss it.

Likewise, the court found that the architect is not allowed to act in relation with what the natural principles call for. On the contrary, the architect was biased in his judgements and actions. The court, namely Judge Megarry J., looked into the whether the licensee when in his normal cooperation and occupation of the site may or may not have the backing of the laws against trespass. The judge held "in recent years it has been established that a person who has no more than a license may yet have possession of the land…The contractor is in de facto control of the site, and whether or not that control amounts in law to possession, the injunction would in effect expel the contractor from the site and enable the borough to re-assert its rights of ownership… I do not think that I have to decide these or a number of other matters relating to possession. First, I am not at all sure that the matter is determined by the language of the contract. It is in a standard form [containing R.I.B.A. conditions] and may be used in a wide variety of circumstances. In some the building

owner may be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site. Second, in recent years it has become established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily denied to a licensee."

19. ***C19: Malayan Flour Mills Sdn Bhd v Raja Lope & Tan Co & Anor (1998)***

In this case, the claimant was the employer and the contractor was the respondent. Both parties entered into a contract for the contractor performs certain building obligations. In April 1989, the engineer sent a letter to the contractor informing the latter about his unacceptable performance. This letter was then followed by 2 other letters in June and July asking the contractor to expedite his progress to meet his target dues. However, on July 28, the engineer sent a pursuant to clause 63 that the contractor is failing to perform his job under the obligations of the contract. on the beginning of August, the employer wrote to the contractor that the contract has been terminated.

The arbitrator held that the notice of termination send was still premature. He also held that the employer has exercised his rights under the contract and as such, the employer cannot refer back to common law to seek a termination correction. However, the employer was dissatisfied with this result mentioning that the arbitrator has been in misconduct.

On the other side, the court held that the engineer erred when he sent the letter in June 26 assuming that the contractor is 9.5 weeks late, and that the contractor was still on schedule during that period. As such, the reasoning becomes is that the letter sent was premature and early sent on the basis of faulty evidence.

20. *C20: Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd [2013] EWCA Civ 577*

Telford Homes was a developer of properties who bought a parcel to build four buildings A through D in South London. Ampurius was the investor who signed a lease agreement with TH. Later, during construction, TH was behind schedule in blocks C and D, and due to consequent funding difficulties, he stopped working on A and B. The latter also declared that he cannot re-establish work progress on A and B unless funding becomes available. However, Ampurius issued, after few weeks of recommencing the work, a notice of termination for the developer's repudiation of contract. On the other hand, judgement acknowledged that the breach was of the remedy-available nature and was not to be considered a factor of initiating termination, and as such, the investor's right to terminate was not yet obtained. Lord Justice Lewison studied the actions taken by both parties between the time to have been considered in breach and the termination claim. Here, two issues prevail and should be considered, harming the beneficial aspect of the contract and frustrating the contract. however, Lord Justice held the TH's delay did not stand as enough for repudiation claim. That been said, the investor's termination filing was the one to be considered as a repudiation of contract. The court's ruling regarding the delay damages was set as a commercial aspect as per

the following “it seems to me that (absent any attempt to make time of the essence) delay, even with its attendant uncertainties, will only become a repudiatory breach if and when the delay is so prolonged as to frustrate the contract.” In addition, the fact that the developer recommenced the work when the investor initiated termination claim, deprived the latter from his right to acknowledge that the work was interrupted indeterminately.

21. *C21: Brani Readymixed Pte Ltd v Yee Hong Pte Ltd and another appeal [1995]*

Suppliers of ready mix, suppliers, were the plaintiffs and the contractor was the defendant. In September 1990, the contractor sat to an agreement with the plaintiffs to supply concrete for a service building construction and the terminal of Brani. In the agreement, clause (13) required the defendant to prepare a schedule for casting for the project and requires a notice to be sent 24 hours prior to any order exceeding 50 m^3. They also decided that when the supplier fail to deliver even when notices properly, the contractor had the right to get the supply elsewhere and the plaintiff has to buy the difference in the price.

As a result, the supplier sent another letter to the contractor asking for the schedule of works and for all the payment of the delivered supplies. The supplier followed this by a time bar of 3 days for action, otherwise they will treat the contract as if had been terminated by the contractor. However, the contractor replied ensuring his right under clause (13). The contractor failed to pay the due amounts in time so the supplier upheld the claim for this and for damages for breaching the contract.

The schedule of works was not submitted by the contractor at all. In the duration between January and April. The contractor claimed that the supplies were unbalanced or never reached, yet it still ordered from the plaintiff. On the 6th of May, one order of 70 m3 was ordered but never received. As a result, the contractor referred back to the contract, clause (13), and sent a notice to the supplier about his intention to seek the supply from a different source. The other supply was one with interest to the contractor, called Rite-mix Pte Ltd. Several orders were made and delivered between the defendant and the plaintiff later on. However, the contractor stopped ordering from the plaintiff since May 11, bearing in mind that he had already signed an agreement with Rite-mix early in April. The contractor then sent a letter to claim that it was the only choice to seek other sources and that the supplier has to bear the cost difference.

Judgement then held in assertion to the plaintiffs stating that "(1) the plaintiffs did not repudiate the contract either by their letter of 30 May or that of 7 June 1991. Instead, the evidence supported the conclusion that the defendants had evinced an intention not to be bound by the contract and that this repudiation was accepted by the plaintiffs in their letter of 7 June 1991; (2) the failure of the defendants to provide the casting schedule did not amount to a repudiation of the contract. As for payment of the demanded sum, mere failure or delay in making payment per se would not amount to a repudiation. However, the defendants here were not merely stalling for time to make payment to the plaintiffs, they did not intend to pay the plaintiffs at all and perform the contract; (3) the trial judge's assessment of the quantum of damages was correct and accordingly judgment was entered

for the plaintiffs in the amount so assessed; (4) as the defendants themselves were in breach of contract, the counterclaim against the plaintiffs failed."

22. *C22: HDK Ltd (t/a Unique Home) v Sunshine Ventures Ltd & Ors [2009] EWHC 2866 (QB)*

In this case, the issue was determining whether the contractor, being the defendant, had been in breach in terms of the contract provisions, or whether the termination exercised by the employer, the claimant, was wrongful with no grounds or reasoning whatsoever. In the facts, the contractor entered into an agreement with the employer to construct three different works at different properties owned by the employer.

The employer was in frustration with the performance of the contractor, and, as such, sent a letter dating September 26, 2006 asking the contractor to "complete the work … as soon as possible". On September 30 of the same year, the employer wrote again to the contractor stating the following "complete the outstanding works as a matter of urgency". With no alleged compliance from the contractor, the employer decided to terminate the contract on terms of having the contractor was having defective works and was late in delivery. Consequently, the contractor claimed against the employer's alleged grounds, opposingly, the employer asked for losses that had been associated with the contract getting terminated.

Judgement was held that the dates of completion were already waived by the contractor due to the variations of the works, and the evidence was the continuous

payments offered by the employer beyond the original duration of works. Moreover, when the employer urged the contractor to finish with the works with expedition, the letter did not specify that time is of an essence and as such failure to do so is not a failure as per the judge. And for the defects claim, the judge found that the quantum of minor defects do not form a major defect counting to a breach under the contract. that said, the judge held that the contractor was wrongfully terminated stating the following "In her oral evidence Miss Thakar told me that the reasons she had terminated the contract in relation to the Home-works were her concerns about the incomplete works and about the impact of those works on the residents in the Home. That may be so. However, the real issue is whether Miss Thakar or Sunshine was entitled to determine the contract, and no sensible legal justification for termination was advanced."

23. *C23: Bedfordshire County Council v Fitzpatrick Contractors Ltd. [1998] EWHC*

The project was for the maintenance of a highway by the employers to the contractor, Fitz. The duration of the period was set to be for four years starting 1996 and ending in 2000. The date of commencement in which the contract is to be enforced was the 1st of June 1996. The work was mandated to be pursuant to what is accepted by the council in Bedforshire mainly relative to the Works Orders for construction, maintenance and clearance.

Later, the employer sent the contractor a notice explaining his intent to terminate the contract because the contractor failed to commence with the works in due time. The contractor, however, failed to start the works on the accepted date alleging the following:

(1) the council failed to permit and allow for sufficient works to be done raising the matter to a prevention by the council; (2) it did not cause the contract to be repudiated; and (3) the council is in repudiation of the provisions of the contract having sent the notice of termination with no proper grounds or reasoning.

The court held that the employer was unable to establish any grounds of termination and thus the termination notice was deemed invalid stating the following on the matters issued "FCL did not repudiate the contract by not taking up its obligations under the contract on 15 June and starting work 2 days later. I have reached this conclusion by considering whether it was reasonable in all the circumstances to require FCL to start work on 17 June, failing which, the contract would be terminated. Another approach to the question whether, by not starting on 17 June, FCL had committed a repudiatory breach of contract is to ask whether that breach was such as would deprive the Council of substantially the whole of the benefit which it was intended that the Council should obtain from the further performance of the contract…In my view, it is clear beyond argument that this breach did not come anywhere near to satisfying that test. I suspect that it is for this reason that Mr. Harvie was so anxious to establish a fundamental implied term of trust and confidence."

24. *C24: Atos IT Solutions v Sapient Canada Inc. [2018] ONCA 374*

A conflict had risen between Sapient Canada, the contractor responsible for IT and their subcontractor Siemens Ltd who preceded that work of Atos, the claimant. The subcontract signed between both parties was with the obligation that the subcontractor

provides service in terms of data conversion and application management systems. The project was complicated and needed proper planning. Works began in June 2007 but were delayed till June 2009. As such, the contractor sought termination for having the subcontract fall behind schedule.

The judge of trial concluded that both parties were in breach in terms of the provisions of the subcontract. Sapient recovered for their damages in an amount of around 750 thousand of dollars whereas Atos was granted more than 6 million in dollars due to Sapient's wrongful termination. Although there was a limitation in the clause calling for the liabilities did not mention "loss of profits", more than half the reimbursement of Atos was due to loss of profits. On those grounds, Sapient appealed such awarding of damages.

The Court of Appeal in Ontario assured that the principle incorporating "minimum performance", even though there appeared to have been bad conduct by Sapient, is still applicable where the damages should be divided according to levels of breaches of contract by their parties and the corresponding burdens. The damages of Siemens where then re-evaluated the claim of damages and concluded with a reduction of 1.4 million of dollars.

C. Analysis of Case Law Review

In the following section, the cases will be analyzed in several areas: alleged grounds of termination, reasons of wrongful termination and the damages emanating due to this process. One more thing to mention is that the spectrum of cases chosen covered different types of participants. Table 4 states the parties to termination in all the mentioned cases.

Table 4 Parties to Termination of Construction Contract

Case no.	Employer	Contractor	Subcontractor	Project Manager	Supplier
C1		✓	✓		
C2	✓	✓			
C3	✓	✓			
C4	✓			✓	
C5	✓	✓			
C6	✓	✓			
C7	✓	✓			
C8		✓	✓		
C9	✓	✓			
C10	✓	✓			
C11	✓	✓			
C12		✓	✓		
C13		✓	✓		
C14		✓	✓		
C15		✓	✓		
C16		✓	✓		
C17		✓	✓		
C18	✓	✓			
C19	✓	✓			
C20	✓	✓			
C21		✓			✓
C22	✓	✓			
C23	✓	✓			
C24		✓	✓		

1. *Alleged Grounds of Termination*

The provisions of any construction contract usually give the right to the parties to exercise termination due to a rising situation or a defined occurrence. Most of the times, such circumstances deal with specified breaches of contract by the defaulting party. As such, the party to terminate the contract must be fully aware of the grounds of termination it is referring to under the contract to obtain the rightful or lawful process of termination. As analyzed in the previous cases, table 5 shows the different grounds for termination alleged

by the terminating party to defend its decision. Such grounds were numerous and might be common in a number of cases. For instance, failure to perform diligently, having delays in payments or failure to honour the engineer's payment certificate, suspension of works, failure to remedy defects, failure to adhere to notices, etc.

Table 5 Alleged Grounds of Termination

Case no.	Non-Compliance with Notices	Defective/ Poor Work	Delays	Not Performing Diligently	Not Following Engineer's Instructions	Site Possession	Not Supplying Resources	Delay in Payment	Suspension/ Abandoning Works	Hindrance or Prevention	Use of Inferior Materials
C1	✓				✓						
C2	✓			✓							
C3			✓								
C4		✓									
C5	✓										
C6				✓							
C7			✓	✓							
C8				✓							
C9								✓			✓
C10							✓		✓		
C11	✓			✓							
C12								✓			
C13	✓	✓		✓				✓			
C14				✓				✓			
C15								✓			
C16		✓						✓			
C17		✓	✓								
C18		✓				✓					
C19	✓		✓								
C20		✓	✓						✓		
C21				✓				✓			
C22		✓	✓								
C23										✓	
C24			✓								

Like any other law or contract, the decision to terminate is not an easy decision, and should be exercised with utmost care and after thorough consultation of the focal people. When establishing the right to terminate, there should be given cautions to possible outcomes and ramifications. Terminating the contract because of a 'breach' relates to either primarily rupturing one of the terms of that contract, or by preventing the damaged party from having its full rights under the contract.

When surfing the case law databases, numerous cases illustrate the different grounding to termination decision by either owner or general contractor. Hence, such causes can be summarized as follows, in reference to each case examined:

- Owner fails to pay, *Haji Abu Kassim v Tegap Construction SdnBhd and Lep Air Ser vices Ltd v Rolloswin*
- Suspending the work, *Cheok Hock Beng v Lim Thiam Siong*
- Failure to grant possession of site, *Attorney General of Singapore v Wong Wai Cheng Trading and Union Contractors*
- Prevention of work, *William Cory & Son Ltd v City of London Corporation and Pembinaan LCL Sdn Bhd v SK Styrofoam Sdn Bhd*
- Work defects, *DCMD Museum Associates v Shademaker (M) SdnBhd, Malayan Flour Mills Sdn Bhd v Raja Lope & Tan Co & Anor, and Hoenig v Issaacs*.

The right to terminate the contract upon any fundamental breach by any of the parties is a given in almost all construction contracts. However, in *Bentsen v Taylor Sons & Co*, the right to terminate under common law was not denoted, but the argument was to

whether the language thereafter indicated a warranty, condition or innominate term where the judge stated that “There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances and then making up one’s mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages or as a condition precedent by the failure to perform which the other party is relieved of his liability.” In other cases where there is a verbatim clause that calls for termination under the contract, breaches of contract then lead to automatic termination as in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*. Therefore, a termination decision must be early set as a contract condition, or the necessity to have huge losses as condition precedent to such act as per *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*. In general, the contractual term “condition” ensures that the contract would not have been signed without ‘promising’ to fulfill such obligations under the contract, *Tramways Advertising Pty Limited v Luna Park (NSW) Pty Ltd*. Under common law, the right to terminate prevails only when it is not otherwise prevented plainly under the contract.

When talking about repudiatory breaches of construction contracts, it means breaches that reach the origin of the contract, preventing the other party from collecting their full benefits of the contract [Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd]. Surahyo (2017) explains that if a contractor regularly does not comply with the consultant’s instructions to make good his defects, then he is breaching the contract on the fundamental level. The judgement in R.F.M. Electric Ltd. v. the University of British

Columbia and Martina Enterprises held that "R.F.M. had failed repeatedly to comply with the specifications and to comply with the electrical General Contractor/Consultant's directions. The court concluded that such non-compliance constituted a fundamental breach of the contract."

In general, common law recognizes that termination can be the result of a repudiation of contract even if this repudiation was not evident or was not brought up at the date of termination. An exception to this showed in Heisler v Anglo Dal Ltd. The result was that a failure or a defect, if brought at a time where they can still be remedied, cannot be considered to be a full basis for claiming termination. In practice of this exception, in C&S Associates Ltd v Enterprise Insurance Company Plc, C&S explained that their improper performance was an issue brought at the time of termination claim by Enterprise and when it was considered to still be curable, and thus, the latter cannot depend on it as basis for termination. However, this argument was rejected, acknowledging that the exception is to be made when the breach was not yet done and could be treated beforehand, whereas in this case, C&S was already in breach. The judge added that in the prior case of Heisler, the stipulation could be argued to be "anticipatory breaches or, to the extent that this is different to situations where if the point had been taken, steps could have been taken to avoid the other party being in breach altogether, either by giving an opportunity to perform its obligations in time or by enabling it to perform in some other valid way.

2. *Reasons of Wrongful Termination*

Whether due to claims or disputes, construction projects in many times face the destination of a termination or suspension decision. Such decision should always be taken with utmost care and following protocols and proper proceedings (Calvey, 2005). For instance, in Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd, judgement held the exercised termination of the employer as wrongful in reference to 25.1 of the construction contract, because it did not follow proper procedures of termination. Clause 25.1 stated that a notice was to be given by a post of registry or a delivery that is properly recorded. Table 6 states the reason of termination by the terminating party and why the termination in question was deemed wrongful.

Table 6 Comparison Between Alleged Grounds and Reasons of Wrongful Termination

Case no.	Terminating Party	Against	Alleged Grounds of Termination (terminating party)	Reason of Wrongful Termination (terminating party)
C1	Contractor	Subcontractor	Failed to follow the instruction of work	Failed to specify the default in the notice delivered
C2	Employer	Contractor	Not proceeding diligently	Not mentioning the default in the notice and sending it by hand
C3	Employer	Contractor	Failure to meet the contract duration	Failing to establish the grounds of termination for convenience
C4	Employer	Project Manager	Work to be remedied	Failing to establish the grounds of termination
C5	Employer	Contractor	Failure to remedy defects	Failing to follow the notice mechanism
C6	Employer	Contractor	Failing to submit program of works	Expelling the contractor from site and not following notice provisions
C7	Employer	Contractor	Slow progress of works	Failing to establish the grounds of termination and thus terminating in bad faith
C8	Contractor	Subcontractor	Convenience	Failing to establish the grounds of termination for convenience in good faith
C9	Employer	Contractor	Use of inferior goods	Not honoring payments to the contractor
C10	Employer	Contractor	Suspension of works	Failing to supply resources
C11	Employer	Contractor	Not proceeding diligently	Failing to send the notice by the right end and sending it by hand
C12	Contractor	Subcontractor	Defects in work and incurring delays	Failing to honor payments and not following notice mechanism
C13	Subcontractor	Contractor	Failing to certify payments	Abandoning the works
C14	Contractor	Subcontractor	Not proceeding diligently	Failing to pay the subcontractor his amounts due
C15	Nominated Subcontractor	Domestic Subcontractor	Delays and insufficient manpower	Having improper payments
C16	Contractor	Subcontractor	Work is tardy	Failing to pay the subcontractor his amounts due
C17	Contractor	Subcontractor	Progress is slow and defective	Contractor did not establish the grounds of termination
C18	Employer	Contractor	Dissatisfaction of progress of works	Failing to allow possession to site
C19	Employer	Contractor	Contractor is behind schedule	Notice sent was premature
C20	Employer	Contractor	Contractor abandoned the works	Employer did not establish the grounds of termination
C21	Contractor	Supplier	Supplier failed to deliver the orders	Failing to send the schedule of works and failing to settle payments
C22	Employer	Contractor	Defective work and delay in progress	Employer did not establish the grounds of termination
C23	Employer	Contractor	Failing to commence with the works	Failing to permit the works
C24	Contractor	Subcontractor	Failing to meet the schedule of works	Failing to establish grounds for termination, terminating in bad faith

Table 7 highlights and categorizes four reasons due to which the termination was wrongful in the cases mentioned earlier (1) Not establishing grounds of termination; (2) Error in notices; (3) Implication of bad faith and (4) Breach by Terminating party.

Table 7 Cases: Reasons of Wrongful Termination

Case no.	(1) Unjustifiable Grounds		(2) Notices						(3) Acting in Bad Faith	(4) Breach by Terminating Party
	Convenience for Terminating Party	Default of Terminated Party	Time Bars	Unclear Content	Default not Specified	Method of Delivery	Premature Default Notice	Party Issuing Notice		
C1				✓						
C2		✓			✓	✓				
C3	✓									
C4		✓								
C5			✓							
C6										✓
C7		✓							✓	
C8	✓								✓	
C9										✓
C10										✓
C11						✓		✓		
C12			✓							✓
C13										✓
C14		✓			✓					✓
C15										✓
C16		✓								✓
C17		✓								
C18										✓
C19							✓			
C20		✓								
C21		✓								✓
C22		✓								
C23		✓							✓	✓
C24		✓							✓	

a. Not Establishing Grounds of Termination

This means that the party terminating the contract was unable to find the proper reasoning to terminate the contract. The case built by this party was not based on the suitable provisions or what the contract calls for. When the employer terminates on wrongful grounds, or could not establish such grounds, this might be due to two reasons: either the other party was not guilty of the default mentioned by the terminating party, or the terminating party was not able to prove solid grounds of their convenience termination and could lead to implying bad faith in the way the contract is to be performed or terminated.

To correctly justify the termination action, the party to termination should be able to check the provisions of the contract whenever adopting to such act. This is important for the mentioned party to avoid falling into the trap of repudiatory breaches within the contract [Diploma Construction Pty Ltd v Marula Pty Ltd [2009]]. Likewise, the judge of Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] apprehended that the act of termination implemented by the employer was not justifiable and based on wrongful blocks in regard to clause 25 part (1) of the contract specifying that a notice should be sent in compliance with a post with registry or delivery records. As such, it is imperative that the owner when terminating on wrongful basis, is to be held accountable for the losses faced by the contractor in regard to prospective profits.

In Obrascon Huarte Lain (OHL) SA v Her Majesty's Attorney General for Gibraltar, the Government of Gibraltar, the employer, filed a termination case due to unanticipated ground conditions. Obrascon Huarte Lain SA was the party responsible for

the design and construction of the road connecting the boundaries at the Gibraltar Airport in addition to a tunnel based at the end of the eastern runway. In fact, this construction project was signed under a contract in turn construed under the FIDIC Yellow Book Conditions. In terms of the schedule, the project was behind reaching early January 2011 for OHL to declare suspension of works and suggesting allowing redesigning the tunnel. This came due to heavy water contamination that was even unforeseen. During July of the same year, a notice of termination was issued by GoG against OHL because of the latter's nonperformance in general and in agreement with what the notice of correct calls for. In the perspective of OHL, GoG has repudiated the contract.

The question back then was whether the termination by the employer legal and accurate or not. When referred to the Court of Appeal, the matter of claiming for redesigning by the contractor was addressed. As such, the latter declared that "it is clear that neither GoG nor the Engineer made an election which committed them to adopting the re-design and rejecting the original design of the tunnel. The Engineer made it plain that the original design was perfectly satisfactory and capable of being constructed without any risk to health or safety. The Engineer was simply considering the re-design as a modification put forward by OHL." Then, FIDIC was revisited, specifically to subclause 15.2, parts (b) and (c-i) directly related to termination. Generally, the contractor is considered to proceed with his works with "due expedition" and avoiding any delays. However, the Court of Appeal mentioned that this matter is not directly related to all the works under the umbrella of obligations of the contractor, but only the tasks entitled "critical". Moreover, the Court looked at the reasonability of the excuse by the contractor and whether or not it serves as

mentioned by 15.2 part (c), after showing his failure to proceed with the works. Following this specific point, the contractor's appeal to the employer's termination was unrealistic and without a proper reasoning. Likewise, the employer was given the righteousness of termination of the construction contract.

It is keen to state that Mr. Justice Akenhead, in the Court of Appeal, was addressing the sensitivity of the termination decision, as well as its consequences. He clearly highlighted that such manner should be dealt with, with utmost care and as such, the parties shall act in a commercially sensible manner. Simply because, not all failures or defaults from either party can give the right to the damaged one to file a termination claim. The ideology of correcting any defaults by the breaching party should always prevail above any termination decision, especially when the contract calls for it. That been said, we could refer back to what Akenhead stated, "The parties cannot [sic.] sensibly have thought (objectively) that a trivial contractual failure in itself could lead to contractual termination." He also concluded that either party cannot consider trivial failures in the contractual aspect as leading to contractual termination. In addition, it was added that the court did not act in expedited manner as he considered the court as has "been slow to regard non-compliance with certain termination formalities including service at the "wrong" address as ineffective, provided that the notice has actually been served on responsible officers of the recipient."

b. Error in Notices

The case of Holland v Wiltshire shows that almost all contracts to construction projects contain what builds the proper mechanism to a termination proceeding as well as

the actions to be taken in order to achieve a righteous process under the contract and the prevailing law. Undoubtedly, following termination steps under the construction contract is the assertive path for the terminating party to undergo to attain prospective results. For instance, notices are considered essential in such a process, in multiple forms and numbers, prior to a phase allowing the party in default to make good what is considered to be a breach under the contract; only then, termination becomes a valid operation [Hyundai Heavy Industries Co Ltd v Papadopoulos].

When we talk about notices, this means notice of default and notice of termination. Hence, the terminating party was not able to properly issue one of those notices to the other party as agreed on in the provisions of the contract. Following the analysis of the cases in the tables, one of the common reasons to wrongful termination was the improper issuance of notices that could be the result of many factors:

- Not respecting the time bars stipulated in the contract, either mentioned in the notice sent or in reference to other notices;
- Not having a clear content that drives the attention of the defaulted party to its default, and as such, will not be able to attain its right of remedying the defect if necessary;
- Not mentioning the default whatsoever in the notice, and seeking termination without having the other party aware of the grounds of termination early on;
- Not proceeding with the delivery of the notices in accordance with the mode of delivery specified in the contract (post, hand, email, etc…); or

- Not having the right person sending the notice defined. For instance, if the Project Manager is now allowed to send the notice of termination, the termination will become invalid.

One important validation of avoiding wrongful termination was illustrated by the court on Hodgkinson v K2011104122 (Pty) Ltd: Whenever a contractor is in repudiation to the terms of the contract, and if the employer established the right to terminate and opts to is, the latter should be able to follow the proper procedure stipulated in the contract. The notice to correct or remedy should be a chance to set forth making good of defaults by the contractor. The trail of termination should be properly followed by the employer so that the contractor in default do not speculate the terms of employer to the stance of termination.

In *Vinergy International (PVT) Ltd v Richmond Mercantile Limited FZC*, the latter terminated the contract without previously issuing a notice to cure to Vinergy. However, the contract ensured that any party, when breached, should be given at least 20 days as a time to correct its defaults. Richmond, on the other hand, argued that upon the breach of contract by Vinergy, and under common law, the right to terminate the contract was established. This argument was adopted by C&S Associates Ltd v Enterprise Insurance Company Plc, and as such, Vinergy did not reject the fact that the right to terminate under the common law were not prevented by the provisions of contract. However, it tried to ensure that exercising this right to terminate should be solely following the provisions of contract, and accordingly, Vinergy should have been given the right time to remedy. Judgement then held that Richmond was not in place to give the time to Vinergy to remedy. Likewise, judge advised that common principles do not ensure that any party should

manage to operate in a way to meet the requirements of the termination right under the common law.

c. Breach by Terminating Party

In this case, the terminating party was in breach of the contract itself before taking the decision to terminate the other party under the contract. whenever this is the situation, the terminating party will automatically lose its right to terminate the contract. For instance, in Sim Siok Eng vs Government of Malaysia, the employer was not able to fulfill his promise to the contractor to supply manpower and material throughout the period of construction. The employer stopped such services without notifying the contractor. As a result, the contractor suspended the works and consequently, the employer terminated. However, the employer was in no place to establish his right to terminate because he was in breach of the contract for not delivering his obligations.

The obligations within the contractual terms to both parties, and the mandating of thoroughness in regard to the contract, is illustrated in the following cases SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd and Vivergo Fuels Ltd and Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd ibid. In the mentioned cases, the employer is set to a challenge of his act of termination by the contractor. The employer's defense was on the basis of either rightful grounds of termination or repudiatory breach of the contract by the contractor. In SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd and Vivergo Fuels Ltd, the owner claimed that the delays by the contractor were numerous and the latter was not abiding by any means to lessen them. The employer also mentioned nonreporting progress

and failure to fully demobilize from the site as reasons to form the basis of repudiatory breach of contract by the contractor. However, although the intentions of noncompliance of the contractor to his obligations under the contract were vivid, the court held that such intentions did not represent full “refusal” to abide by his side of responsibilities. Moreover, it was quoted that “mere delay - even when substantial - is not necessarily to be equated with a renunciation of the defaulting party's side of the contract." Whereas in Vivergo Fuels Ltd and Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd ibid, the employer declared the breach of contract by the contractor due to the latter’s inability of attaining proper resources and in decently sufficient amounts as well as his lack of conforming to progress. However, the court did not find such affirms as adequate or enough to ensure the repudiatory breach. As such, the employer was held in repudiatory breach of the contract for not properly following the mechanisms of termination as set in the contract.

d. Acting in Bad Faith

In many construction contracts, good faith can be one of the conditions governing the relation between any two parties, be it the owner, contractor, subcontractor or engineer/architect. However, in the absence of such a clause, termination will be a term in question to whether bad faith can be a good reasoning of such action. In Monde Petroleum SA v Western Zagros Limited, there was no providing for ensuring acting in good faith. Nevertheless, judgement acknowledged that provisional good faith language does not block the right to terminate in other circumstances.

In general, English Law does not ensure acting in good faith whenever the owner wants to practice his right to terminate under the contract [Mid-Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd]. Likewise, in Monde Petroleum Sa v WesternZagros Ltd, the case illustrates that there appears to be no unilateral rule in the English Law directly indicating exercising good faith in termination. In conclusion, unless otherwise mentioned in the contract, English Law does not set forth the duty to any party to act in good faith whenever opting to termination.

Termination for convenience is becoming more common where one of the parties has the right to put the construction contract to an end upon at its convenience. Typically, the party opting to this termination is the owner. However, terminating for convenience with respect to the owner does not give him the right to terminate at any time at his ease. Some incidents showed that some of those owners went to this entitlement of clauses to end the contract with the current contractor, when later, it was deduced that he has gotten a better price from another contractor; this is considered to be a breach of the contract by the owner. This naturally falls within what is so called the “good faith” of the owner towards his contractor. In Carr v Berriman, the case was referred to the High Court. In general, the High Court has not acknowledged that the Australian Law of contracts must adhere to the good faith mentioned earlier. Though, in the case mentioned earlier, the High Court declared that the strength within the contact’s language variables neglected the possibility of the owner to switch contractors by terminating the first one. On a second note, in Edo Corp. v. Beech Aircraft Corp., the Court of Appeal acknowledged that the evidence

provided for the convenience termination by the employer was enough to show good faith in action, proper mechanisms, and therefore, valid termination.

However, in Questar Builders, Inc. v. CB Flooring, the subcontractor was able to show credible proof against the general contractor in terms of the latter's termination for convenience. The Appellate Court recognized the damages of the subcontractor expected due to termination. This reasoning came after providing that the general contractor failed to follow the proper terms of terminating his contract for convenience. The court clearly indicated that although the clauses and mechanism of termination was enforceable in this case, his intentions did not comprehend good faith.

In TSG Building Services plc v. South Anglia Housing Ltd, South Anglia Housing Ltd contracted TSG to deliver services of gas works. The first clause incorporated in the contract stated that "The [parties] shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents…and in all matters governed by the Partnering Contract they shall act reasonably and without delay." To the end of partnering matters, cooperation, fairness in work, trustworthiness and dedication to mutual goals were all part of the constituents of the clause. However, the judge did not consider such provisions as limiting to allowing for termination. So did the standard of behavior ensuring that good faith should not be a requirement to practice the right to terminate the construction contract. As such, the judge then stated that "The parties have gone as far as they wanted in expressing terms…about how they were to work together in a spirit of 'trust, fairness and mutual co-operation' and to

act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed…that either of them for no good or bad reason could terminate at any time…".

In MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt, it was clear that the Common Law has widely spread the need for good faith in construction, through the experience of Leggatt J. who was urged to incorporate the thought of good faith whenever opting to exercise termination. He insisted that "The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case. … In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organizing principle' drawn from cases of disparate kinds."

In a similar case, in Monde Petroleum SA v Westernzagros Ltd, the High Court negated the need to exercise termination explicitly in application of good faith. However, the claimant argued that the fact that construction contracts are lengthy and should be looked after with mutual goals, the good faith practices must be inevitable and should be explicitly stated. Nevertheless, the judge rejected his argument, and continued "it is clear that the mere fact that a contract is a long-term or relational one is not, of itself, sufficient to justify such an implication". Yet, the court did not apply the normal tests to show any implications of the term "good faith" within the contract, where the judge concluded that it was "impossible … to identify any facts forming part of the commercial background, or

any aspects of the relationship between the parties as set out in the [agreement] itself, which indicate that the [agreement] would lack commercial or practical coherence without the implication of a 'good faith' term." In addition, he continued that "a contractual right to terminate is a right which may be exercised irrespective of the exercising party's rights for doing so. Provided that the contractual conditions (if any) for the exercise of such a right (for example, the occurrence of an event of default) have been satisfied, the party exercising such right does not have to justify its actions." This means that only the requirements stipulated for in the contract are the ones to be fulfilled and should be judged as per his say "whether the conditions laid down in the contract have, on the true interpretation, been fulfilled". Back then, the defendant did not practice his right to terminate the construction contract based on the provisions of the contract. The claimant then took this opportunity to consider this as a breach of the contract. On the other hand, the judge disregarded his argument and acknowledged that when the employer served the notice of termination, he was following the proper mechanism, even if the notice appears to be with faults.

In Bhasin v Hrynew, termination for convenience took place based on "good faith contract performance" as per the decision taken by the Supreme Court in Canada. The court held that practicing good faith in performing under the contract should be a driving principle in the sequence of works under the common law, and that it is a mandatory act to be applied following any contract provisions. On the other hand, in Lomas v JB Firth Rixson Inc, the Court of Appeal clearly stated that termination should not be limited by any

obligations to act in good faith simply because that practice was unilateral and not an exercise with a variety of choices.

In Atos IT Solutions v Sapient Canada Inc., a conflict had risen between Sapient Canada, the contractor responsible for IT and their subcontractor Siemens Ltd who preceded that work of Atos, the claimant. The judge of trial concluded that both parties were in breach in terms of the provisions of the subcontract. Sapient recovered for their damages in an amount of around 750 thousands of dollars whereas Atos was granted more than 6 million in dollars due to Sapient's wrongful termination. Although there was a limitation in the clause calling for the liabilities did not mention "loss of profits", more than half the reimbursement of Atos was due to loss of profits. On those grounds, Sapient appealed such awarding of damages. The Court of Appeal in Ontario assured that the principle incorporating "minimum performance", even though there appeared to have been bad conduct by Sapient, is still applicable where the damages should be divided according to levels of breaches of contract by their parties and the corresponding burdens. The damages of Siemens where then re-evaluated the claim of damages and concluded with a reduction of 1.4 millions of dollars.

In Harris Corp. v. Giesting & Assoc., Inc., the court of the Eleventh Circuit accepted the terms of the manufacturer terminating for convenience. Quoting the judge "termination for convenience clauses may not be used to shield the terminating party from liability for bad faith or fraud." In conclusion, the court vividly showed that the contract's parties were excessively cultured, their provisions were monitored, and termination took place with no further expectations of bad faith.

D. Ramifications and Damages of Wrongful Termination

Termination is a decision in which many risks are tangled, and as such, should always be handled in utmost levels of care and professionalism. Before the employer decides to pursue his right and terminate the contract, he should seek all endeavors through opening the chains of communication with the other party to establish any grounds of resorting back to the contract.

Whenever a party is in breach to the contract, the innocent party will be given the right to levy damages in a means of compensation to the loss of what had been expected. Such damages or liabilities by the breaching party are grounded usually on putting the innocent party in the same beneficial position expected to reach had the contract not been terminated. As such, damages of breaching the contract through a wrongful termination will entitle the other party a monetary reimbursement to level the losses incurred. Table 8 shows the different damages that were entitled to the terminated party in the cases mentioned in the sections earlier.

Table 8 Cases: Damages Emanating from Wrongful Termination

Case no.	Terminating Party	Against	Damages/Liability
C1	Contractor	Subcontractor	Amount of work due up till termination plus interest in addition to all judges' fees
C2	Employer	Contractor	Not Available
C3	Employer	Contractor	Loss of expected profit with an interest rate of 6%
C4	Employer	Project Manager	All *the fees that were to be earned by the PM had the contract not been terminated*
C5	Employer	Contractor	Damages, interest and penalties
C6	Employer	Contractor	Loss of profit
C7	Employer	Contractor	Loss of expected profit
C8	Contractor	Subcontractor	Damages of wrongful termination and sums in regard to loss of profit

C9	Employer	Contractor	Work completed
C10	Employer	Contractor	Not Available
C11	Employer	Contractor	Not Available
C12	Contractor	Subcontractor	Pay for work done with interest thereon at 6% per annum from the date of the Writ of Summons to the date of payment
C13	Subcontractor	Contractor	Cost and expenses to complete the project, loss of profit and less value of work not carried out by contractor
C14	Contractor	Subcontractor	Not Available
C15	Nominated Subcontractor	Domestic Subcontractor	Amount of performance guarantee, retention money and damages payable for wrongful termination
C16	Contractor	Subcontractor	Amount of work done, material supplied and an additional cost for damaged against the breach of contract
C17	Contractor	Subcontractor	Remaining balance of work done and an extra amount for loss of profit
C18	Employer	Contractor	Employer was not allowed an injunction and thus the contractor was granted possession to the site.
C19	Employer	Contractor	Interest at 8% on damages from the date when such payment represented by damages ought to have been made to the date of payment
C20	Employer	Contractor	Loss of original deposit and compensating for additional losses due to the difference between the contractual price of leases and their actual price upon termination
C21	Contractor	Supplier	Damages for breach of contract and the remaining balance for the supplier
C22	Employer	Contractor	Amounts due to the contractor less the defective work and the remaining of the work (supply and installation) which was properly in progress averaged the amount of supply
C23	Employer	Contractor	Damages ‘to be assessed’ due to wrongful termination
C24	Contractor	Subcontractor	Amount of around $5M for loss of profit and damages of the subcontractor

As inferred from the analysis of the cases represented and concluded in table 8, the liabilities emanating from the termination decision, when deemed wrongful by law, are painful. The terminating party might be repaying losses of profit, interest on delayed payments, general or nominal damages due to wrongful termination, etc. Such damages could be classified as follows:

- Payment for work executed
- Payment for proven loss in terms of materials, equipment, tools, machinery, etc..

- Payment for reasonable overhead, profit and damages.
- Costs incurred due to termination.
- Cost of repair or difference in value in the case where the contractor is replaced

That said, the employer should rely on legal authorities to build up his rightful case, if any. However, the employer might favor revisiting such decision and check the availability of less costly options. What if the communication between the parties could lead to having the problems solved and the decision revoked?

Self-assessing the situation that the employer may be in, will result in a better consideration of what will happen next. Having in mind all the liabilities the employer is to handle post a wrongful termination should enforce the thoughtful process of revoking the termination decision against the lower tier. This is clearly done through an analysis of the costs of terminating the contract wrongfully vs revoking such decision and reinstating the contract in place. This contract could be a new contract or an agreement with its provisions referring back to the old one already instituted. In simpler terms, the employer can always find himself in a position where the termination act or decision is not the best option and that this process was not really thought of, and as such revoking such a conclusion will be the best opportunity.

CHAPTER V

RAMIFICATIONS OF EXERCISED/REVOKED TIERED TERMINATION DECISION

A. Preamble

Termination usually detach one of the parties to the construction contract, or both, to the rights and obligations stipulated earlier under the contract before reaching the milestones of substantial completion of the project. That said, the terminating party should be very careful to the repercussions that could be emanating like exceeding expected completion time for revenue generation, additional costs, facing number of damages, etc. This necessitates the need to reach out to all sorts of legal experts, engineers, architects, financial accountants and others for proper advice regarding such decision.

The employer might find himself seeking termination of the contract via the main contract due to the latter's breach of contract provisions. Nevertheless, even if the employer opt to revoke such decision, having it being amicably or not, many complications will prevail and it will be difficult to manage the ripple effect of this decision reaching lower tier participants such as the subcontractor.

B. Conceptualization of Possible Tiered Actions Resulting from Termination Practice

Termination is a process in which the construction contract is ended in regard to the obligations and duties of both parties. However, such action does not stand alone, and will lead to many subsequent upshots. Hence, termination is a very strict decision that must be taken with utmost care and due diligence, for it incubates extra costs and damages to multiple parties.

At times, the owner decides to end the construction contract with the general contractor due to the latter's breach of contract. Even if the owner decides to revoke the decision of exercising termination, be it cordial or not, there is a number of ramifications that is to prevail in regard to the effect on both the main contract and the subcontracts, mainly constituting the lower tier. That said, fig. 10 illustrates possible exercises by different parties to the project upon (1) termination of the main contract by the employer and (2) revoking the termination decision, if possible.

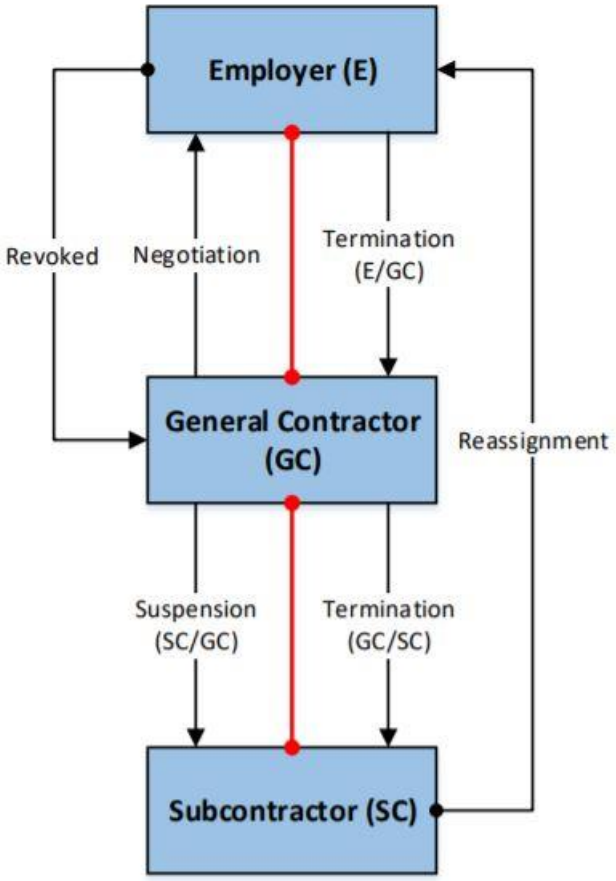

Figure 10 Conceptualization of Possible Tiered Actions Resulting from Termination Practice

The first thing to mention is that the employer and the subcontractor are not legally bound to any contractual relationship in reference to the general contract. The rights and obligations therefore stipulated under the main contract are by heart for the sole purpose of binding the general contractor, who in turn is not considered as one of the employer's personnel. In terms of the subcontracts' works, it is the duty of the general contractor in relation to the employer. Likewise, the general contractor is bound to his subcontractors with different subcontracts mentioning thereafter quality, time and cost without any regards

to any matter that can surface between the owner and the main contractor under the main contract. Note that what has been mentioned should clearly be stated and monitored by the subcontract between the general contractor and his subcontractor as well as the main contract managing the relationship between the owner and the main contractor.

Usually, in any contract, the parties pertaining to the signature of this establishment, are the ones who directly act upon their obligations. On the other hand, in construction contracts, the main contract is signed between the owner and the general contractor, who in turn, signs another contract, a subcontract, with subcontractors to perform the work estimated under the main contact. In the case where the owner terminates the main contract, he could carry the lead and assign the same subcontracts under his umbrella to recommence the work. In this case, the owner takes the place of the general contractor, with all its entitlements as to the responsibilities, right and obligations. The owner will have the right to decide on what subcontractors to continue and whom to be dismissed. As such, all the subcontracts will then be reassigned to the owner. An example to this might be that if a subcontractor is owed money by the general contractor under his subcontract, will now be owed by the owner. Note to mention is that the subcontractor does not have the right to be granted the reassignment of the work under the owner, unless the old subcontract with the general contractor calls for the right to recommence the work with the owner upon the termination of the main contract between the owner and the general contractor. If the subcontract does call for such reassignment, both the subcontractor and the main contractor will be notified.

‘Back-to-Back’ suspension and termination rights of subcontractors should not be blindly assumed even if most of the standard forms of construction contracts permit the main contractor to put the subcontract to an end immediately when notified about the termination of the main contract. If the subcontract does not allow explicitly its immediate termination upon the termination of the main contract, then this act should not inevitable especially in the Mena region where parties have a large inclination to adjust standard forms of conditions.

Most of the contracts do include the clauses allowing the suspension of works or termination of the subcontract immediately upon the termination of the main contract, as both links in figure 10 show. As such, subcontracts can either be terminated immediately or upon notification. For this to be true, the subcontract must explicitly state that the general contractor has the right to suspend or terminate the subcontract upon the termination of the main one. In many cases, the general contractor and his subcontractor decide not to file a lawsuit against the other, mainly the subcontractor facing the general contractor, in the event where the contractor is the damaged party. Otherwise, if the main contractor has breached under the contract permitting the owner to terminate the main contract and thus the subcontract gets terminated, then the subcontractor has the right to claim against the general contractor under the subcontract.

In some cases, upon the issuing of the termination notice by the employer, the contractor might open the channels of communication to negotiate that decision. In such event, the owner might revoke his termination decision and the general contractor resumes his work. In fig.10, negotiations between the owner and the contractor are assumed, and the

termination decision is revoked. However, the subcontract was already suspended, or in other cases, immediately terminated. In such events, the subcontractor might practice his right of filing a claim, if the termination notice was due to a default by the general contractor.

C. UAE Termination Dispute: Project Case Study

1. *Preamble*

In the countries where the Civil law is applied, especially when talking about countries like United Arab Emirates, Saudi Arabia, Qatar, etc.; There prevails a sequence of bindings and jurisdictions that represent the nucleus of the law itself. For example, when talking about UAE, an Islamic country in description, Shariaa' Law becomes the main source of the Civil law incubated within the system. However, like any other legal system, Civil Law has its own repercussions on the construction contract binding the two parties. Likewise, such laws define the termination process and the effects of such decision on the parties to the contract. The termination in general will lead those contracts to their end, and consequently, parties are no longer bound to their duties and responsibilities speculated earlier. On the other hand, claiming for general damages will later prevail as a righteous decision for either parties, however, their amounts and types will be relative. In Civil law, it is really important to be familiarized on how to handle threats of this process, and to be able to understand all possible outcomes.

This case demonstrates the practical level of what was early discussed. The analyses of the following case aim to demonstrate the following points:

- Acts of a contracting firm towards its subcontractor after having the main contract terminated by the owner.
- How the subcontractor managed to take measures against what happened.
- The optional actions sought by both parties, the subcontractor and the main contractor, to preserve the interests and favors of both.
- Lessons deducted in regard to a caused harm, in nature, being irrevocable.

In this case, the employer terminated the contract with the general contractor that dictated having the latter to execute a multi-tower composed of offices. On the other hand, the general contractor did not opt to terminate his subcontracts, but rather decided to hold or freeze of the works, in hopes to open the chains of communication with the owner, thus revoking the effect of termination of the main contract. In the meantime, there started a pressure of the performance guarantee by the owner, being an ordinary consequence to any termination decision, reaching the subcontractor as an intention by the general contractor to penalize the former under the subcontract.

2. *Termination under UAE Civil Law*

There are many countries that adopt civil laws like Qatar and UAE. UAE for example, which is an Islamic country, is governed by Sharia' Law which represents the source of the civil regulations. In UAE, Law consists of some articles tackling the

management of relations between different parties within the construction contract. The mentioned section is entitled [Muqawala Contract] and is subdivided into 4 subcategories:

- Articles [872, 873 & 874] define different terms and illustrates the scope of contract.
- Articles 875 through 889 show the consequences of adopting the contract of Muqawala.
- Articles 890 and 891 explain the principles of subcontracting under this contract.
- Articles 892 through 896 define the termination process and the mechanism imposed under Muqawala.

In the last subgroup, earlier mentioning termination of the contract under UAE, contains five different articles numbered 892, 893, 894, 895 and 896 and are stated as follows:

- Article 892: “A contract of Muqawala shall terminate upon the completion of the work agreed or upon the cancellation of the contract by mutual consent or by order of the court.”
- Article 893: “If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be canceled or terminated as the case may be.”
- Article 894: “If the contractor commences to perform the work and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the

expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom."

- Article 895: "A party injured by the cancellation may make a claim for compensation against the other party to the extent allowed by custom.
- Article 896: "(1) A contract of Muqawala shall terminate upon the death of the contractor if it is agreed that he should perform the work himself, or if his personal qualifications are a material consideration in the contract. (2) If the contract contains no such condition or if the personal qualifications of the contractor were not a material consideration in the contract, the employer may require that the contract be canceled if the contractor's heirs do not provide sufficient guarantees for the proper performance of the work. (3) In either event, the value of the works carried out and the expenses incurred therein shall devolve upon the estate in accordance with the conditions of the contract and the requirements of custom."

In the UAE civil code, termination considerations are mentioned in the 5th section, mainly in articles numbered 267 through 273. Article 267 states that construction contracts, when legal, are said to be compulsory and are legally terminated under one of three conditions, in the cases where:

- Both parties jointly agree on terminating the contract, as mentioned in article 268. As for Article number 270, termination takes place via a proposition offered to and accepted by the "Majlis". However, for such proceeding to be forwarded correctly, the matter of subject should be mentioned in the contract

between the parties. Even if the subject is partially mentioned thereafter in the contract, termination can be deemed acceptable to the extent cited.

- The court orders for the contract to be terminated. However, freedom of parties, under Article 271, to terminate the contract automatically upon a contract breach still prevails, bearing in mind that notice is to be issued and the measures are taken according to precedent contract provisions. On another note, Article 272 mentions that if one party defaults under the contract to fully oblige to its duties, then the other party establishes the right to notify the breaching party to fulfill its duties or termination takes place. As such, termination notice should be sent through a letter to the court. Following, the court ensures that the breaching party should oblige to the letter and fulfill its actions as per the contract immediately or postpone it to a set date. Nevertheless, the court may still issue an order of termination to cancel the contract between the parties. In addition, even if the court issues no order and in the absence of any agreements to terminate, there exists Article 247 that permits any party to reject its contractual duties under the contract in the case where the other party refused its obligations under the same contract, stating the following “In a contract, where the contractual obligations are due, each of the contracting parties will have the authority to abstain from executing his part of the obligations, should other party failed to perform theirs.”
- Prevailing law operates one of its provisions, as stated in Article 273. This Article stipulates that in the case of a force majeure, affecting the progress of work on site and rendering it impractical, the contract between the parties gets

> inevitably annulled. In Article 893, it is stated that if the performance of works or the establishment of the contract of Muqawala gets hindered by any situation, then any party has the right to request this contract to be terminated. As mentioned in the previous chapter and as per Article 872, Muqawala contract is ““a contract whereby one of the parties thereto undertakes to make a thing or to perform work in consideration which the other party undertakes to provide.” Referring back to Article 893, force majeure cases that are considered to be unforeseen, give the right to both parties, or any, to give the rise to the issue of termination. Moreover, Article 894 provides that if the contractor is rendered incapable of finishing the work regardless of the reason being his responsibility or not, then the entitlement is thereafter stated as “the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom”.

Additionally, both Articles 274 and 275 emphasize on the repercussions of termination of the contract ensuring that if the contract gets annulled, the court should ensure that both parties are to be in their original positions had the progress of works been properly continued. The central value discussed here is that compensation should be directly related to the amount of damage incurred. Any party, under the UAE Civil Law, is to be compensated for damages that is equivalent to, as stated, “harm, indeed, endured post the occurrence of an event". As for the progress actions post termination, both parties will refer back to the contract in search for any binding element related to the alteration. For

example, if the employer terminates the contract for contractor's default, then the employer won't pay the contractor until he establishes the expenses and costs of finishing the remaining works. This means that the employer won't fall in any losses upon appointing a new contractor. Likewise, the employer is to be granted the right to request any documents from the contractor on the construction procedures and to be reimbursed any values under the contract. However, if a contractor terminates for the owner's default, he then stands the right of qualification of harms under the contract and his expenses.

Almost all contract running under the UAE law refer to the obligation of acting in good faith where it is evident in the values of equity and fairness under the law of Shariaa'. As such, the 246th Article of the UAE Civil Code ensures that "a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith." Whether an act is considered to be as in bad faith or not, the court refers in its judgement to Article 106, under the same Civil Code, indicating that a party is considered prohibited from ensuring its rights in the cases where (1) it has intended to ignore the other party's rights, (2) the result of the act is opposing what is illustrated under the rulings of the Islamic Shariaa', public acknowledgments, prevailing law, etc., (3) there have been a favored amount of benefits exceeding that of the expected damage due to the faults of the other party or (4) it outstrips what is so called acts of tradition in practice.

In reference to Article 390 (2) of the UAE Civil Code, the parties should agree to amounts of compensation due to damages early on in the contract between them. However, the court has all the right to change such amounts under the principle of fairness, so that the reimbursement of damages is equitable and reasonable.

It is vital to understand the correlation between contract termination and acting in good faith especially when it comes to termination for convenience. However, such burden should not be carried in the essence of a condition or requirement only but should be exercised in all motives. In that case, the parties, with the court's approval, do agree to termination for convenience provisions, even in the cases where it is viewed as one of the contradicting acts of good faith. However, this does not mean that the owner has the right to abuse this condition and terminate the contract for his own favor especially in the cases where it is practiced in bad faith against the other party. For example, if the owner has the right to terminate for convenience under a contract that allows reimbursing the contractor up till the date of termination with no regards to mobilization fees, then the owner who terminates for his convenience post mobilization directly before the execution of any works by the contractor is evidently acting in bad faith. Hence, the contractor can, by referring to Article 246 of the UAE Civil Code, alongside with Articles 106 and 390 (2), recover its losses.

3. *Case Specifics*

In the table below, the chronological summary of events is presented. The events then are related to the default by the contractor, being a payment default allowing the subcontractor to suspend the works and taking over of the works by the main contractor leading to termination or suspension intent. In the second table, the subclauses mentioned in the case are shown.

The case as submitted by the subcontractor is referred to in table 9, event E2, requested the contractor to resolve all his overdue payments under the subcontract, extra compensation of the works in the variation orders and the general damages regarding the delays occurring to works prior to termination of the main contract and leading to suspension of the subcontract. An important note here is that the subcontract, under Subclause 51 (a), called for a phase concerning amicable settlement allowing for mutual communication in good faith, prior to arbitration. However, arbitration could be the direct action only in the case where the subcontract is terminated by the general contractor, in accordance with Subclause 51 (d). Likewise, the subcontractor has no right to terminate his subcontract with the general contractor for any reason under this contract.

Throughout the 1st session, as shown in table 9, E3, the contract failed to challenge any arguments, and to that extent, had his rights to any disputes waivered and to be later determined through arbitration. That said, the subcontract was still on hold, or suspended, throughout the course of litigation. On the other side, as depicted in table 9, E4, negotiations took place between the parties that later resulted in revoking the effect of termination of the main contract by the employer. As in E6, the subcontractor insisted on reminding the general contractor of his right under the subcontract, mainly Subclause 44 (i), to append the ongoing works if the payment was not settled within a time frame of 30 days post the end of the 45 days period, as stipulated under Subclause 44 (e), in which within any amount already certified by the Engineer should be made due to the subcontractor.

Table 9 UAE Case Study: Chronological List of Events

Event (E)	Participant	Description
1	Subcontractor	The Subcontractor filed a request at the first-instance court to have a freeze on the attempt of forfeiting his performance guarantee.
2	Court	The court responded positively to the Subcontractor's request but informed the Subcontractor that the freeze will be valid for 7 days only, within which the Subcontractor shall file an official (right-proof) court case proving the right for such a freeze to be maintained by the court beyond the awarded initial 7-day freeze period.
3	Subcontractor	The local legal counselor of the Subcontractor ended up mistakenly submitting a full case (instead of a right-proof case) to the court.
4	Contractor	During the first scheduled session, the Contractor's legal counselor requested extra time to study the case, instead of contesting to the court that the resorting to litigation by the Subcontractor was outside the calling of the Subcontract's terms.
5	Employer, Contractor and Subcontractor	Negotiations between the parties were taking place for a number of months after the court case had been filed, parallel to negotiations between the Contractor and the Employer.
6	Contractor	The Contractor wrote the Subcontractor informing him of the uplifting of the suspension of the Subcontract effected earlier by the Contractor and instructed him to resume work under the Subcontract.
7	Subcontractor	The Subcontractor responded through repeated correspondences that the resumption of work is contingent on the settlement by the Contractor of all amounts overdue under the Subcontract.
8	Subcontractor	The Subcontractor wrote the Contractor informing him that he has suspended the works pursuant to Sub-Clause 44(i) of the Subcontract's conditions.
9	Contractor	The Contractor responded that the Subcontractor cannot suspend the Subcontract's works, claiming that the court case (filed by the Subcontractor) hints to the fact that the Subcontract is considered as having been terminated or requests that the Subcontract be considered as such by the court.
10	Contractor	The Contractor gave a 7-day notice to the Subcontractor, pursuant to Sub-Clause 5(b), requesting him to undertake preparatory work that will facilitate the full resumption of the works.
11	Subcontractor	The Subcontractor reiterated his right to suspend the works in accordance with Sub-Clause 44(i).
12	Contractor	The Contractor gave another reminder 7-day notice to the Subcontractor, pursuant to Sub-Clause 5(b), requesting him to undertake preparatory work that will facilitate the full resumption of the works.
13	Subcontractor	The Subcontractor objected to having "notices and reminder notices" served by the Contractor pursuant to Sub-Clause 5(b) as a way for attempting to remedy a situation that has prevailed due to the Subcontractor having rightfully exercised his right and suspended the works under the Subcontract pursuant to Sub-Clause 44(i).
14	Subcontractor	The Subcontractor then requested that the matters in dispute, which have arisen under the Subcontract, be resolved "through good faith negotiation between the Main Contractor and the Subcontractor", as per the provisions of Sub-Clause 51(a) of the Subcontract conditions.
15	Subcontractor	The Subcontractor requested a meeting with the Main Contractor's top management, with the date to be set for this requested meeting to be regarded as the designated start of the 84-day period stipulated under Sub-Clause 51(c) of the Subcontract Conditions.
16	Contractor	The Contractor wrote back stating that the terms of Sub-Clause 51(a) have been waived by the fact of having an ongoing court case against the Contractor.

17	Contractor	The Contractor stated that he is exercising his rights under Sub-Clause 5(b) to "take over the Subcontract Works".
18	Subcontractor	The Subcontractor responded that it is his firm opinion that the interpretation of the mechanism stipulated under Sub-Clause 5(b) has been stretched beyond any reasonable scope that the said clause is meant to serve.
19	Contractor	The Contractor reacted by: repeatedly attempting to deny the Subcontractor's staff and workers the entry to the Site; refusing to receive the Subcontractor's legal notice delivered to the Site via the concerned judicial authority; authorizing a third party to access the Site, handle Subcontract's materials stored on site, and perform execution of the Subcontract's Works, despite the Subcontractor's repeated expressions of the risks potentially resulting therefrom, due to the delicate nature of the said Works; blocking access for the Subcontractor's upper management to the Contractor's upper management as well as to the Contractor's management at the level of the Project's Site; and ignoring the Subcontractor's attempts to establish communication and/or meet with the Contractor through various means of telephone calls (both Project's Site level and Head-Office level), emails, phone messages, visits to the Site's Offices, etc.
20	Subcontractor	The Subcontractor replied that having resorted to Sub-Clause 5(b) as an alleged remedy under the Subcontract does not entitle the Contractor to put into effect what is clearly seen to be similar to the repercussions stipulated under Sub-Clause 48 (c)(i), which would have otherwise resulted if the Contractor had opted to determine the employment of the Subcontractor under the Subcontract (i.e., terminate the Subcontract).
21	Subcontractor	The Subcontractor added that it is his opinion that these actions and conduct by the Contractor do not reflect the exercising of any business ethics that are known to be, or can be viewed as, acceptable.
22	Subcontractor	The Subcontractor called on the Contractor to take immediate measures to correct the conditions that have prevailed as a result of the Contractor's breaches under the Subcontract and the miscalculated actions taken by him.

Table 10 UAE Case Study: Contract Language

Sub-Clause	Sub-Clause Language
5(a)	The Main Contractor may in his absolute discretion and from time-to-time issue further drawings, details, and/or written instructions (all of which are hereinafter collectively referred to as 'Main Contractor's instructions') in regard to: […](vi) The amending and making good of any defects whatsoever under Clause 42; (vii) any matter which is necessary and incidental to the carrying out and completion of the Subcontract Works under this Subcontract; or (viii) any matter in respect of which the Main Contractor is expressly empowered by this Subcontract to issue instructions.
5 (b)	Subject to sub-clause (c) hereof, the Sub-Contractor shall forthwith comply with all instructions issued by the Main Contractor. if within 7 days after the instruction issued by the Main Contractor, the Sub-Contractor failed to comply with such instruction, the Main Contractor shall issue a reminder to the Sub-Contractor requiring compliance to such instruction. If within 7 days after the reminder issue by the Main Contractor, the Sub-Contractor failed to comply with such reminder requiring compliance to such instruction then without prejudice to other rights and remedies available to the Main Contractor, the Main Contractor shall be entitled on its own, to execute any works whatsoever in order to give effect to such instruction or to appoint another party to execute any works whatsoever in order to give effect to such instruction according to the terms and conditions it deems fit and all costs and expenses, including the Main Contractor's management fees and other related costs arising thereto shall be recoverable from the Sub-Contractor as a debt due and shall be deducted by the Main Contractor from any monies due to the Sub-Contractor under this Subcontract.
44 (e)	Within several days as stated in the Appendix to these Conditions or if none so stated then within forty-five (45 days) of the issue of any such Interim Certificates as aforesaid the Main Contractor will make a payment to the Sub-Contractor on the amount certified as due to the Sub-Contractor in the Said Certificate.
44 (i)	The Sub-Contractor may, in the event, the Main Contractor fails to pay the Sub-Contractor the amount due under any certification within 30 days after the expiry of the time stated in Clause 44 (e) within which the payment is to be made, subject to any deduction that the Main Contractor is entitled to make under the subcontract, after giving 28 days prior notice to the Main Contractor upon the expiry of 30 days above, with a copy to the Employer and Engineer, suspend work or reduce the rate of work.
48 (c) (i)	In the event of the Sub-Contractor's employment under this Subcontract being determined under sub-clause (a) or (b) hereof irrespective of the validity of such determination: (i) the Site and the Sub-Contractor shall immediately cease all operations on the Works, remove this personnel and workmen therefrom and leaving all temporary buildings, plant, tools, equipment, goods and unfixed materials belonging to him upon the Site, save only such as he may at any time be specifically directed in writing by the Main Contractor to remove therefrom; (ii) the Main Contractor may carry out and complete the Works itself or employ and pay a Sub-Contractor or other persons to carry out and complete the Works and he or they may enter upon the Works and use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to an placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works;
51 (a)	if any dispute or difference shall arise between the Main Contractor and the Sub-Contractor, either during the progress or after completion of the Works or after the determination of the Sub-Contractor's employment, or breach of this Subcontract, as to: (i) the construction of this Subcontract, or (ii) any matter or thing of whatsoever nature arising under this Subcontract, or (iii) the withholding by the Main Contractor of any certificate to which the Sub-Contractor may claim to be entitled, then such dispute or difference shall be resolved through mutual good faith negotiation between the Contactor and the Sub-Contractor.

51 (b)	In the event a decision is reached pursuant to Clause 51 (a) above, the decision shall be put in writing and binding on the parties until the completion of the Works and shall forthwith be given effect to by the Sub-Contractor who shall proceed with the Works with all due diligence whether notice of dissatisfaction is given by him.
51 (c)	In the event the Parties fail to reach a mutual decision in the manner provided by Clause 51 (a) above for a period of eight four (84) days from the date of commencement of negotiation referred to in Clause 51 (a) above, then such dispute or difference shall be referred to arbitration, by giving a notice to the other party of its intention to commence arbitration and a final decision of a person to be agreed between parties to act as the Arbitrator.
51 (d)	Such reference, may be commenced prior or after the completion or alleged completion of the Works or determination or alleged determination of the Sub-Contractor's appointment under this contract, or abandonment of work by giving fourteen (14) prior notification to the Main Contractor, after the expiry of the period stated in Clause 51 (c).

As in E9 and E11, the subcontractor saw that the notices and their reminders as delivered by the contractor may adhere to the option of being in some form of breach of his dues as stipulated in the subcontract, whereas the truth is that the subcontractor was not given the proper chance to continue his works in fulfillment of his obligations under the subcontract. This was mainly due to the continuous failure of the main contractor to exercises his duties to pay his subcontractor. Additionally, the subcontractor cleared that he has to be given his proper rights against damages due to what made his suspension initiated, only then can the suspension be raised and the work recommenced.

In his argument, the subcontractor referred to Subclause 5 (b), as in Event number 16, which directed him to ensure, also as in E17 where he mentioned his apart posture regarding the wrong referring of the contractor to the same clause, that he has rightfully suspended the works under the contract and that the contractor has no right, under the same clause, to build his argument of taking over all of the subcontractor's works. To strengthen his entitlements, he focused on the conditions as per Subclause 5 (a), which in line with Subclause 5 (b), can draw the borders of actions to the extent offered by the latter Subclause. His supplementary note was that the letters sent by the contractor mentioned the instruction to have been related to "the preparatory works for the recommencement of the Subcontract Works". However, the contractor stated that he is exercising his "rights to take over the Subcontract Works." The subcontractor then made it clear that utmost caution should be taken while exercising any action as to performing any alleged right under the contract, mainly by the general contractor, because it might be then considered by the subcontractor as a breach of subcontract by the main contractor leading to huge

consequences that will not be in favor of any of the parties nor to the proper progress of the project. To that extent, the subcontractor maintained a clear stand to have the right to take any necessary action in order to protect his rights under the subcontract, and to be safe against any accountabilities be it financial or technical. He also added that his intent in works under all liabilities of the subcontract was administered in good faith as ensured by Subclause 51 (a). The latter also explained that he had not sustained the contract to be terminated and had effectively initiated suspension of his works under the subcontract, as stipulated under Subclause 44 (i) of this subcontract. As such, the subcontractor continued to add that he effected Subclause 44 (i) at least ten weeks post the day on which the main contractor decided to acknowledge that the suspension of the subcontract has been revoked and raised. Concludingly, the subcontractor clarified that he believes his intention to proceed with good faith under Subclause 51 (a) is righteous, and no sign suggests that he has waived his right of amicable communications prior to exercised litigation. However, generally speaking, the contractor had no right to unilaterally act under the subcontract, and it is the Law to decide if any of the conditions under the contract was rendered unsuitable.

D. Deduced Ramifications of Tiered 'Back-to-Back' Termination Practices

The following figure demonstrates a summary of the main events of the case as explained earlier. It lists the events related to the Contractor's defaults (payment default by the Contractor leading to putting into effect a suspension by the Subcontractor) and actions (taking-over of the works) as well as those describing the actions taken by the Subcontractor in pertinence to the purported suspension and subsequent termination.

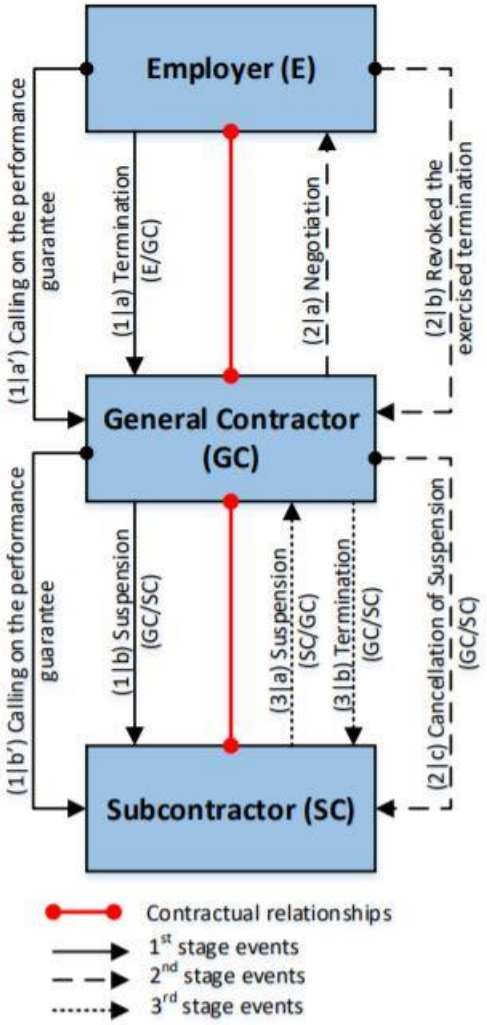

Figure 11 Reconfiguration of Conceptualization of Possible Tiered Actions Resulting from Termination Practice

The model in fig. 11 is a summary of the list of events illustrated in the previous section, highly complements the hypothetical model in question in fig.10. The aim of the model was to show the practices that the general contractor could perform towards his subcontractors in the cases of termination decision by the employer or revoking of that

decision, whenever possible. It highlights how the termination of the upper tier propagates to ramifications experienced downstream by the subcontractors, and the decision that could be made by all parties throughout. In the events of the first stage, we can see that upon the termination notice issued by the Employer to the general contractor **(1|a)**, the general contractor decided to suspend the works of the subcontractor **(1|b)**. This is one of the rights that can be established under the subcontract between the general contractor and the subcontractor. As a consequent action to the Employer termination, he also called on the performance guarantee of the Contractor **(1|a')**, who in turn called on the performance guarantee of the subcontractor **(1|b')** as a way to protect himself. However, the Contractor further opened the chain of communications between him and the Employer **(2|a)**, having the latter revoking the decision to exercise the termination **(2|b)**. As a result, the General Contractor decided to cancel on the suspension decision he already had instated **(2|c)**. On the other hand, and in the 3rd stage of events, the Subcontractor considered the actions by the General Contractor as not construed within good faith and under the contract decided to suspend the works until further being paid **(3|a)**. Consequently, the General Contractor decided to terminate the Subcontractor for breaching under the Subcontract **(3|b)**.

Although there is no direct contractual relation between the employer and the subcontractor, the decision taken by the employer to terminate his general contractor, led to the termination of the subcontractor by the general contractor. In this case, the general contractor found himself in a position attempting to have the exercised termination amicably canceled, however, upon the success of this step, the ramifications in terms of propagation of impacts subsequently surfaced on the level of the subcontract. An important

key notice to mention is that handling the termination procedures and ramifications will fall to handling the claims of the secondary level of parties, like subcontractors, and consequently, vendors (Barrett, 1994). Considering the mere fact that vendors and subcontractors do not have the rights directly with the owner but under the main contractors, rests the onus of handling the ripple effect of termination towards the lower-tier-parties on the main contractor. The latter thus has to settle with his subcontractors their claims in case the termination is for cause. As such, it is very compelling to reach out to legal instructions towards such cases because the termination decision taken upstream will keep pushing downstream to reach various lower layers.

One of the main issues faced by the parties, being upstream or downstream the hierarchy chain of actions, is the practicalities faced post-termination, in other words, the obligations and rights of all parties involved. In *ABB AB HVDC v McLaren Construction (Midlands and North) Ltd*, the issues discussed was the distribution of the liabilities and protecting rights by the parties to the construction project upon termination of the main contract. ABB, the owner, had engaged McLaren, the main contractor, in turn subcontracting with several subcontractors. ABB, due to delays in the project, decided to terminate the contract and got opposed by the contractor who decided that such decision is a contract breach. Nevertheless, both decided that the contract has been terminated. Even though in the stance of the contractor ABB did not have the right to terminate, having the contract terminated means that all subcontractors are to be reassigned to the owner under the contract. In construction projects, it might be common for the main contractor to reassign the subcontractors to the owner upon termination for the contractor's default. As

such, the owner will have the right to impose the provisions of the subcontract to the subcontractors, now working under his authority, containing all work-related modifications and performance progression. However, ABB needed to ensure that the general contractor did not terminate the subcontracts before reassignment.

The pertaining issue hereafter becomes how the subcontractors are to protect themselves: if the general contractor falls, this does not mean that all is gone. As a matter of fact, 'step-in' rights are of the tools that can protect the subcontractor against termination ramifications. However, some books of conditions like JCT ensure that upon termination of the main contract, subcontract is automatically terminated too stating that "If the Contractor's employment under the Main Contract is terminated, the Sub-Contractor's employment under this Sub-Contract shall thereupon terminate and the Contractor shall immediately notify the Sub-Contractor." One of the solutions to this issue is obliging the subcontractor to sign with a step-in party that needs to be notified of the termination of the subcontract and accept it accordingly. However, if no such provision is instated in the subcontract, then freedom of contract prevails, that is the subcontractor could be hereafter under the umbrella of the owner directly.

In some reassignment cases, not all rights under the subcontract could be reallocated to the employer and as such, the general contractor could face a high potential risk to having his ability to pass on his liabilities to the subcontractor under the subcontract thereafter with the owner. This is one of the groundlines to be instated in the subcontract initially between the general contractor and his subcontractor pre-termination. In *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd*, the court established that the main

contractor has no right to seek claims by the employer against the subcontractor under the sub-contract restraining the chances of the main contractor to pass on the responsibilities it already had under the main contract to the subcontractor. Although the debate was to whether the termination was for convenience as by the contractor MW, or due to contractor's default as per the owner EWHL. However, both did agree that the main contract has been terminated and that the subcontract has been waived to the employer, with the subcontractor Outotec, under the provisions of the subcontract. EWHL had engaged MW as the main contractor for designing, procuring, constructing and commissioning and testing a fluidized bed gasification power plant. In turn, MW engaged Outotec as a subcontractor to supply the main components of the plant.

The argument was to the extent of passing on liabilities under the subcontract to the owner upon reassignment of the subcontractor to the owner:

- MW ensured that only future rights were assigned.
- MW is to recover losses of past liabilities as both MW and Outotec are collaterally liable to the owner.

The general contractor, MW argued that it is 'uncommercial' to get forced all the damages of termination with all the past liabilities under the subcontract waived to the owner. However, Mrs. Justice O'Farrell stated that "It is not for the Court to re-write the contractual arrangements entered into by the parties or to impose what it considers would be an equitable and fair commercial bargain by reference to the events that have unfolded", referring back to subclause 9.1(b) under the contract stating that "if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the

Purchaser". As a result, the owner had the general contractor solely reliable to termination losses and unilaterally with the subcontractor liable to defective work in the plant and to Liquidated damages incurred. In conclusion, reassigning the subcontract to the owner post termination of the main contract is not always a healthy decision by the main contractor as the latter could suffer the liability under the obligations of the main contract without being able to recover related losses from subcontractors downstream. That said, the contractor should seek advice of provisions related to assignment post termination, in a way to limit rights of damages of owner and protect their alleged rights under the subcontract.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

A. Summary of work

This research redefined the contractual relationship between the main parties to construction projects in which rights and obligations are defined. However, this relationship can come to end upon one of the parties practicing its right of termination under the contract. The objective of the study is to highlight the challenges that emanate due to termination decision, showing the effect on the lower-tier parties whenever the main contract gets terminated. Moreover, the study summarizes the responsibility of the party opting to terminate to avoid having such action rendered unlawful. This in turn, paved the way to the question of revoking such decision if the cost of such action would be lower than actually terminating the contract.

In order to attain such objectives, literature review was browsed to identify the scope of termination and define its ties. Then, six different standard conditions of contract were studied and analyzed in order to draw out the full spectrum of termination processes and by that understand the importance of following the proper mechanisms. Moreover, caselaw were reviewed so that termination could be viewed in live action of practitioners. In this chapter, damages were identified and thus compared with the possibility of revoking the decision of such act. In the last chapter, the emanating ripple effect of termination was introduced, as having the damages being “back-to-back” starting with the employer

terminating the main contract and reaching the subcontractor. A hypothetical model was recognized and validated in the help of a case study under the UAE Civil Law.

B. Conclusions

The construction industry is a challenging one that resulted along years in many claims and disputes. Termination is a tough decision to take and should be the last resort in any frustrated relationship between the parties to a construction contract. As such, immense legal advice should always be sought to avoid troublesome consequences.

Termination is not a one-call decision. There are many ways to attain proper and lawful termination. The studied standard conditions of contract showed that the mechanisms used to terminate the contract by the employer are numerous and differ between the books. There are several ways and steps that each book takes and allocating the right end to perform each task along the way. Out of this field of study, it is important to show that if a party fails to follow the process of termination called for under the contract, then the right of termination becomes unenforceable, or the termination is rendered wrongful. As such, it is really important to understand the procedure of termination accepted under the contract because the spectrum of mechanisms appeared to be very wide and branched.

One of the interesting findings happened with the updated version of the FIDIC book from 1999 to 2017, where in the latter, the employer has to issue dual notices to confirm the termination. In such addition, the ambiguity towards the intention has almost

disappeared where the employer is obliged to send the 2nd notice of termination for this action to be deemed effective. However, in 1999, it is left open for questions. Because of this comparison, the idea of revoking such decision prevails to whether it is possible in both cases and at what stages along the sequential mechanism of action especially when the employer's stance is threatened to be wrongful.

Wrongful termination is a serious matter that should be addressed and analyzed so that the employer can avoid in his ways to terminate the contract. 24 different cases were studied in this manner to sort out the analysis of such findings. In the mentioned cases, there happened to be many grounds for termination by all the parties regardless of whether such grounds were properly attained or not: failing to comply with notices, poor progress of works, incurring delays to the project, failing to perform diligently or follow the engineer's instructions, not giving site possession, not supplying resources, having delays in payment, etc. Moreover, reasons of wrongful termination were deduced and 4 different categories were itemized (1) failing to establish the proper grounds of termination either for its own convenience or for the default of the other party (2) failing to follow the proper mechanism of the notices by not respecting time bars, having unclear content where the innocent party cannot locate its default, having the default unspecified to give the other party the right to make good of it, sending the notice in a different method of delivery as stipulated in the contract, sending the notice with the default still being premature and having the wrong end sending the specified notice (3) terminating the contract with no intentions of good faith where the terminating party seeks such action for its own good only and (4) having the party to terminate in breach of the contract depriving it from its right to terminate.

The damages deduced in these cases of wrongful termination showed that the termination decision should be taken in due care and understanding of the situation at hand. Liabilities that the terminating party should carry in the case where termination is deemed wrongful represent a burden that is not easy to handle. This party can either be paying losses of anticipated profit to the other party, costs of finished works up to termination, general damages and losses related to the wrongful termination as well as the overhead of the innocent party. The party at stake might at many times handle the costs of arbitration and trials solely if deemed fully in wrongful termination. This is why, any party seeking termination should be able to comprehend the situation and seek legal advice to where it stands, because at many times, it might find itself in a better off position to retreat and revoke this decision. The cost of revoking the termination decision at many situations can be lower and easy to handle than falling into the taboo of the wrongful termination.

Termination decision usually binds the parties to the contract being terminated, especially when talking about the main contract, but the ramifications of this termination exceed that specific contract and ripples to the lower tier participants, mainly subcontractor. For that purpose, a hypothetical diagram was established to understand the possible consequential back-to-back effects on the chain of participants having the main contract terminated and reaching the subcontract. When the main contract gets terminated, the subcontractors are either terminated and reemployed under the umbrella of the employer or suspended in the hopes of revoking the decision by the owner where the main contract gets reestablished in consent. That said, the case study of the termination case in the UAE fairly explained how the subcontractors were affected by the termination of the main contract.

The sequence of events that took place in the tunnel of this termination validated the hypothesis in question and identified the possible options and outcomes of all decisions, the most important of which being the opportunity of revoking.

C. Recommendations

Table 11 summarizes the different actions recommended for all participants as a result of different deduced conclusions within this research.

Table 11 Recommended actions to be taken by different parties upon main contract or subcontract termination

Parties to Termination	Party Acting	Before Contract Termination	Opting to Contract Termination	After Contract Termination
Employer vs Contractor	**Employer**	• Review other possible options • Evaluate the ground of termination • Assess the possible emanating damages • evaluate the reassignment of SCs • Send the proper notices • Act in good faith	• Follow the provisions of contract • Keep the chain of communication open	• Levy damages • Keep the chain of communication open • Arrange for court in case of arbitration/litigation
	General Contractor	• Start correcting the default • Check the SC's default • Negotiate with the Employer • Assess the possible emanating damages	• Keep the chain of communication open • Check possible actions towards SCs • Follow the contractual mechanism	• Keep the chain of communication open • Build the case in case of opting to court
	Subcontractors	• Correct the default if mentioned by GC • Check reassignment under Employer	• Decide on reassignment • Follow contractual mechanism	• Reflect on the situation
Contractor vs Employer	**Employer**	• Start correcting the default • Negotiate with the GC • Assess the possible emanating damages	• Follow the provisions of contract • Keep the chain of communication open	• Keep the chain of communication open • Arrange for court proceedings
	General Contractor	• Review other possible options • Evaluate the ground of termination • Assess the possible emanating damages • evaluate the position of SCs • Send the proper notices • Act in good faith	• Keep the chain of communication open • Check possible actions towards SCs • Follow the contractual mechanism	• Keep the chain of communication open • Build the case in case of opting to court
	Subcontractors	• Assess the possible actions	• Follow contractual mechanism	• Reflect on the situation

Contractor vs Subcontractor	**Employer**	• Keep an eye on what goes on • Interfere if it helps the project	• Keep an eye on what goes on	• Reflect on the situation
	General Contractor	• Review other possible options • Evaluate the ground of termination • Assess the possible emanating damages • Send the proper notices • Act in good faith	• Review other possible options • Evaluate the ground of termination • Assess the possible emanating damages • Send the proper notices • Act in good faith	• Levy damages • Keep the chain of communication open • Arrange for court proceedings
	Subcontractors	• Start correcting the default • Negotiate with the GC • Assess the possible emanating damages	• Start correcting the default • Negotiate with the GC • Assess the possible emanating damages	• Keep the chain of communication open • Build the case in case of opting to court
Subcontractor vs Contractor	**Employer**	• Keep an eye on what goes on • Interfere if it helps the project	• Keep an eye on what goes on • Check for possible actions	• Reflect on the situation
	General Contractor	• Start correcting the default • Negotiate with the SC • Assess the possible emanating damages	• Follow the provisions of contract • Keep the chain of communication open	• Keep the chain of communication open • Arrange for court in case of arbitration/litigation
	Subcontractors	• Review other possible options • Evaluate the ground of termination • Assess the possible emanating damages • Send the proper notices • Act in good faith	• Keep the chain of communication open • Check possible actions towards SCs • Follow the contractual mechanism	• Keep the chain of communication open • Build the case in case of opting to court

D. Limitations

The scope of this study is limited to the following:

- The comparison between the standard conditions of contract was only done on FIDIC in purposes to highlight the importance of dual termination notices.
- The grounds of contract termination as mentioned in the different standard conditions of contract were listed as stipulated in the books. Such clauses were only analyzed in terms of timelines and no analysis on such grounds was done.
- Caselaw review was limited to 24 identified cases pertaining to wrongful termination. That said, reviewing more cases will lead to more lessons learnt. However, the scope of such new cases will fall under the analyzed headings in this research.
- Caselaw review covered the aspect of terminating the construction contract in an unlawful fashion in the endeavors to understand the emanating damages.

E. Work Contributions

This research was able to bridge the knowledge gap in the field of construction contract termination in many areas:

- Employers will have a better understanding of the spectrum of standard conditions of contract with their points of strengths and weaknesses. It is very important to be cautious when the terminating party proceeds with its intention to terminate the contract under the provisions stipulated in the contract. Whenever these rights are to be entertained, the mentioned party should firmly

follow the proper mechanisms of termination (notice submission and other procedural requirements). Notices are an important pillar of a successful act of termination. Procedural time bars should be fully respected and the wording should be clear and concise.

- The provisions of the contact usually call for the proper grounds of termination. That said, whenever termination is sought, the party should consider if the claim is appropriate and whether or not the default considered is an applicable ground in this situation.
- Employers will better understand the pitfall of wrongful termination with its possible damages, and thus will approach their termination processes more carefully. Since the damages of termination are painful, mainly in the case of wrongful termination, the employer or the contractor should reiterate their value of options to understand their best way out.
- Employers will understand that ramifications of their main contract termination will surface down the hierarchy lines and the project. As such, they will entertain a better vision on all possibilities before opting to termination. On many occasions, backing off and revoking such act describes the win-win situation for all the parties of the contract that could be harmed and affected in the case of termination. This is simply because the ramifications, for example of terminating the main contract, are not contained at the level of the contract being terminated but surface at the lower levels and affect the project entirely.

F. Future work

For future workings related to such field, the following is recommended:

- Looking for more cases targeting wrongful termination. As such, court rulings will be easier to grasp and comprehend, as well as lessons learned.
- Tackling the caselaw related to lawful termination, analyzing the grounds and mechanisms on which the terminating party could be able to righteously attain its decision.
- Looking for the deflection point where the matter in dispute diverted to terminating the construction contract. As such, reasons could be identified as possible solutions could be suggested whenever such alarming signs appear.

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44. MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2015] EWHC 283 (Comm)

45. Imperial Chemical Industries Ltd v. Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC) MMT

46. Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2) [2017] WASCA 76

47. TT International Ltd v Ho Lee Construction Pte Ltd [2017] SGHC 62

48. Atos IT Solutions v Sapient Canada Inc. [2018] ONCA 374

49. GPP Big Field LLP v Solar EPC Solutions SL [2018] EWHC 2866

50. Redbourn Group Ltd v Fairgate Developments Ltd [2018] EWHC 658 (TCC)

51. Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited [2019] NSWCA

52. Hodgkinson v K2011104122 (Pty) Ltd and another [2019] 2 All SA 754 (WCC)

53. Triple Point Technology Inc v PTT Public Co Ltd [2019] EWCA Civ 230

54. Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Ors [2020] EWHC 2537 (TCC)

55. ABB AB HVDC v McLaren Construction (Midlands and North) Ltd [2019]

56. Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC)

57. Tan Hock Chan v. Kho Teck Seng[1979] 1 LNS 110; [1980] 1 MLJ 308

58. Edo Corp. v. Beech Aircraft Corp., 715 F. Supp. 990

59. Diploma Construction Pty Ltd v Marula Pty Ltd [2009] WASCA 229

60. Sim Siok Eng v Government of Malaysia [1978] 1 MLJ 15

61. Central Provident Fund Board v Ho Bock Kee [1980-1981] SLR 180; [1981] SGCA 4

62. AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd [2001] SGHC 243

63. Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd [2005] SGHC 227

64. Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261

65. Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others [2008] SGHC 201

66. Goh Kian Swee v Keng Seng Builders (Pte) Ltd Suit No 9126 of 1984

67. Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd [2001] SGHC 68

68. Hounslow LBC v Twickenham Garden Developments Ltd [1971] Ch 233

69. Brani Readymixed Pte Ltd v Yee Hong Pte Ltd and another appeal [1995]

70. Bedfordshire County Council v Fitzpatrick Contractors Ltd. [1998] EWHC