THE CONCEPT OF VARIATIONS IN THE CONSTRUCTION INDUSTRY

INTRODUCTION

This article[1] aims to explore briefly the concept of variations in the construction industry. Most construction projects are carried out on the terms of a formal building contract based on standard forms.[2] Which form is used depends on the nature of the contract works and the bodies involved.

A building contract is a particular species of contract in that it allows for the work to be carried out under the contract to be varied as and when necessary while the work is in progress. This is in direct contrast to the ordinary types of contracts in that normally once the terms of the contract are reduced to writing, it is accepted business and trade practice that such terms are not substantially varied, and this includes the subject-matter of the contract.

However, it is quite an accepted rule and a term of the standard forms of building contract currently in use that variations may be allowed. A distinction must be drawn between variations of the contract and variations in the sense used in this article. "Variations" in the sense used in this article means essentially a change to the works as detailed or described in the contract documents i.e. the works which the contractor has undertaken to construct.

All well-drafted building contracts empower the employer to order variations in this sense. In the absence of such an

[1]The writer is grateful to Professor Vincent Powell-Smith, Professor, Faculty of Law, University of Malaya, for his valued comments and suggestions. The writer is, however, responsible for any errors or omissions herein.

[2]The standard forms of building contract used in Malaysia are of two types - one which is commissioned or written by the Malaysian Government for use on all Government contracts, the PWD 203 form and the other for private sector use, and which is issued by the Pertubuhan Akitek Malaysia (PAM) together with the Institution of Surveyors (ISM) i.e. the PAM/ISM Form 1969. It is currently under revision (1992).

express power, there is no right in the employer or his agent to order varied work.[3]

The reason for the existence of a clause empowering the ordering of extra work and so on is supported by the fact that in contracts of this nature, there may be various reasons for being unable to proceed as the contract originally provided for.

Unforeseen ground conditions, changes in technology due to innovative discoveries, or changes in the employer's financial status, inability to proceed due to new statutory regulations are some situations which may hinder the smooth performance of a building contract and it is in such situations that the variation provision may be resorted to.

The absence of such a provision may be detrimental to the parties to a contract in that any reason for not proceeding with the work as contracted for would amount to a breach or frustration of the contract thereby resulting in damages being payable or the contract coming to an end by operation at law.

Thus as long as there is a specific provision in the contract then the parties to the contract may avail themselves of the provision to authorise variations as described.

WHAT CONSTITUTE "VARIATIONS"?

Variations may take either one of two forms. It may take the form of alterations, additions or omissions to the actual works intended to be performed.[4] It may thus cover "extras, additions, deductions, enlargements, deviations, alterations, substitutions and omissions"[5] but not works to be omitted in order to be given to another contractor for completion.[6]

[3] *R v Peto* [1826] 1 Y. & J. Ex. 37.

[4] See John Dorter, *Variations*, [1990] 6 B & CL 156 reprinted in [1991] 7 *Const.L.J.* 281.

[5] This list was laid down in the case of *Arcos Industries Pty Ltd. v Electricity Commission (NSW)* [1973] 2 NSWLR 186.

[6] This was held in the case of *Carr v J.A. Berriman Pty Ltd* [1953] 89 CLR 327. It is the writer's view that this is the better interpretation of the provision relating to variations because otherwise it may lead to an abuse of the clause. An architect who is approached by another contractor may omit certain works in accordance with this provision and offer them to another contractor without reasonable explanation.

The second form means a change in the agreed contractual terms particular completion date but which later may be extended. This must depend on the agreement of the parties. The contract however, cannot be unilaterally varied in this sense.

In practice, however, when the term "variation" is used it normally refers to the first form rather than the second meaning. This is also due to the fact that dates may be changed using the extension of time provision which is another clause common in building contracts.

Variations is also known as "extras" and in the United States of America they are popularly termed "changes". Thus the US term depicts the nature of variations more correctly as they are changes rather than merely extra works which are authorised. Variations will usually be the result of the following acts:

- Authorised by the architect on behalf of the employer. (This covers changes or alterations such as the grant of an extension of the original contract period or in relation to the works to be performed e.g. different materials to be used);
- Recommendation by the contractor. (Where the contractor feels that such works are necessary for the successful completion of the contract - upon his recommendation the architect may be obliged to authorise such works);
- Necessary variations. These may come about where the variations actually comprise works which are necessary for the completion of the contract but which have been somehow omitted in the contract and overlooked by the respective parties. However although these works may constitute variations, they may not merit extra payment as they may be held to be indispensably necessary works for the successful completion of the contract.[7]

[7]The case of *Williams v Fitzmaurice* [1858] 3 H & N 844 is relevant on this point where it was held that although the contract did not specifically provide for flooring, it was an integral part of the contract in building a house that floors are to be included in the contract price. The decision could also be supported by the fact that this was a lump sum contract - which provides that the contractor is bound to complete all the work for an already agreed sum.

PAYMENT

In a lump sum contract, the contractor is paid a definite sum for completing all the necessary works in the contract. In an entire contract, however, the contractor is expected to complete the whole works before he can be paid.

This may lead to commercially unfair results as evidenced by *Sharpe* v *San Paulo Railway*[8] where the contractor had undertaken to make a railway line "from terminus to terminus complete".[9] Due to a mistake in the original plan by the engineer, the contractor, upon the engineer's orders, carried out nearly two million cubic yards of excavation in excess of the work set out in the schedule to the contract. This resulted in double the excavation work being carried out. It was held that these were not extra works and thus the contractor could not recover.

On the other hand, if it can be shown that works are extra to the works contracted to be done, then the contractor is entitled to be paid for such works. If the varied works are required because unforeseen ground conditions are encountered, the contractor will in general be held responsible for such works especially if he had been warned to inspect the site and ground conditions prior to entering the contract.[10]

The contractor may not allege that he relied on the plans and specifications prepared by the architect, thereby importing

[8][1873] L.R.8 Ch App 597,

[9]*Ibid*, p. 608 - Clause 25 of the contract read as follows:"The contractors will execute and provide not only all the works and materials mentioned in the specification comprised in the first schedule to these presents, but also such other works and materials as in the judgment of the company's engineer-in-chief are necessarily or reasonably implied in and by or inferred from that specification, and the plans and sections of the railway and works, it being the true intent and meaning of this contract that the works and materials to be executed and provided respectively by the contractors under this contract shall comprise all works, buildings, materials, operations, and things whatsoever proper and sufficient in the judgment of the company's engineer-in-chief for the perfect execution and completion of the railway, and all the works and conveniences thereof and connected therewith, and the maintenance of every section of the railway for twelve calendar months after the completion and delivery to the company of each section".

[10]See *Bottoms v Lord Mayor of York* (1812), *Hudson's Building Contracts*, Vol.2, 4th edn. p. 208. Site conditions are in principle at the risk of the contractor and, in the absence of some guarantee or representation to the employer, the contractor is not entitled to abandon the contract on discovering the nature of the soil.

an implied warranty upon the architect although he did supply the plans and specifications requested.[11] However, if the architect had the relevant information but failed to reveal it to the tenderers, the position would be different. In such a case, the employer may be held liable for such works and thus may need to pay for them as extras.[12]

Although this is the general rule, it is not an absolute rule. In one case, builders agreed to construct two cottages according to plans and specifications for a lump sum. There was no specification but a bill of quantities. There was a mistake in the quantities resulting in amount of brickwork running short of usual amounts. The builders did not go to the site nor check the quantities before tendering and entering into the contract. They claimed for the extra brickwork necessary to complete the cottage beyond the amount taken in the quantities. The court gave judgment in favour of the builders.[13]

Thus it may be said that it is not always that the contractor is held liable for extras encountered during the course of building although he is supposed to have inspected the site. In one case,[14] the contractor agreed to erect a convalescent home under a contract which contained a clause incorporating the Standard Methods of Measurement (SMM) and provided that the Bills of Quantities were deemed to have been prepared in accordance with the current SMM. The SMM provisions required that where practicable, the nature of the soil should be described, attention drawn to any trial holes, and that excavation in the rock should be given separately. The Bills referred the contractor to the drawings, block plan and the site to satisfy himself as to local conditions and the full extent and nature of the operations.

[11] *Alexander Thorn v The Mayor and Commonalty of London* [1876] 1 App Cas 120.
[12] See Gajria G.T.in *Law Relating to Building and Engineering Contracts in India*, Third Edition, (1985), Tripathi Private Ltd. p. 370.
[13] *Meigh & Green v Stokingford Colliery Co. Ltd.* (1922) (unreported). This case followed the case of *Patman & Fotheringham Ltd. v Pilditch* [1904] HBC 4th Ed., Vol. 2, p. 368.
[14] *C. Bryant & Son Ltd v Birmingham Hospital Saturday Fund* [1938] 1 All E R 503. An enlightening discussion of this case may be found in Powell-Smith, . *Problems in Construction Claims*, BSP Professional Book, (1990), p. 36-37.

Although the existence of rock was known to the architect, it was not revealed on any of the plans or referred to in the bills. It was held that the contractor was entitled to treat the excavation in rock as an extra and thus to be paid.

Thus extra works may be the result of requiring additional quantities of materials, difficulty of performance or a reduction in the quantity of work.

Generally, it may be held that the contractor must be paid as long as the work is not meant to be performed gratuitously.[15] But it should be noted that there are works which are deemed to be part of the contract, even though they may have been authorised during the progress of the works. In such cases, the contractor cannot demand payment because these are deemed to be integral to the successful completion of the contract.[16]

However, the harshness of the above situation has been mitigated in certain circumstances where it is doubtful whether such works are indeed part of the contract. In this context, it is necessary to go back to the terms of the contract in order to ascertain its true meaning. The decision must be made as to what the contract is ultimately meant to achieve.

The position is mitigated to some extent in Malaysia by virtue of s.71 of the Contracts 1950 which allows for compensation for any works done with the intention of not being performed gratuituously.[17] Thus as long as the contractor may prove that the works authorised by the architect were not intended to be performed gratuitously by him, and this fact was common knowledge, then he should be compensated for such works.

[15]It may be pertinent at this point to refer to s.71 Contracts Acts 1950 (Malaysia) which is as follows: "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered". S.71 of our Contracts Act is in *pari materia* with s.70 of the Indian Contract Act. It was held in the case of *Subramaniyam v Thayappa* (1961) 3 SCR 663 (1966) A.S.C. 1034 that if a party to a building contract has done additional construction for another, not intending to do it gratuitously and such other has obtained benefit, the former is entitled to compensation for the additional work, not covered by the contract. If an oral agreement is pleaded which is not proved, he will be entitled to compensation under s.70.

[16]See the case of *Williams v Fitzmaurice* [1858] 3 H & N 844.

[17]*Supra*, fn.15.

To summarise the position, it may be said that the fact extra work has been necessitated by unforeseen physical obstacles,[18] or by an impracticable design[19] will not of itself override the contractor's obligation to perform at his own cost works that are indispensably necessary for the achievement of the contractual result.

SUBSTANTIAL COMPLETION AND PAYMENT ON QUANTUM MERUIT

However, in certain cases it may be quite impossible to complete the whole works but a substantial part may have been completed. A contractor may thus be able to be paid on quantum meruit as long as the "substantial completion" stage had been reached.[20] Once again this may be easily reconciled with lump sum contracts but not with entire contracts.[21]

The test of substantial completion is to see if the work was "finished" or "done" in the ordinary sense even though part of it is defective and whether the contract has been completed for the intended purpose.[22]

[18]*Bottoms v Lord Mayor etc. City of York* [1892] Hudson's BC (4th ed.) 208 (CA)
[19]*Sharpe v San Paulo Railway*, [1873] LR 8 Ch App 597
[20]*Hoenig v Issacs* [1952] 2 All E R 176 CA where the plaintiff had redecorated a flat but the defendant, after moving in, refused to pay because the design was faulty. It was held that the defendant should pay the amount and go by way of counter-claim for the amount necessary to make the defects good. This principle was supported in the Malaysian case of *Building & Estates Ltd. v. A.M. Connor* [1958] 24 MLJ 173. In this case the defendant went into occupation of the house built by the plaintiff under a lump sum contract but refused to pay the balance of the purchase price on the ground that it was not built according to specification and that much of the work was defective and of inferior quality. It was held the defendant could not refuse to pay on the ground that the work, though substantially performed, was defective. He was thus liable for to pay the balance less a deduction for making good the defects and omissions proved.
[21]H.B.C. (7th ed.) p. 165 citing *Cutter v Powell* [1795] 2 Sm.L.C.1
[22]See *Bolton v Mahadeva*, [1972] 1 WLR 1009 CA. This case concerned the installation of a central heating system. Although the cost of remedying the defects was not very much, the Court of Appeal held that the defects were such that the system did not heat the house adequately and fumes were given out so as to make living rooms uncomfortable. It was held that the work was ineffective for its primary purpose. See also the recent Malaysian case of *Aw Yong Wai Choo & Ors v Arief Trading Sdn. Bhd. & Anor* [1992] 1 MLJ 166, where it was held by J. Peh Swee Chin that when the second defendant had decided to take over the housing project it did not do so unlawfully, neither did it intend to do so gratuitously. The

ARCHITECT'S POWER TO AUTHORISE VARIATIONS

Before varied works may be paid for, assuming that they constitute extras in the true sense of the word, other considerations need to be taken into account. One of these considerations is the power of the architect to authorise such variations.

POWER TO AUTHORISE VARIATIONS

An architect's power to authorise variations must be expressly embodied as a term in the building contract.

In the absence of a variations clause the architect would be devoid of the power to either authorise variations or to ratify performance of the varied work.

An architect has no implied authority to order varied works.[23] Moreover, it is clear that the contractor may actually refuse to carry out the works unless there is a variations clause and the works ordered are within its scope. However, a provision to order variations appears in most if not all standard forms of building contract.

A further consideration is in relation to nature of variations - are they works that are not extra works but indispensably necessary works? If the answer is "yes", then such works are not extras or variations but are part of the contract and therefore do not merit separate or extra payment other than the price contracted for even though the architect may have expressly ordered such works.

A factor to bear in mind is that the variations ordered must bear some relationship to the main object of the contract.[24]

plaintiffs had gained and enjoyed the benefit of more expensive' specifications. Thus all the conditions in s.71 of the Contracts Act 1950 had been fulfilled and the plaintiffs claim for liquidated damages for late delivery would be set-off against the higher price payable. Thus on the basis of contract law, a party is not entitled to benefit from another party without making arrangements for due compensation.

[23]*R v Peto* [1826] 1 Y & J Ex. 37

[24]See Powell-Smith, *Problems in Construction Claims*, BSP Professional Books, Oxford, (1990).

The architect cannot order varied works of such immensity that they result in an entirely different building from that which was originally contracted for. To allow the contract to be so substantially altered so that it bears no form or resemblance to the original contract would not be a variation but the birth of a new contract in place of the original one.[25]

It may therefore be concluded that the "extra" must mean "extra" to a contract[26] but not something which alters the nature of the contract fundamentally.

ARCHITECT'S POWERS - UNFETTERED?

Moreover, it must not be assumed that so long as the architect is acting within the terms of the contract, his powers of authorisation are unfettered.

A statement in contract documents as to what is expected to be the monetary extent of additional works may persuade a court that the parties have agreed to appropriately limit the power to vary. The extent of the power to vary is a question of construction and may only be ascertained by reference to the particular contractual provisions.

The power to order omissions cannot be used to alter the contract fundamentally. For example in *The Melbourne Harbour Trust Commissioners* v *Hancock*,[27] the engineer was empowered to make omissions of portions of work when necessary. Certain omissions were made which were disputed and thus were referred to arbitration.

The arbitrator's award held that the omission was not one that could properly be made under the contract because the

[25]See *Halsbury's Laws of England*, 4th ed. vol. 4, para 1178 "If the nature or extent of the variation or additional work is such that it is not contemplated by the contract, the contractor can refuse to carry it out or can recover payment for it without complying with the requirements of the variation clause. For varied work to fall outside the contract it must, it seems, either result in it being impossible to trace the original work contracted for or be of a kind totally different from that originally contemplated".

[26]The case of *S.C. Taverner and Co.Ltd. v Glamorgan County Council* [1941] 164 LT 357 holds that an "extra" means "extra" to a contract.

[27][1927] 39 CLR 570.

contract did not authorise the engineer to require an omission, which fundamentally altered the contract as the particular omission did. The High Court upheld the award.

An architect may not omit works which is part of the work contracted for and give it to another contractor for performance.[28] This is especially in relation to lump sum contracts. Usually lump sum contracts define the extent of the work in the specifications and drawings. Although the variation clause allows for addition, omission or substitution of any work it is not in the power of the architect to omit such work and offer it to another contractor.

However, on the proper construction of the contract, a power to omit may permit the employer to omit work from the contract for the purpose of having it done by others. This construction however may be more readily accepted in the case of a schedule of rates[29] contract than in a lump sum contract.[30]

TEST OF REASONABLENESS

Although variations may be allowed, however they must be reasonable. So in *Wegan Constructions* v *Wodonga Sewerage*[31] which concerned the building of sewers, the proposals for the development of the land were redesigned and consequently new plans were prepared by the defendants and given to the plaintiff contractors.

The amendments were extensive and the plaintiff thus claimed for damages of breach for the repudiation of the first contract by the defendant requiring the plaintiff to carry out altered and increased works which were not a variation of the original contract but were substantially different.

It was held that in the circumstances the amended plan did not constitute a variation permitted by the original contract.

[28]This was held in *Carr v J.A. Berriman Pty.* [1953] 27 ALJR 273.
[29]Schedule of rates contract is defined in the case of *Arcos Industries Pty. Ltd. v The Electricity Commission of NSW* [1973] 12 BLR 65.
[30]See the case of *Greenfield and Stammers v Commonwealth Railways Commissioner,* (Dean J. Supreme Court of Victoria, 15 June 1961, unreported, 21-22).
[31][1978] VR 67.

The court held that the test of reasonableness of a variation is that of objective assessment by an independent by-stander, namely whether the amount of the increase or decrease is such that it would be judged by the by-stander to be reasonable for the employer to require the contractor to submit to the increase or reduction of the total sum and so to the increase or reduction of the work involved and to the performance of the extra or reduced work on the contract terms.

EFFECT OF UNAUTHORISED VARIATIONS

Where there arises a situation that the contractor may not claim due to unauthorised variations which do not bind the employer, it has been held that the architect may be liable to the contractor in damages for breach of warranty or authority. It is possible that he may be held personally liable and it is irrelevant that he was acting in a professional capacity.[32]

FORM OF AUTHORISATION

Whatever form of authorisation is expressly set out in the contract, strict compliance is required before the employer is bound by any such authorisation resulting in variations to the original contract.

For instance, if the architect must authorise the variation in writing, then works carried out in compliance with verbal authorisation cannot qualify for extra remuneration.[33] In *Taverner's case*[34] it was held that in the absence of any order in writing as provided for in the contract, the builders were not entitled to any payment for carrying out extra works based on verbal instructions.[35]

In the absence of his taking the opportunity offered to him and acting on the verbal instructions of the architect, the contractor may be deemed to have waived or absorbed any increase brought about by the increased workload due

[32]See *Sika Contracts v Gill and Closeglen Properties* [1978] 9 BLR 11.
[33]*S.C. Taverner and Co. Ltd. v. Glamorgan County Council* [1941] 57 TLR 243.
[34]*Ibid.*
[35]See s.71 Contracts Act 1950 (Malaysia), *supra*, fn.15, p.6.

to the extra ordered. Thus, it appears to be clear that where the contracting parties have clearly and expressly stated the terms relating to extras or variations, the law holds that these terms must be adhered to strictly if any action for payment is to be enforced. It is submitted that according to normal contractual principles, this present position of the court is correct.

Another form of authorisation may take place indirectly. This is when the contractor feels that he is unable to complete the works without certain extras or variations and submits such a request to the architect. This form of authorisation pertaining to a contractor's request may take one of many forms. It may be inferred from a letter agreeing to accept the proposal of a variation by a contractor.[36]

In the *Simplex*[37] case, the plaintiffs, who were specialists in pile driving were employed to create certain foundations under then current standard UK conditions, which provided that the architect under the contract might issue instructions to the contractor for variations, that the contractor should comply with them and that the amount of any expense incurred by him should be added to the contract sum.

After the plaintiffs had driven 38 piles one was tested and failed. As a result the plaintiffs suggested to the architect two other methods of providing what would be foundations; the second of which involved the employment of sub-contractors to provide bored piles. The architect wrote to the contractor saying "we are prepared to accept your proposal ..... in accordance with quotations submitted by .....". The issue was whether this letter constituted an architect's instruction under which the contractor was entitled to be paid extra for the varied works.

The plaintiffs claimed that the architects had given an instruction for a variation for which they were entitled to be

[36]*Simplex Concrete Piles Ltd. v. The Mayor & Ors. of the Metropolitan Borough of St. Pancras*, [1958] 14 BLR 80. However, the question ultimately depends on the exact terms of the contract and in *Howard de Walden Estates Ltd. v Costain Management Design Ltd.* [1992] 26 *Con. L.R.* 141, it was held that an architect's instruction does not by itself entitle the contractor to payment for works necessary to comply with instruction. It is a question of the construction of the contract and *Simplex* does not lay down any general principle.

[37]*Ibid.*

paid. The defendants contended that the architects had merely made a concession to the plaintiffs enabling them to perform their obligations under the contract in a manner different from that specified.

Edmund Davies J held[38] that it was not right to say that a variation must involve an addition to or omission from the contracted works, that the architect's letter contained a variation of the works which the plaintiffs were to perform and that since the variation led to the plaintiffs doing something different from that which they were obliged to do under the contract the defendants were responsible for the extra expense entailed.

This was so even though had the contractors not been permitted to deviate from the specified works they might have been unable to recover anything for the works already performed and would further have been liable in damages in additional costs for completion of the works since the contractors would have been in breach of contract. The contractors conceded that they would have been in breach but for the variation.

The court was only interested in one question i.e. was the letter a variation instruction which, under the contract, the architect was empowered to authorise? If it was then the liability of the defendants would be clear.[39]

Thus it appears that a variations clause may be subject to abuse by the contractors as was evident from the *Simplex* case. It seems to be an unfair decision in that the fact that the contractors would have been in breach of the contract if not for the variation was not given due weight although the contractors conceded the point.

IMPACT OF VARIATIONS

The principle of the clause empowering variations in a building contract is two-fold:

[38] *Ibid* at p. 99
[39] *Ibid* at p. 98

(1) It enables the employer to instruct changes to the work contracted for.
(2) It enables the contractor to claim payment for any such authorised varied works.

If there is no provision in the contract to empower the architect to order variations, the employer will have no right to insist upon any departure from the works specified in the contract and any such insistence may entitle the contractor to treat the attitude of the principal as repudiating the contract.[40]

On the other hand, it could either mean that the contractor may be able to claim payment for the extras as being works out of the contemplation of the parties or not being able to claim anything at all since the works formed an integral part of the contract.

THE MALAYSIAN FORMS

The two standard forms of building contract currently and commonly used in Malaysia are the Malaysian Standard Form of Building Contract (PAM/ISM 69)(the PAM form) and, for public sector work, the Standard Form of Contract to be used for Contract Based on Drawings and Specifications PWD Form 203 (Rev. 10/83)(PWD 203 form).

THE PAM FORM

The variation provisions are contained in Clause 11, which provides:

11(1) - "The Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the Contractor otherwise than pursuant to an instruction of the Architect. No variation required by the Architect or subsequently sanctioned by him shall vitiate this Contract.

[40]See *Ettridge v Vermin Board of the District of Murat Bay* [1928] SASR 124 (FC)

11(2) - The term "variation" as used in these Conditions means the alteration or modification of the design, quality or quantity of the works as shown upon the Contract Drawings and described by or referred to in the Contract Bills, and includes the addition, omission or substitution of any work, the alteration of the kind or standard of any of the materials or goods to be used in the Works, and the removal from the site of any work materials or goods executed or brought thereon by the Contractor for the purposes of the Works other than work materials or goods which are not in accordance with this Contract".

Clause 11(1) appears to be the most important because it gives the express power for the employer to authorise variations. Power to require variations is essential in any modern construction contract. It also allows the architect to sanction in writing any variation made by the contractor otherwise than pursuant to the instruction of the architect.[41]

Clause 11(3) requires the architect to issue instructions for the expenditure of any prime cost (PC) and provisional sums included in the Contract Bills and of prime cost sums which arise as a result of instructions for the expenditure of provisional sums. Clause 11(4) provides for the measurement and valuation of variations as defined in Clause 11(2) and any contractor's work ordered by the architect when issuing instructions on the expenditure of provisional sums.

Clause 11(5) provides for the cost of variations valued under clause 11(4) to be included in interim certificates and Clause 11(6) deals with all direct loss and/or expense arising from variations and not specifically covered by the valuation of the varied work itself i.e. the consequential financial effect of the variation.

THE PWD 203 FORM

Clause 24 provides:

"(a) The S.O. may at his absolute discretion issue instructions requiring a variation and he may confirm in writing pursuant

[41]See Powell-Smith, *The Malaysian Standard Form of Building Contract (PAM/ISM 69)*, Kuala Lumpur, Malayan Law Journal, (1990), pp. 40-46.

to Clause 5(c) hereof any oral instructions requiring a variation to the Works. No variation required by the S.O. or subsequently confirmed by him shall vitiate this Contract.
(b) The term "variation" means the alteration or modification of the design, quality or quantity of the Works as shown upon the Contract Drawings and Specification, and includes the addition, omission or substitution of any work, the alteration of the kind or standard of any of the materials or goods to be used in the Works and the removal from the Site of any work, materials or goods executed or brought thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract".

It is clear from the wording of the clauses in the two forms outlined above that the general principles discussed in this article would apply.

CONCLUSION

The writer has attempted to outline briefly the nature and effect of variations in a building contract. The variation clauses are an integral part of the contract so that alterations and additions may be accommodated in order to satisfy the needs of the employer.

The various standard forms of building contract have so far proved not lacking but not entirely adequate either. A review of the terms of the existing standard forms of building contract may be a timely exercise in order to achieve a better balance between the contractor's rights and the employer's duties.

However the danger of a revamp of existing provisions may lead to a hornet's nest being stirred in that there may be other problems which may only emerge once the "new" provisions are in force. The current situation evolves on strict adherence to the contractual terms. This may operate unfairly against the contractor who is evidently the subservient party. He must do the work as the architect orders but in the absence of strict adherence to the terms of the contract he may not be able to claim for the extra works.

On the other hand, an employer may not be aware that the works he is ordering as variations is indeed part of the contract. In such an instance, in the absence of any dispute, the contractor is paid for works which he should have done as part of his contract.

Thus problems like these are evident and although not insurmountable are not readily overcome. A further bone of contention is the role of the courts in interpreting the cases before them. As long as the courts have access to the magical tool of interpretation, there is no sure way of bridling the horse, so to speak. And so one straddles the horse and prepares to gallop into fields of litigation!

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