Universiti Tun Hussein Onn Malaysia

UNIVERSITI TUN HUSSEIN ONN MALAYSIA

FINAL EXAMINATION
SEMESTER I
SESSION 2021/2022

COURSE NAME	:	CONSTRUCTION LAW AND CONTRACT
COURSE CODE	:	MPC 12003
PROGRAMME CODE	:	MPC
EXAMINATION DATE	:	JANUARY / FEBRUARY 2022
DURATION	:	3 HOURS
INSTRUCTION	:	1. ANSWER **ALL QUESTIONS** 2. THIS FINAL EXAMINATION IS AN **ONLINE** ASSESSMENT AND CONDUCTED VIA **CLOSED BOOK**

THIS QUESTION PAPER CONSISTS OF **FOUR (4)** PAGES

Q1 According to the Business Dictionary, delay refers to the unplanned deferment of a scheduled activity because of some thing or occurrence that impedes its commencement or continuation. Unnecessary project delivery delays are a frequent root cause of complications in construction projects, particularly in developing countries and Malaysia is no exception with nearly 80% of traditionally procured projects experiencing time overruns. A comparable situation also occurs in Saudi Arabia, for instance. Previous research indicates that the reasons for schedule delays are similar to those of cost overruns. Delays adversely undermine the production planning and control dimension of operations, particularly in construction projects, regardless of the socio-economic status of the country involved. Delays can cause such predicaments as increased construction costs, loss of profits due to low productivity, lawsuits between contracting parties and contract termination. A contractor will suffer a loss of output and revenues due to missed opportunity costs. In Nigeria, the two most frequent effects of delays are cost overruns and time overruns. In South Africa, the leading effects of schedule delays are extensions of time, cost overruns, loss of profits, disputes and substandard quality of work attributable to hastily performed tasks to complete the project. Along these lines, the negative repercussions of schedule pressure can be attributed to out-of-sequence work, cutting corners and poor worker motivation, resulting in further losses in productivity and quality.

Source: Yap et al., Alexandria Engineering Journal (2021)

Differentiate between **FOUR (4)** types of construction delays with examples.

(25 marks)

Q2 Subcontractors are typically construction firms with a contract with the main contractor to perform some part of the general contractors' work. Often, more than 40% of the contract work is completed by subcontractors. Subcontractors normally provide services such as design input, bulk material supply, component prefabrication, and site erection services. The primary reason for subcontracting is that the contractors cannot afford to have full time skilled workers due to fluctuation of workloads in construction projects or the contractor cannot afford to acquire all the necessary equipment. Most contractors are also heavily involved in task management and organisation.

Source: Jazayeri et al., Construction Research Congress (2018)

Outline **FIVE (5)** benefits of subcontracting in terms of cost, quality and time in a construction project with example.

(25 marks)

Q3 Construction contracts generally allow for the extension of the construction period if there is a delay that is not the contractor's fault. To avoid incurring losses as a result of delays, contractors often look for opportunities to claim an Extension of Time (EOT). The procedures to claim for EOT are closely related to the type of contract used between client and contractor. Different clauses in various forms of contracts would affect the EOT application and approval processes. In Malaysia, PAM/ISM 1969 Form were first issued in 1969 by Malaysian Institute of Architects (PAM) and the Institution of Surveyors of Malaysia (ISM). Later, other forms of contract including PAM 98, PAM 2006, Public Work Department (PWD) 203 and PWD 203A, Institution of Engineers Malaysia (IEM), and Construction Industry Development Board (CIDB) 2000 were introduced to cater for various types of conditions. Just like most of the Commonwealth countries such as Hong Kong and Singapore, these contracts carry the same offshoots and derivatives from the Joint Contracts Tribunal Ltd (JCT) contracts originated from the United Kingdom.

According to the PWD 203A Form of Contract, when it becomes reasonably clear that a delay has occurred or is likely to occur that would justify a time extension, the contractor notifies the contract administrator in writing, identifying the relevant event that caused the delay. If the contract administrator determines that the delay was caused by a relevant event, the contract administrator may grant an EOT and adjust the completion date.

Source: Lew, et al. International Journal of Engineering and Technology (2012)

Justify **FIVE (5)** relevant events that may allow EOT to be given to a contractor referring to the clauses in PWD 203A Form of Contract.

(25 marks)

Q4 Arbitrability of public–private partnership disputes in China

The year 2014 witnessed heavy law-making in the mainland encouraging the use of the public-private partnership (PPP) model for public construction projects, facilities and services. By the end of December 2018, there were 8,654 projects in the management database of the National PPP Integrated Information Platform with an investment of 13.2 trillion yuan.

Cases are not rare where private parties in PPP projects are discouraged from resorting to litigation owing to concerns of local protectionism. In contrast, arbitration institutions are generally more distanced from government authorities and arbitrators usually have a stronger business sense and can better embrace the need to maintain a level playing field for private participants. Therefore, the private players are strongly motivated to submit the disputes arising from PPP contracts to arbitration. However, the current judicial practice in the mainland splits as to whether the disputes arising from PPP projects can be submitted to arbitration. This is largely due to the unspecific nature of PPP contracts.

There are three categories of views on the nature of PPP contracts in the mainland. The first is that a PPP contract is in fact a civil and commercial contract, while the second view

holds that it is of purely administrative nature. The difference between the two is that parties to civil and commercial contracts have equal legal status while parties to administrative contracts are not. According to Articles 2 and 3 of the Arbitration Law, disputes between parties of unequal status and administrative disputes that should be settled by administrative organs are not arbitrable in the mainland. Therefore, if a PPP contract is considered as an administrative contract, parties to the PPP contract cannot submit their disputes to arbitration.

There is also a third view, which holds that PPP contracts are of hybrid nature. Whether a dispute arising from a certain PPP contract is arbitrable shall be decided on a case-by-case basis. This is said to be the mainstream opinion in the mainland.

Courts in the mainland will look to the content of a PPP contract to determine the arbitrability issue. When a PPP contract does not concern government regulation, approval, licence or the dispute arising from a PPP contract that does not concern governmental acts, the relevant disputes can be submitted to arbitration. For example, in Henan Xinlin Highway Construction Co Ltd v. the Government of Huixian City, the SPC held that a contract to which a governmental authority was a party was not per se an administrative contract. Rather, the nature of a PPP contract needed to be determined by taking into account several factors, such as whether the private party was of an equal footing with the governmental authority when the contract was concluded, whether the private party had full autonomy and was not compelled by administrative power, and whether the contract contained equitable consideration and the parties' mutual consent. Similarly, in a case tried by the Beijing Second Intermediate People's Court in 2017, the Court ruled that the arbitration clause in the PPP contract was valid because in view of the purpose of the contract and the rights and obligations of the parties and other factors, the PPP contract apparently had the characteristics of a civil and commercial contract.

In contrast, Jinan Yuqing Water Making Co Ltd. Government of Shangqiu City, the SPC ruled that the joint venture contract between the private party and the government was of administrative nature because the contract was concluded on the basis that the government would grant the private party a 30-year concession to supply water in the city without the need to pay concession fees. Thus, the rights and obligations under the joint venture contract should be governed by the Administrative Procedure Law of the People's Republic of China and the dispute was an administrative dispute.

The SPC is suggested to promulgate specific interpretations on the unification of standard of review on the nature of PPP contracts and provide guidance to the arbitrability issue for PPP contracts.

Source: https://globalarbitrationreview.com

Propose **FIVE (5)** types of arbitration options for dispute resolution in public-private partnership (PPP) contract based on the statement above.

(25 marks)

-END OF QUESTIONS-