RETHINKING OR TINKERING CONTRACT MANAGEMENT?

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ABSTRACT

Published standard terms of construction contracts often originate from decades earlier and are revised occasionally. Clearer contracts ought to be common goals. Some contracts and their revisions are however, a mere tinkering rather than the result of extensive rethinking. Rethinking involves wider intellectual thought than mere tinkering. Both may lead to improvements, but tinkering alone usually does not result in a significantly positive long-term outcome.

This paper illustrates the importance of drafting construction contracts in plain language – language that parties to the contract and the contract administrator can understand better. A selection of clauses from construction contracts in commonwealth jurisdictions shows that many are still drafted in legalese and would benefit from major rethinking. In some cases, a mere tinkering creates more problems than it attempts to resolve. This paper repeats an earlier call for a set of common plain language drafting guidelines for construction contracts to be developed and adopted. Such guidelines - akin to those found in parliamentary drafting guidelines in Australia and New Zealand – would help avoid problems associated with poor drafting style. Clearer drafting based on the drafting guidelines and model structure can lead to clearer thought, clearer allocation of risks, and reduced disputes. In addition, structuring contracts and arranging clauses in a more logical manner adopting a project management approach will benefit users and lead to greater efficiency during contract administration.

This paper shows the positive outcome of rethinking in drafting and the use of modern plain language drafting using some „before and after" examples and a case study of a plain language contract drafted anew – the Model Terms of Construction Contract for Subcontract Work 2007 first published in Malaysia in September 2006.

This paper does not call for a single set of construction contract to be developed. It only calls for a set of drafting guidelines to be developed for construction contracts. Existing contracts drafted in traditional style and newer ones could then be redrafted based on the guidelines but preserving the way risk is allocated between the contracting parties and how the contract is administered. The common drafting guidelines may be used worldwide when amending existing construction contracts and when drafting new contracts. A model base structure adopting the tenets of project management – arranging clauses under time, financial, and quality clauses is also illustrated.

„To write well, express yourself like common people, but think like a wise man." Aristotle – over 2300 years ago.

„The time has come for every construction contract to be re-drafted adopting a structure, readability style, and language that the parties to the contract and the contract administrator can understand better – a plain language style."Naseem – July 2008

The overall PAQS 2009 congress theme is „Bringing the Future Together". And theme 3 is „Rethinking Contract Management". This paper addresses both themes and puts forward a challenge to the PAQS. If the PAQS members take up the challenge, it will require major „rethinking" on construction contract drafting style and if the recommendations are implemented, it will „bring the future together".

Keywords: Construction Contracts, Contract Management, Model Terms of Construction Contract, Modern Legal Drafting, Plain Language Contracts

1. STANDARD TERMS OF CONSTRUCTION CONTRACTS -RETHINKING AND TINKERING

1.1 Standard terms of construction contracts

Construction contracts are usually entered into based on published standard terms of contracts. Although „standard" terms connotes some degree of uniformity, the reality is the numbers and variety of construction contracts around the world are large – and still growing. In the United Kingdom alone there are over 100 published „standard" terms of construction contracts.

Having standard terms of contract is beneficial to the construction industry. It helps parties involved in these contracts become familiar with the terms and provides greater efficiency during the preparation of contract documents. Equally important is continuous improvement. Improvements may be made by amending existing contracts or by drafting new contracts.

1.2 Tinkering and rethinking

Improvements are either made by only tinkering with the words or they may be the result of major rethinking. Tinkering is associated with effects that are minor or casual. Rethinking involves a deeper thought process. Both tinkering and rethinking may result in changed outcomes, but the effect of rethinking would be more significant and strategic – thus having a longer lasting positive effect.

2. CONSTRUCTION CONTRACTS – DRAFTING STRUCTURE AND STYLE

2.1 Drafting structure and style

Construction contracts must ***clearly*** set out the parties" and the contract administrator"s rights and obligations. A study of construction contracts within several commonwealth jurisdictions shows a large number of them are still written in legalese – legal language typically adopted by traditional lawyers. Many still have multiple cross references with clauses spread over long sentences. And most of them do not adopt a structure that arranges the clauses in a holistic and cohesive logical flow – a project management structure more familiar in the construction industry. A structure where clauses are grouped within the areas of time obligations, financial obligations and quality obligations would suit those in the construction industry.

Judges have criticized archaism and lack of clarity in traditional construction contracts for years. *„A farrago of obscurities"*, said Edmund Davies LJ, when describing the old JCT 63 contract in *English Industrial Estates Corporation v George Wimpey & Co Ltd*.[1] Sachs LJ in *Bickerton & Son Ltd v North West Metropolitan Regional Hospital Board* condemned the JCT63 as being *„deviously drafted with what in parts can only be a calculated lack of forthright clarity."*[2] Salmon LJ, suggested in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* that the (JCT 63) building contract contained among the most *„obscurely and ineptly drafted clauses in the United Kingdom"*.[3]

Despite these criticisms the drafting style of the JCT contracts has largely remained for decades in the United Kingdom and in other jurisdictions that have adopted the traditional drafting style.

2.2 Modern plain legal drafting style

There is now enough evidence from around the world, mainly from other industries that plain language legal drafting is a better approach. It is more effective for users and it has been suggested it can even save money. Professor Peter Butt argued using four assumptions in his paper at an international conference in Kuala Lumpur in 2005:

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[1] [1973] 1 Lloyd's Rep 118, CA at 123

[2] [1969] 1 All ER 977, CA at 979

[3] [1970] 1 BLR 111, CA at 114

1. It is possible to effectively express legal concepts in plain language;
2. Plain legal language saves money;
3. Judges prefer plain language; and
4. Non-lawyers prefer plain legal language.

He then concluded:

> *„Plain language in law is now reasonably well-established....more than 20 years on, research has proved the assumptions to be correct. The evidence is overwhelming. Plain legal language brings substantial benefits. It would bring those benefits to the construction industry. Carefully used, plain language is legally safe; it saves time and money; lawyers and non-lawyers alike have a better chance of understanding it; and most judges prefer it. There seems no substantial reason to resist it."*[4]

Many modern legal drafting experts recommend adopting plain language. Among them are law professors, English language professors, judges, lawyers, and other experts from the USA[5], United Kingdom[6], and Australia[7].

A structure and style that is clearer is particularly important for construction contracts because construction contracts are used throughout a construction project that typically span over months or years. Further, the parties to the contract and the contract administrator are all not usually additionally legally qualified. Among the modern drafting structure and style that would benefit construction contracts are:

1. Keeping the average number of words per sentence fairly low – around 20.
2. Preferring the active to the passive style. Write: „the contractor must submit a programme" rather than „the programme must be submitted by the contractor".
3. Drafting in gender-neutral style. Using „he or she" is acceptable but restructuring the sentence by using the plural or repeating the noun would be better.
4. Removing redundant doublets like „null and void". Just use void instead.
5. Removing redundant legalese like whereas, hereinbefore, hereinafter, said, the said, and provided always. Also avoid using shall and use must to mean must. And don't use conflicting conjunctions like and/or.
6. Avoiding introducing legal fiction through deeming provisions.
7. Preferring plainer words wherever possible.
8. Using one word to consistently mean one thing within a contract.
9. Avoiding redundant duplication through parenthetical numerals like fourteen (14).
10. Avoiding multiple cross-referencing wherever possible.
11. Using lists with sub-numbering instead of long paragraphs.
12. Structuring clauses in a logical manner as would be familiar to those in the construction industry. Consider grouping clauses in the following groups: general obligations, administrative provisions, financial obligations, quality obligations, time obligations, subcontracting and sub-letting, breaches and termination, and dispute resolution.

2.3 Myths of traditional drafting style

There are fears plain legal drafting may be unsafe to adopt in legal documents. Among reasons given for maintaining traditional drafting construction contracts are:

1. They are „tried and tested" and therefore contain fewer errors

[4] Professor Peter Butt, *Plain Language in the Construction Industry*, International Forum on Construction Industry Payment Acts and Adjudication, (Kuala Lumpur, September 2005), page 9

[5] Including Judge Mark Painter, Professor Joseph Kimble, and Bryan A Garner

[6] Including Mark Adler and Martin Cutts

[7] Including Professor Peter Butt, Dr Robert Eagleson, Dr Neil James, Michele Asprey, and Christopher Balmford

2. They contain many „terms of art"
3. They are familiar and therefore easier to use
4. They are necessary to maintain legal intent
5. Construction being a complex process needs complex contracts

These excuses are not justified. They are all myths. These myths are dispelled in a paper on Modern Legal Drafting presented at an international conference in 2008.[8] Rudolf Flesch, creator of the Flesch Reading Ease test and co-creator of the Flesch-Kincaid Readability test suggests habit as a major reason for sticking to legalese. Professor Joseph Kimble offers a few more reasons and bluntly advises:

> *„Legalese persists for the same reasons as always – habit, inertia, formbooks, fear of change and notions of prestige. These reasons are more emotional then intellectual. ... And besides, since legalese has nothing of substance to recommend it, its dubious prestige value depends on ignorance.* ***We cannot fool people forever. Our main goal should be to communicate, not to impress."***

3. CONSTRUCTION CONTRACTS IN COMMONWEALTH JURISDICTIONS – A COMPARISON ON DRAFTING STYLE

Here is a glimpse of how construction contracts are now typically drafted.

3.1 United Kingdom

The Joint Contracts Tribunal commonly known as „JCT" series of contracts have historically been the most widely used in the United Kingdom.[9] Their derivatives are commonly found throughout many commonwealth countries. When the JCT proclaimed it was coming up with a new edition in 2005 to supersede earlier ones, there was much anticipation that the new suite of contracts will finally heed judicial advice given decades earlier by Sachs LJ in *Bickerton & Son Ltd v North West Metropolitan Regional Hospital Board*. After condemning the old JCT63 contract Sachs LJ suggested:

> *„The time has come for the* ***whole to be completely redrafted so that laymen – contractors and building owners alike – can understand*** *what are their own duties and obligations and what are those of the architect."*[10]

The new suite of contracts did not however heed Sachs LJ's advice. Whilst there were improvements on both technical content and drafting style, most of the contracts remained written in legalese. Here is an example of one minor improvement from the main JCT building contract[11]: All references to „determination of the Contractor's employment" have been changed to „termination of the Contractor's employment". Is this rethinking or tinkering? Although more akin to tinkering, and replacing the word „determination" with „termination" does not change the legal meaning here, using termination in this context is better, and an improvement.

One of the basic rules of good drafting is to avoid words that have multiple meanings - wherever possible. The meaning of termination is clear, whereas the word determination can mean termination but it also has

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[8] N A N Ameer Ali (2008) Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - 'The CICC Model Terms Of Construction Contract For Subcontract Work 2007'. In: *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur, pp 12-24

[9] Joint Contracts Tribunal series of contracts published by Sweet and Maxwell Limited, 2005 Edition, London, available at www.jctcontracts.com

[10] [1969] 1 All ER 977, CA at 979

[11] Joint Contracts Tribunal, JCT Standard Building Contract: With Quantities, Sweet and Maxwell Limited, 2005, Rev 1 June 2007

several other meanings. The New Collins Dictionary lists multiple meanings of determination. It is best avoided.

Confusion surrounding the word „determination" still exists today. More modern contracts go even further and adopt the plainer word „end" instead of „determine" or „terminate".[12] See also the illustrations on errors caused by using the word „determination" and related discussions on determination under the headings Singapore, New Zealand, and Australia below.

The structure and sequence of the JCT 2005 clauses have some order but are far from adopting a holistic approach. See for example the contents of the JCT Standard Building Contract: With Quantities SBC/Q pp i – iii.[13] Issues relating to time, quality and financial obligations are all interspersed. The government contracts in the United Kingdom are no better in drafting style or structure.

See for example the UK GC/Works/1 contract for *Single Stage Design & Build* (1998)[14]. Clause 8A(1) on professional indemnity insurance for design reads in a single 156-word sentence:

> *„The Contractor shall maintain professional indemnity insurance covering (inter alia) all liability hereunder in respect of defects or insufficiency in design, upon customary and usual terms and conditions prevailing from the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom (in an amount not less than that required by the Abstract of Particulars) for any one occurrence or series of occurrences arising out of any one event, for a period beginning now and ending 12 years (or such other period as is required by the Abstract of Particulars) after certification under Condition 39 (Certifying completion) of the completion of the Works or the last Section thereof in respect of which completion is certified, or the determination of the Contract for any reason whatsoever, including (without limitation) breach by the Employer, whichever is the earlier, provided always that such insurance is available at commercially reasonable rates."*

And clause 51 competes for the notorious longest sentence in the contract with 159 words:

> *„Without prejudice and in addition to any other rights and remedies of the Employer, whenever under or in respect of the Contract, or under or in respect of any other contract between the Contractor or any other member of the Contractor's Group and the Employer or any other member of the Employer's Group, any sum of money shall be recoverable from or payable by the Contractor or any other member of the Contractor's Group by or to the Employer or any other member of the Employer's Group, it may be deducted by the Employer from any sum or sums then due or which at any time thereafter may become due to the Contractor or any other member of the Contractor's Group under or in respect of the Contract, or under or in respect of any other contract between the Contractor or any other member of the Contractor's Group and the Employer or any other member of the Employer's Group."*

There is much drafting rethinking to be done if users of this contract are expected to understand these clauses.

3.2 Singapore

Here is something from the relatively new Singapore Contractors Association Limited (SCAL)'s *Conditions of Sub-Contract for Domestic Sub-Contracts* published in ***2005***.[15] The assumption may be made that much thought would have gone into drafting a new contract in relatively recent times. But again, much rethinking is

[12] New Zealand Institute of Architects (NZIA), *National Building Contract – General* (NBC G 2003); obtainable via www.nzia.co.nz

[13] Joint Contracts Tribunal, JCT Standard Building Contract: With Quantities, Sweet and Maxwell Limited, 2005, Rev 1 June 2007

[14] GC/Works/1 *Single Stage Design & Build* contract (Edition 3, 1998), obtainable via www.tsoshop.co.uk

[15] Singapore Contractors Association Ltd, *SCAL Conditions of Sub-Contract for Domestic Sub-Contracts* (2005), obtainable via enquiry@scal.com.sg

required if the typical users of this contract – contractors and subcontractors are to understand this contract easily. See for example clause 6 on performance bonds:

> *„The Obligor agrees that its liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Sub-Contract or the works or reason of any arrangement made between the Sub-Contractor and the Contractor or by reason of any breach or breaches of the Sub-Contract, whether by the Sub-Contractor or by the Contractor, and whether the same is or are made or occurs with or without the Obligor"s knowledge or consent. The Obligor further agrees that no invalidity in the Sub-Contract nor its avoidance, suspension or termination shall discharge, affect or impair its liability hereunder and that no waiver, compromise, indulgence or forbearance, whether as to time, payment or any other matter afforded to the Sub-Contractor under the Sub-Contract, shall discharge, affect or impair the Obligor"s liability hereunder."*

Not surprisingly, such convoluted drafting style has muddled the technical and legal content too. Clause 45 of the SCAL sub-contract refers to *terminating the Sub-Contract*. Clauses 46 and 47 then refer to terminating the *employment* of the Sub-Contractor. And yet clause 48, when referring to the same clauses 46 and 47, refers to *termination of the contract* not termination of the *employment* of the Sub-Contractor. Clause 49, on the other hand, in making reference to the same clauses 46 and 47, talks about terminating the *employment* of the Sub-Contractor. Is *terminating the contract* the same as *terminating the employment of the subcontractor*? Many or most construction lawyers do not think so. Even the authors of this SCAL contract itself differentiate them in clause 51. And even if they are the same, different words and phrases should not be used interchangeably. It goes against a basic rule of legal drafting. Different words are taken to refer to different things, and the same words to the same things. Or expressing it in *Piesse"s* words:

> *„Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning."*[16]

To further aggravate the inconsistency, clause 51 then introduces yet another variant. After referring to the *termination of the Main Contract* and the *termination of the employment of the Contractor*, it then refers to *determination of the Sub-Contract*. That word *„determination"* has of course historically long been used in the JCT contracts and their many derivatives around the world. As explained earlier under the heading United Kingdom, „determination" is best avoided.
Here is another clause from the SCAL contract. Clause 53 reads:

> *„If a dispute arises between the parties under or out of or in connection with this Sub-Contract or under or out of or in connection with the Sub-Contract Works, the parties **shall** endeavour to resolve the dispute through negotiations. If negotiations fail, the parties **shall** refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force. For the avoidance of doubt, prior reference of the dispute to mediation under this clause **shall** not be a condition precedent for its reference to arbitration by either party nor **shall** it affect either party"s rights to refer the dispute to arbitration under Clause 54 below." [Emphasis added]*

Do the words „the parties *shall* endeavour to resolve the dispute through negotiations" mean that negotiations are mandatory? Reading the whole clause, they are not; but others may disagree. „*If* negotiations fail, the parties *shall* refer the dispute for mediation …". Given the „if" then „shall", does „shall" here mean „must" or „may"? On first reading, it appears to mean „must". But because of the subsequent „for the avoidance of doubt"

[16] J K Aitken and Peter J Butt, *Piesse: The Elements of Drafting,* Sydney, Lawbook Co (10th ed, 2004), page 18

provision, stating that mediation is not a condition precedent to arbitration, this „shall" is more likely to mean „may". But again, others may argue differently.

The word „shall" has over eight meanings. It is rarely used consistently to mean only must. The SCAL contract is peppered with shalls. The use of „shall" can cause problems in any jurisdiction.

The SIA building contract is the most commonly used main contract in Singapore for private sector projects. It was first introduced in 1980 and it made a significant departure on technical content away from the traditional JCT approach. The one significant similarity that has remained is the steep traditional drafting style and structure peppered with archaism and complex long sentences. An example of a long sentence that goes against a good rule of modern legal drafting is found even in the basic clause defining the Architect's directions and instructions: The 135-word sentence of Clause 1(2) of the SIA Building Contract[17] reads:

> *In this Contract or when used by the Architect the term direction shall mean an order of the Architect (as opposed to suggestions, recommendations, or agreements with proposals made by the Contractor) compliance with which will not under the terms of the Contract entitle the Contractor to additional payment or compensation or to an increase in the Contract Sum, but which may in some cases result under the terms of the Contract in a reduction of the Contract Sum, whereas the term instruction shall mean an order of the Architect compliance with which, while it may in some cases involve a reduction of the Contract Sum, will in principle entitle the Contractor in an appropriate case under the terms of the Contract to additional payment or compensation or to an increase in the Contract Sum.*

The traditional drafting approach is similarly found in legislative drafting in Singapore. See for example the Building and Construction Industry Security of Payment Act 2004 and the comparison on drafting style on payment and adjudication Acts in nine jurisdictions.[18] There is no justification for such style in the future.

With rethinking these complex style and other convoluted clauses can be made plainer without loss of legal intent. See the following table for several options with the corresponding readability statistics. In all alternative options, the number of words is reduced. And in all alternative options the average number of words per sentence is reduced ***significantly*** with the Flesh Readability Ease score improving ***significantly*** compared to the original version.

Table 1: Comparing redraft versions of clause 1(2), SIA building contract and readability statistics

Version	**Clause**	**Readability statistics**
Original	In this Contract or when used by the Architect the term direction shall mean an order of the Architect (as opposed to suggestions, recommendations, or agreements with proposals made by the Contractor) compliance with which will not under the terms of the Contract entitle the Contractor to additional payment or compensation or to an increase in the Contract Sum, but which may in some cases result under the terms of the Contract in a reduction of the Contract Sum, whereas the term instruction shall mean an order of the Architect compliance with which, while it may in some cases involve a reduction of the Contract Sum, will in principle entitle the Contractor in an appropriate case under the terms of the Contract to additional payment or compensation or to an increase in the Contract Sum.	Total words: 135 Av wps: 135 FRE score: 0

[17] Singapore Institute of Architects (SIA), Singapore Standard Form of Building Contract, Sixth edition, 1999

[18] N A N Ameer Ali and S Wilkinson (2009) Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User's Perspective on Legislative Drafting Style. In: *Proceedings of the Commonwealth Association of Legislative Counsel Conference*, 1-4 April 2009, Hong Kong.

Rev 1	In this Contract, direction means an Architect‟s order – as opposed to suggestions, recommendations, or agreements with the Contractor‟s proposals. The Contractor will not be entitled to additional payment or compensation or to an increase in the Contract Sum. But in some cases it may result in a reduction in the Contract Sum. Instruction means an Architect‟s order, which in principle will entitle the Contractor in appropriate cases to additional payment or compensation or to an increase in the Contract Sum. But in some cases it may result in a reduction in the Contract Sum.	Total words: 94 Av wps: 18.8 FRE score: 43.7
Rev 2	In this Contract, direction means an Architect‟s order for which the Contractor will not be entitled to additional payment or compensation or to an increase in the Contract Sum. But in some cases it may result in a reduction in the Contract Sum. Instruction means an Architect‟s order, which in principle will entitle the Contractor in appropriate cases to additional payment or compensation or to an increase in the Contract Sum. But in some cases it may result in a reduction in the Contract Sum.	Total words: 85 Av wps: 21.2 FRE score: 47.9
Rev 3	In this Contract, direction means an Architect‟s order for which the Contractor will not be entitled to additional payment or compensation or to an increase in the Contract Sum. Instruction means an Architect‟s order, which in principle will entitle the Contractor in appropriate cases to additional payment or compensation or to an increase in the Contract Sum. Both directions and instructions may in some cases result in a reduction in the Contract Sum.	Total words: 73 Av wps: 24.3 FRE score: 37.2
Rev 4	(i) Direction means an Architect‟s order for which the Contractor will not be entitled to additional payment or an increase in the Contract Sum. (ii) Instruction means an Architect‟s order, which in principle will entitle the Contractor in appropriate cases to additional payment or an increase in the Contract Sum. (iii) Both directions and instructions may in some cases result in a reduction in the Contract Sum.	Total words: 64 Av wps: 21.3 FRE score: 41
Av wps means average words per sentence; FRE score means Flesch Reading Ease score		

Tinkering or rethinking or both? Which version would the users of this contract prefer? The most recent edition, the 8th edition, was launched in December 2008. Here is the clause on definition of direction and instruction:

> *In this Contract or when used by the Architect the term "direction" shall mean an order of the Architect (as opposed to suggestions, recommendations, or agreements with proposals made by the Contractor), compliance with which will not under the terms of the Contract entitle the*

> *Contractor to additional payment or compensation or to an increase in the Contract Sum, but which may in some cases result under the terms of the Contract in a reduction of the Contract Sum, whereas the term "instruction" shall mean an order of the Architect, compliance with which, while it may in some cases involve a reduction of the Contract Sum, will in principle entitle the Contractor in an appropriate case under the terms of the Contract to additional payment or compensation or to an increase in the Contract Sum.*

It is effectively the same as the old 6th edition! Even if any rethinking was done, it must have been thought that this clause should remain in tact with all the 135 words. Perhaps if PAQS and its members take the challenge posed by this paper, a future ninth edition of the SIA building contract might lead to major rethinking - at least in the drafting style - and it might be shorter and better understood by its users.

3.3 Malaysia

This is clause 57.1 of the 2002 edition of the public works department standard form of design and build contract published in Malaysia.

> *This Contract shall be deemed to be a Malaysian Contract and shall accordingly be construed according to the laws for the time being in force in Malaysia and the Malaysian Courts shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of this Contract and the Contractor hereby submits to the jurisdiction of the Malaysian Courts for the purposes of any such actions and proceedings.*[19]

This 69-word clause begs more questions than it attempts to instruct. It raises many questions and anomalies and much of it is redundant. The long awaited revised edition released in early 2008 amended this clause. A new clause 70.1 now reads:

> *This Contract shall be governed by and construed according to the laws of Malaysia and the Parties irrevocably submit to the exclusive jurisdiction of the courts of Malaysia.*[20]

Instead of maintaining apparent original legal intent, the drafters appear to have thought through and have managed to reduce the 69 words to 29. That is less than half the original version. This is a move in the right direction. But deeper rethinking may have improved it further to just:

> *Malaysian law governs this contract and Malaysian courts have exclusive jurisdiction.*

These 11 words now are fewer than half the number of words from the reduced version – without losing any legal intent. The equivalent construct-only contract, which was launched around the same time, reads in clause 72:

> *This Contract shall be governed by and construed* ***in accordance with*** *the laws of Malaysia and the Parties irrevocably submit to the exclusive jurisdiction of the courts of Malaysia.* [Emphasis added].

This differs slightly from the design and build version but does not change the meaning. This small difference is clearly tinkering.

Here is a typical clause on design obligations of a design and build contractor under several standard forms including the JCT design and build provisions, UK GC/Works/1 Single Stage Design & Build contract and

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[19] Government of Malaysia, Standard Form of Design & Build/Turnkey Contract, (PWD Form DB / T), 2002 Edition, obtainable from Public Works Department, Ministry of Works, Malaysia. The contents pages are downloadable from www.jkr.gov.my/apkpkr/pdf/5kandung.pdf

[20] Government of Malaysia, Standard Form of Design and Build Contract, PWD Form DB (Rev 2007), obtainable from Public Works Department, Ministry of Works, Malaysia

which was carried down to the Construction Industry Development Board Malaysia (CIDB) 2000 construction contract published in Malaysia:

> *„Insofar as the Contractor is responsible for the design of any part of the Works, he shall have in respect of Defects or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect, or as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a contractor not being the supplier of the design."*

The 100-word clause could easily be re-worded in plain English:

> *„The Contractor owes a reasonable skill and care obligation for design as would a professional appointed independently."* [17 words]

That has been the intended meaning for decades – since the *Bolam*[21] days.

The most commonly used standard terms of construction contract for building works in the Malaysian private sector is the PAM contract. The 1969 version was nearly identical to JCT 63. Despite judicial criticism of some of the equivalent clauses from JCT 63, it remained un-amended for 39 years! Extensive amendments were made in the 1998 edition. A quick withdrawal of the first published version earlier in 1998 was then followed by the October 1998 version. There were improvements but it also introduced some new difficulties or inconsistencies – including conflicting provisions between determining the contract and determining the employment of the contractor. This version remained un-amended until the 2006 version was launched in 2007. The inconsistency on determination was corrected.

What has remained constant among all versions is the traditional drafting style peppered with shalls, long sentences, deeming provisions, provisos, multiple cross-referencing, and redundant legalese like whereas, desirous, has caused, and hereinafter. Particularly distracting and unacceptable during these modern times is the redundant repeat of numbers that are spelt out in parenthetical numerals like: fourteen (14). This redundant style also remains in the PWD 203 (Rev 2007) contracts. This distraction has fortunately long disappeared even in other contracts steeped in traditional drafting style such as the JCT 2005, the Singapore SIA Standard Form of Building Contract and the Hong Kong building contract.

Another unfortunate style still maintained is the use of the contrived conjunction „and/or". There are at least 35 „and/or"s in the new Pam 2006 contract. It has been referred to by judges as an „abominable invention … as devoid of meaning as it is incapable of classification by the rules of grammar and syntax" and as a „Janus-faced verbal monstrosity." It has even been banned in some courts in the USA. It can create confusion and it is sometimes not easily understood.

A and B means both. A or B means ***either*** A or B. A or B means they are both mutually exclusive – you can only have one and not the other. This is exactly the opposite of A and B, yet both opposing conjunctions „and" and „or" are combined to create a conflicting possibility – a contrived conjunction. One does not have to be a quantity surveyor or engineer to understand this simple logic or a lack of it. Usually with careful thinking either „and" or „or" alone would do. Where all possibilities are needed use „A or B or both". And instead of A and/or B and/or C and/or D and/or E, it is better to write:

> *„Any combination of one or more of the following:*
> *(i) A*
> *(ii) B*
> *(iii) C*
> *(iv) D*
> *(v) E."*

[21] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, CA

We hope the next edition of the PAM contract will be in plainer English to *„best serve the interest of the parties to the contract as well as those who are entrusted with the application".* That is the stated intent on the contract.

One other contract used in the private sector, particularly for engineering projects is the Institution of Engineers Malaysia (IEM) engineering contract. This was substantially similar to the older version of the PWD contract (including most of the clause numbering) but modified to suit the private sector. There is now a refreshing revised draft version available for comments from the public[22]. What is refreshing is an attempt (partially at least) to make the contract plainer. Must has been used 548 times generally in a mandatory sense instead of shall – although 8 shalls remain in the draft. This is presumably an oversight left over from the traditional drafting style of decades ago. This ought to be removed particularly because they are all not used in one consistent sense such as in the mandatory sense.

There is no repeat of numbers in parenthetical numerals. But the contract is not drafted in gender-neutral style. The 117 „he"s are not expressly deemed within the contract itself to include the other gender or genders in this contract. The PAM 2006, which is also not drafted in gender-neutral style thought it fit to provide that „words of one gender include the other gender" expressly in the contract. Other contracts such as the Hong Kong building contract have thought fit to additionally include the neuter.

3.4 Hong Kong

Among the most commonly used construction contract is the HKIA"s building contract.[23] The Hong Kong Joint Contracts Working Committee claims to have set itself *„the tough objectives of preparing forms of contract that:*

- *are fair and equitable;*
- *are fully **comprehensive yet concise**;*
- *enable the optimum balance to be struck between time, cost and quality; and*
- *contain effective means to resolve disputes as they arise."*

The committee has strived to achieve these targets. What is missing is to additionally have the target of having a contract that is not only ***'comprehensive yet concise'*** but also one that is more ***comprehensible***. The drafting style and structure of the current version with its relatively shorter sentence structure is better than many earlier JCT contracts, their derivatives and those found in Singapore and JCT derivatives in Malaysia, but would benefit from rethinking and adopting a plain language style. Perhaps the committee may consider adding „more comprehensible" as an additional objective for the next edition.

3.5 New Zealand

Among the most commonly used standard terms of construction contracts in New Zealand are the New Zealand Standard Conditions of Contract for Civil Engineering and Building Work (NZS3910:2003)[24] and the New Zealand Institute of Architect"s National Building Contract (NZIA NBC).[25] In drafting style, both are relatively well structured - compared to the convoluted traditional style found in many other contracts around the world.

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[22] See www.iem.org.my and click on the news item on the top line. Alternatively, it may be obtained directly through this link accessed on 19 July 2009: http://www.iem.org.my/wapi/mctweb.dll/file?MID=IEMWEB-MAIN2&filename=doc/CONTRACT-CS.pdf

[23] The Hong Kong Institute of Architects, The Hong Kong Institute of Construction Managers, and The Hong Kong Institute of Surveyors, Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region: Private Edition – With Quantities (2005); obtainable via www.hkia.net

[24] Standards New Zealand. Conditions of Contract for Building and Civil Engineering Construction. Standards New Zealand, Wellington, 2003, NZS 3910:2003

[25] New Zealand Institute of Architects (NZIA), *National Building Contract – General* (NBC G 2003); obtainable via www.nzia.co.nz

They have shorter sentences and plenty of sub-numbering and breaking up of clauses, but neither contracts have adopted the project management approach to overall arrangement of clauses by grouping clauses in clusters of time, quality and financial provisions as suggested in this paper.

Both have quite successfully kept to gender-neutral drafting - the NZS 3910 adopting the somewhat more cumbersome „he or she", „him or her", and „his or her" but never re-sequencing „she or he", „her or him" or „her or his". It only fails to be gender-neutral once and misses out on „her" (presumably an oversight) in the whole contract in clause 14.1.1 (b). A similar (also presumably) oversight appears in clause 14.1.2 (b) in the NZS 3915 contract.

The NZIA NBC does better on the choice of language. It adopts plainer language. For example, it clearly and plainly refers to „ending the contract" rather than „terminating the contract" or (worse still) „determining the contract." Using the word „determination" goes against good rules of modern legal drafting, since „determine" has multiple meanings. Yet as discussed earlier, many construction contracts, including many Malaysian,[26] Singaporean,[27] Hong Kong[28] and all the pre-2005 JCT contracts use „determination of the contractor's employment" instead of either „termination of the contractor's employment" or just „ending the contractor's employment".

The NZS 3910 attempts to dictate authoritatively with 756 shalls (but not all used in one single sense to mean must) in addition to 53 musts. The NZIA NBC is clearer and uses just „must" and „may" without „shall" in most of its terms of contract, and uses proper listing. It unfortunately slips into „shall" and other archaism when it comes to the format of the Contractor's Performance Bond and other bonds! For further discussions on objections to the use of shall see pp 25-26 under the heading *„To „shall" or not to „shall"? This should no longer be a question"* in a paper published by the Society of Construction Law[29].

Again, there is room for more rethinking here. Perhaps a different person drafted the formats of the bonds. Or perhaps the formats may have been taken from another document? Or maybe, the drafters (erroneously) thought that „highly formal or legal" documents like performance bonds must use „tried and tested" archaism? Or wrongly assumed some of these archaisms were „terms of art"? The bonds also slip into other archaism and redundant doublets like „null and void".

Genuine „terms of art" may of course be maintained in contracts. There are not many terms of art in a typical construction contract. One study of a real-estate sales agreement found that only about 3% of the words had significant legal meaning based on precedent.[30] In construction contracts this is estimated to be much less than 3%.[31] Among these terms of art might be reasonable skill and care, fitness for purpose, collateral warranty, regularly and diligently, time is of the essence, practical completion, liquidated damages, bills of quantities, provisional sums, loss and expense, and termination of the contractor's employment. Hereinafter, hereinbefore, whereas, whereinbefore, said, the said, for the avoidance of doubt, provided always, and/or, or shall are all ***not*** terms of art.

These archaisms have long disappeared from even legislative drafting in New Zealand and most parts of Australia and in many other parts of the developed world. These legislative drafters advocate the use of plain

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[26] For example the PAM 2006, PWD 203A (Rev 2007) and CIDB 2000 standard forms of contract (Malaysia)

[27] For example the Singapore Contractors Association Ltd, *SCAL Conditions of Sub-Contract for Domestic Sub-Contracts* (2005), obtainable via enquiry@scal.com.sg

[28] For example the Hong Kong Institute of Architects (HKIA), *Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region: Private Edition – With Quantities* (2005)

[29] N A N Ameer Ali (2008) *Modern Plain English Drafting And Construction: The Malaysian Subcontract Model Terms.* Society of Construction Law, April 2008, London

[30] Benson Barr, George Hathaway, Nancy Omichinski and Diana Pratt, 'Legalese and the Myth of Case Precedent' (1985) 64 Michigan Bar Journal 1136-1137, quoted in Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language*, Durham NC, Carolina Academic Press (2005), page 11

[31] N A N Ameer Ali (2008) Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - 'The CICC Model Terms Of Construction Contract For Subcontract Work 2007'. In: *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur, p 16

English words. See for example Chapter 3 of the New Zealand Parliamentary Counsel Office"s in-house Drafting Manual headed *„Principles of Clear Drafting".* Rule 3.12 instructs[32]:

- *Use the simplest word that conveys the meaning*
- *Eliminate unnecessary words*
- *Do not use archaic language*

It is even more important that archaism should not remain in construction contracts, because construction contracts and subcontracts are used on a more regular basis by „lay" users in the construction industry and construction professionals.

3.6 Australia

Among the most commonly used construction contract in Australia is the AS 4000-1997.[33] The layout of the contract is relatively clear but the drafting style is still partly in traditional English and not entirely in plain English. The 298 „shalls" are the most notable traditional style. „Shall" has over 8 meanings. And not surprisingly „shall" in the AS 4000-1997 is not used consistently throughout in a single sense to mean only one thing such as must.

As stated earlier, even many Australian legislative drafters have adopted plain English in legislative drafting but this contract does not. One of their legislative drafting manuals orders in Chapter 4, Rule 83: Say "must" or "must not" when imposing an obligation, not "shall" or "shall not".

Standards Australia will do better if it heeds this advice and similar advice from many modern legal drafting authorities from around the world including Michele Asprey and Professor Peter Butt (Australia), Martin Cutts and Mark Adler (United Kingdom), Bryan A Garner (says shall „runs afoul of several basic principles of good drafting"[34] and Professor Joseph Kimble (suggests „give shall the boot") (United States of America). Their advice, paraphrased in my words: shun shall.

There is no „shall" in modern legislative drafting such as in the New Zealand Construction Contracts Act 2002 or the Security for Payment Acts in New South Wales, Queensland and Victoria. Even in the United Kingdom, the original bastion of traditional drafting, recommendation are for legislative drafters to stop using shall. The *Drafting Techniques Group Paper 19 (final): March 2008*. In a 24-page review document headed „shall" among the recommendations in paragraph 51 and 52 are:

> *51 The Group considers that "must" in this context means the same as "shall" but is clearer, more modern and more consistent with Plain English drafting. There is no real argument that "must" is weaker (or stronger) than "shall", or that it should be used for directory as opposed to mandatory obligations. Its use to impose duties is increasing, and there is no real danger that, if this became more widespread, the courts would think a different meaning was intended. This development would align practice in this Office more closely with practice elsewhere in the UK and in other jurisdictions.*
> *52 The Group recommends that there should be a presumption in favour of alternatives to "shall" to impose obligations.*

Despite the crumbling of the archaic style in the United Kingdom, it is unfortunate that instead of the steep traditional and archaic drafting style being discarded, it remains strongly engrained in other countries – generally in developing countries and countries where English is not the sole language. Many of the industries in more developed countries where English is the primary language like Australia, New Zealand, USA, and Canada (which is embracing plain English and plain French) have rapidly moved to plain English – some even mandating plain language through legislation.

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[32] Accessed on 17 July 2009 at:
http://www.pco.parliament.govt.nz/clientfile/drafting/draftingmanual.shtml

[33] Standards Australia. General conditions of contract. Standards Australia, SAI Global, Sydney, 1997, AS 4000-1997

[34] Bryan A Garner, *A Dictionary of Modern Legal Usage*, New York, Oxford University Press (2nd ed, 2001), page 939

4. THE MODEL TERMS OF CONSTRUCTION CONTRACT FOR SUBCONTRACT WORK – 2007 (MODEL TERMS)

This was a contract that was drafted from a blank screen to fill a gap within the Malaysian construction industry. Whilst there were several choices of published standard terms of main contracts and the corresponding nominated subcontracts there never was a published set of subcontract terms for „domestic" subcontractors. „Domestic" subcontractors are subcontractors selected by and appointed by the main contractors as opposed to „nominated" subcontractors who are selected by the client or contract administrator but appointed by the main contractor.

The Model Terms was drafted with flexibility such that it may be used in conjunction with any main contract, and with little modification, it could be used in other jurisdictions. The drafting approach and use in practice are elaborated in three different papers published in the United Kingdom (a Society of Construction Law paper)[35], Malaysia (Master Builders Association Malaysia"s Journal)[36], and New Zealand (New Zealand Building Subcontractors Federation publication)[37]. The Model Terms holds the unique position of having the unprecedented endorsement of 14 professional and trade organizations in Malaysia, led by the Construction Industry Development Board. Some of the persuasion for endorsement came because of the sensible structure, modern style, and content of the terms of contract. Consensus was obtained following workshops. In other words, persuasion was obtained through merit and not through drafting bodies" muscle.

From a drafting structure and style perspective, here are some of its features:

1. The average number of words per sentence is around 19.
2. Over 70% of the sentences are in the active voice.
3. It is written in gender-neutral style and without using the cumbersome „he or she".
4. There are no redundant doublets like null and void, or other legalism like whereas, hereinbefore, hereinafter, said, the said, and provided always. There is no shall and no conflicting conjunctions like and/or.
5. There are no „deeming" provisions.
6. The words used are generally plain, although terms of art are maintained.
7. There is no redundant repeat of numbers spent out in parenthetical numerals like fourteen (14).
8. The contract adopts referencing to the appendix but no multiple cross-referencing.
9. Paragraphs are broken up into lists using sub numbering.
10. Clauses are structured adopting a project management structure where clauses are grouped under general obligations, administrative provisions, time obligations, financial obligations, quality obligations, legal rights and termination, and dispute resolution.
11. It is drafted flexibly such that many of its provisions may be modified easily through filling it the provisions in the appendix.

5. MODEL TERMS OF A MAIN CONTRACT

It is possible to modify from the Model Terms and develop and adopt a structure that could be used for main contracts around the world. Here is a model of the contents page for a main contract that could be used as a

[35] N A N Ameer Ali (2008) *Modern Plain English Drafting And Construction: The Malaysian Subcontract Model Terms.* Society of Construction Law, April 2008, London

[36] N A N Ameer Ali (2008) Modernising Construction Contracts, Incorporating A Case Study - The CICC Model Terms Of Construction Contract For Subcontract Work 2007 - Part One, *Master Builders Journal*, 3rd Quarter 2008, Master Builders Association Malaysia.

[37] N A N Ameer Ali (2008) Unique Plain Language Contract A Success, *New Zealand Building Subcontractors Federation UPDATE*, May 2008, Wellington.

base and modified to suit. The key point to note is the logical structure and the project management approach to gathering clauses in groups relating to time, financial, and quality clauses.

PART A – AGREEMENT

1 Date of contract
2 Parties to this contract – Client and Contractor
3 Contract Administrator
4 Scope of work
5 Contract documents
6 Date for starting the work
7 Date for completing the work
8 Price for the work
9 Law governing this contract

PART B – STANDARD TERMS OF CONTRACT

1 Definitions and interpretation
- 1.1 Definitions
- 1.2 Singular and plural

2 General obligations
- 2.1 The Client‟s general obligations
- 2.2 The Contractor‟s general obligations
- 2.3 The Client‟s and Contractor‟s general obligations

3 Contract administration and changes to the work (variations)
- 3.1 The Contract Administrator
- 3.2 Contract Administrator‟s representatives and delegation of powers
- 3.3 Instructions, decisions, certificates, claims, and notices
- 3.4 Mode of communication
- 3.5 Changes to the work (variations)

4 Time
- 4.1 Date for starting the work
- 4.2 Work programme
- 4.3 Work progress
- 4.4 Date for completing the work
- 4.5 Suspension of work
- 4.6 Adjusting the date for completing the work (or extension of time)
- 4.7 Practical completion and practical completion certificate
- 4.8 Defects liability period and final completion certificate
- 4.9 Starting and completing the work in sections (sectional completion)
- 4.10 Non-completion
- 4.11 Compensation for delayed completion

5 Financial
- 5.1 Insurance
- 5.2 Security deposit
  - 5.2.1 Performance security deposit
  - 5.2.2 Advance payment security deposit
- 5.3 Timing of payment claims, payment certificates, and payment
- 5.4 Contents of payment certificates
- 5.5 Final accounts, release of retained amount, and final payment certificate
- 5.6 Right to pay subcontractors directly

6 Contract obligations including quality, safety, health, and environmental obligations
- 6.1 Breach of contract including breach relating to time and quality provisions

6.2 Safety, health, and environment

7 Subcontracting and other contractors
- 7.1 Provisions for subcontracting
- 7.2 Obligations for subcontract work
- 7.3 Other contractors

8 General legal rights and termination
- 8.1 General legal rights
- 8.2 Termination of the Contractor‟s employment under this contract by the Client
- 8.3 Termination of the Contractor‟s employment under this contract by the Contractor
- 8.4 Termination of subcontractors
- 8.5 Compensation following termination
- 8.6 Procedures following termination of the Contractor‟s employment under this contract

9 Disagreement and resolution of disagreement
- 9.1 Disagreement, negotiation, and mediation
- 9.2 Adjudication
- 9.3 Arbitration

PART C – APPENDIX TO AGREEMENT AND STANDARD TERMS OF CONTRACT

If there were specific additional requirements, they could be clothed around this base structure. Provisions that are likely to be variable for every project should ideally be placed in other parts of the contract such as the Preliminaries or Bills of Quantities.

6. TABULATION OF KEY FEATURES OF PUBLISHED STANDARD TERMS OF CONSTRUCTION CONTRACTS

Appendix A is a tabulated comparison of a few key features from published standard terms of construction contract relating to drafting structure and style from several commonwealth jurisdictions.

7. CONCLUSION

There is great variety in the current drafting styles and structures of construction contracts used in the construction industries around the world. Many are peppered with legalese.

There is now enough evidence that legal documents can be drafted with greater clarity whilst maintaining legal intent and (possibly) enhancing the content too. Legislative drafters in New Zealand and Australia are trained in their field of drafting and are guided by drafting style manuals. Construction contracts drafters are not always trained in drafting skills and there are no known published drafting style manuals specifically for construction contracts drafting that construction contracts drafters use. Habit tends to be the basis of drafting style and „tried and tested‟ legalism is common. Yet much of this legalism is „tried and tested‟ in court because they cause legal problems. Many have been the subject of judicial criticism.

Developing a set of modern drafting style guidelines for construction contracts will benefit the construction industry around the world.

There may be alternatives to modernizing construction contracts into plain language so that parties can understand the contract better. Brian Hunt suggests:

> *„When a person encounters a difficulty involving a statute, what is so wrong with him/her taking it to an expert in the field – a lawyer?‟*[38]

[38] Brian Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?', Fourth Biennial Conference of the Plain Language Association INternational (PLAIN), Toronto (27 September 2002), page 13; downloadable from the link to the 2002 conference at www.plainlanguagenetwork.org/conferences or directly from http://www.plainlanguagenetwork.org/conferences/2002/index.htm

One could put forward an analogous suggestion for construction contracts. But that will not be accepted by the construction industry. It will be grossly inefficient. The alternative of employing lawyers to administer construction contracts would not work given the many technical issues the contract administrator has to deal with. Analogy from empirical evidence on understanding payment and adjudication legislation in New Zealand shows lawyers may not be the best person to administer construction contracts on a day-to-day basis.[39]

There are many barriers to entry of a new contract in any jurisdiction. See for example the detailed discussions in the paper titled *„Could the NEC be widely used in New Zealand?"*[40] Drafting bodies may well take a strong stand on contracts drafted by them based on claims of technical brilliance or pride or both and may insist their contracts are the best. They may well be right within their own jurisdiction. We are not in this paper suggesting there ought to be only one set of standard terms of construction contract across various jurisdictions. At best that would be only a laudable ideal. It will for now be more of a laughable dream.

We are here suggesting:

(i) a set of construction contract drafting style guideline be developed; and following that
(ii) a rethink is done by all drafting bodies, and if appropriate, existing and new contracts be redrafted and structured based on the drafting style guideline.

Each jurisdiction and drafting body can maintain how risk is allocated in existing contracts and how and who administers the contract. It is the traditional drafting in legalese that is unlikely to continue to survive if a plainer method of achieving the same result is available. Barriers to changes as a result of guarding professional turf may be common but barriers to proven modern methods of drafting should not be there – not among professionals.

Such major redrafting from traditional style to modern plain language has been done extensively in various other industries throughout the world including complex areas covering tax, health, and banking. They include legislative drafting. This seems to be the trend in the USA and other developed countries such as Australia, New Zealand, the United Kingdom, and Canada more than in developing countries.

There are now a few contracts in the construction industry that are moving in the right direction – as far as style of drafting is concerned. Catering for much smaller projects, the JCT 05 HO or home owner/occupier (with or without consultant)[41] and the *NZS 3902:2004 New Zealand Standard Housing, Alterations and Small Buildings Contract* are also moving towards modern plain English. The approach of the Engineering and Construction Contract ECC or more commonly known as NEC (now in its third edition as NEC3[42]), published in the UK attempted towards making the contract simpler. The criticisms that were made, particularly on its earlier editions, and what valid criticism that may remain, particularly from lawyers, could be attributed to attempts at over-simplifying. A present tense style of drafting is not necessarily easy to understand. Another point to note is although NEC3 promotes good project management practice, the contract does not cluster clauses according to the project management tenets of time, finance and quality. There are many clauses, as would be expected of the contract which attempts to cover many procurement options. Restructuring them as we have suggested would help those new to the contract to steer through a maze of legal (and project management) provisions. The suite of contracts as it stands now is not easy to understand on first reading.

Principles of modern legal drafting are now being applied in redrafting exercises in Malaysia. A major redrafting exercise is now being done on a new design and build construction contract. The current 40,000-word draft in traditional style is being redrafted into modern plain language. It is targeted to be published in early 2010. Preliminary results show the original drafting committee is satisfied with the re-draft from the

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[39] N A N Ameer Ali and S Wilkinson (2009) Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User's Perspective on Legislative Drafting Style. In: *Proceedings of the Commonwealth Association of Legislative Counsel Conference*, 1-4 April 2009, Hong Kong, pp 34-36

[40] Wilkinson S and Farhi C (2008) Could the NEC be widely used in New Zealand? Proceedings of the Institution of Civil Engineers, Management, Procurement and Law, Volume 161, Issue 3 pp107-113: 2008

[41] Joint Contracts Tribunal Ltd, *Building Contract for a Home Owner/Occupier who has not appointed a consultant to oversee the work* (JCT 05 HOB) and *Building Contract and Consultancy Agreement for a Home Owner/Occupier who has appointed a consultant to oversee the work* (JCT 05 HOC), London, Sweet & Maxwell (2005)

[42] *The New Engineering Contract* (NEC3), London, ICE/Thomas Telford, 2005

traditional version into the modern plain language version. Among the benefits are significant reductions in both the total number of words and the average number of words per sentence. The readability statistics have improved. The drafting structure and style of the *Model Terms* is also worth considering as a base model for new contracts planned to be drafted.

8. A FEW CHALLENGES

8.1 The Commonwealth Association of Legislative Counsel (CALC) challenge

During a conference in Hong Kong in April 2009, the authors posed a challenge to the Commonwealth Association of Legislative Counsel (CALC) in a paper titled *Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User's Perspective on Legislative Drafting Style*. Following a plea for legislation to be drafted in language that its primary users can easily understand, the challenge for CALC and its members was put forward:

> *Develop a **single** set of agreed standardized core legislative drafting style guidelines.*

We suggested the existing parliamentary drafting manuals from Australia and New Zealand could be a good starting base. There could also be variances attached to the core style guidelines that might be necessary for different jurisdictions. This challenge was noted at the CALC's annual general meeting. We await further outcome.

8.2 Call to modernize construction contracts drafting style

During an international conference on modern legal drafting in Kuala Lumpur in July 2008, it was suggested:

> *The time has come for every construction contract to be re-drafted adopting a structure, readability style, and language that the parties to the contract and the contract administrator can understand better – a plain language style.*[43]

8.3 The PAQS 2009 rethinking contract management challenge

A set of modern drafting style guidelines will help the construction industry achieve the call to modernize construction contracts drafting. We now put this challenge to the PAQS and its members:

> ***Develop a set of construction contract drafting style guideline.***

It makes good sense for the parties to construction contracts and the contract administrator to understand the contract well and easily. How risk is allocated can remain the prerogative of the various drafting bodies, but adopting a drafting style guideline will create contracts that are better understood. It can also help prevent unwarranted interpretation disputes and lead to greater efficiency during contract administration.

If the PAQS members take up the challenge, it will require major „rethinking" on construction contract drafting style or not mere tinkering and if the recommendations are implemented, it will „bring the future together" through collaboration and avoid isolation.

[43] N A N Ameer Ali (2008) Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - 'The CICC Model Terms Of Construction Contract For Subcontract Work 2007'. In: *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur, p 55

REFERENCES

Ameer Ali, N.A.N (2008). Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - „The CICC Model Terms Of Construction Contract For Subcontract Work 2007". In: *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur.

Joint Contracts Tribunal (2005). *Joint Contracts Tribunal series of contracts*. London: Sweet and Maxwell Limited. Available at: www.jctcontracts.com

Joint Contracts Tribunal (2005) (Revised 1 June 2007). *JCT Standard Building Contract: With Quantities*. London: Sweet and Maxwell Limited.

New Zealand Institute of Architects (NZIA), *National Building Contract – General* (NBC G 2003); Available at: www.nzia.co.nz

GC/Works/1 *Single Stage Design & Build* contract (Edition 3, 1998). Available at: www.tsoshop.co.uk.

Singapore Contractors Association Ltd (2005). *SCAL Conditions of Sub-Contract for Domestic Sub-Contracts* Available at: enquiry@scal.com.sg

Aitken, J.K. and Butt, P.J. (2004). *Piesse: The Elements of Drafting.* Sydney: Lawbook Co. (10th ed).

Singapore Institute of Architects (SIA), Singapore Standard Form of Building Contract, Sixth edition, 1999.

Ameer Ali, N.A.N. and Wilkinson, S. (2009) Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User"s Perspective on Legislative Drafting Style. In: *Proceedings of the Commonwealth Association of Legislative Counsel Conference*, 1-4 April 2009, Hong Kong.

Government of Malaysia (2002). *Standard Form of Design & Build/Turnkey Contract, (PWD Form DB / T)*, 2002 Edition. Available at: www.jkr.gov.my/apkpkr/pdf/5kandung.pdf.

Government of Malaysia (2007). *Standard Form of Design and Build Contract, PWD Form DB (Rev 2007)*.

The Hong Kong Institute of Architects, The Hong Kong Institute of Construction Managers, and The Hong Kong Institute of Surveyors (2005). *Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region: Private Edition – With Quantities*. Available at: www.hkia.net.

Standards New Zealand (2003) *Conditions of Contract for Building and Civil Engineering Construction. Standards New Zealand*. Wellington, NZS 3910:2003.

New Zealand Institute of Architects (NZIA), *National Building Contract – General* (NBC G 2003); Available at: www.nzia.co.nz.

Ameer Ali, N.A.N. (2008). *Modern Plain English Drafting And Construction: The Malaysian Subcontract Model Terms.* Society of Construction Law, April 2008, London.

Barr, B., Hathaway, G., Omichinski, N. and Pratt, D. (2005). „Legalese and the Myth of Case Precedent" (1985) 64 Michigan Bar Journal 1136-1137, quoted in Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language*, Durham NC, Carolina Academic Press.

Ameer Ali, N.A.N. (2008). Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - „The CICC Model Terms Of Construction Contract For Subcontract Work 2007". *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur.

Standards Australia. General conditions of contract. Standards Australia, SAI Global, Sydney, AS 4000-1997.

Garner, B.A. (2001). *A Dictionary of Modern Legal Usage*, New York, Oxford University Press (2nd ed).

Ameer Ali, N.A.N. (2008) *Modern Plain English Drafting And Construction: The Malaysian Subcontract Model Terms.* Society of Construction Law, April 2008, London.

Ameer Ali, N.A.N. (2008). Modernising Construction Contracts, Incorporating A Case Study - The CICC Model Terms Of Construction Contract For Subcontract Work 2007 - Part One, *Master Builders Journal*, 3rd Quarter 2008, Master Builders Association Malaysia.

Ameer Ali, N.A.N. (2008). Unique Plain Language Contract A Success, *New Zealand Building Subcontractors Federation UPDATE*, May 2008, Wellington.

Hunt, B. (2002). Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?. *Fourth Biennial Conference of the Plain Language Association International (PLAIN)*, Toronto (27 September 2002), p. 13. Available at: www.plainlanguagenetwork.org/conferences or directly from http://www.plainlanguagenetwork.org/conferences/2002/index.htm.

Ameer Ali, N.A.N. and Wilkinson, S. (2009). Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User"s Perspective on Legislative Drafting Style. *Proceedings of the Commonwealth Association of Legislative Counsel Conference*, 1-4 April 2009, Hong Kong.

Wilkinson, S. and Farhi, C. (2008). Could the NEC be widely used in New Zealand? *Proceedings of the Institution of Civil Engineers, Management, Procurement and Law*, (Vol. 161, No. 3), pp. 107-13.

Joint Contracts Tribunal Ltd (2005). *Building Contract for a Home Owner/Occupier who has not appointed a consultant to oversee the work* (JCT 05 HOB) and *Building Contract and Consultancy Agreement for a Home Owner/Occupier who has appointed a consultant to oversee the work* (JCT 05 HOC), London: Sweet & Maxwell.

NEC (2005). *The New Engineering Contract* (NEC3), London: ICE/Thomas Telford.

Ameer Ali, N.A.N. (2008). Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - „The CICC Model Terms Of Construction Contract For Subcontract Work 2007". *Proceedings of the International Conference on Modern Legal Drafting*, July 2008, Kuala Lumpur.

Appendix A - Tabulation of key features of published standard terms of construction contracts

Description	UK	Singapore		Hong Kong	Australia	New Zealand		Malaysia			
	JCT 05	SCAL	SIA	HKIA	AS 4000	NZS 3910	NZIA - NBC	PAM 2006	PWD 2007	IEM DRAFT 09	Model Terms
Average sentence length	Long	Long	Very long	Medium	Short	Short	Short	Long	Long	Short	Short
Gender neutral	No	No	No	No	Yes	Yes	Yes	No	No	No	Yes
Drafting style – traditional / modern plain	Traditional	Highly traditional	Highly traditional	Moderately traditional	Moderately traditional	Moderately traditional	Mainly modern plain and partly traditional	Traditional	Traditional	Modern plain combined with traditional	Modern plain
Inconsistent use of shall	Yes	Yes	Yes	Yes	Yes	Yes	Yes but only in certain parts of contract	Yes	Yes	Yes but only 8 times	No
Use of contrived conjunctions like and/or	Yes		No	Yes	Once in index	Yes	No	Yes	Yes	Yes	No
Redundant duplication of numbers	No	No	No	No	No	No	No	Yes	Yes	No	No
Multiple cross referencing	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	No

Project management approach to sequencing clauses	No	No	No	No	No	No	No	No	No	No	Yes
Availability in soft copy	Yes as an additional alternative	No	No	No	Yes as an additional alternative	Yes included with hard copy	No	No	No	Not known yet	Yes
Availability as an on-line download	Yes	No	No	No	Yes	No	No	No	No	Not known yet	Not officially but available through certain bodies
Price	Hard copy: GBP 36.52 Online version for complete suite: GBP 491.05 per annum, with price increasing on 1 August 2009	SGD 12.00 (members) – SGD 24.00 (non-members)	SGD 9.50 – SGD 26.00 depending on who buys it – SIA student members, SIA or SISV members, university / school or others	HK$ 120.00	Hardcopy: AUD 88.50 Downloadable soft copy: AUD 79.65	NZD 86.00 includes CD of soft copy	NZD 54.00	RM 12.00	RM 20.00	Not known yet; previous published edition: RM 5.00	Hard copy: RM 15.00 Soft copy on a CD RM 10.00
Presentation	Glossy card cover	Glossy card cover	„Neither glossy nor matt cover“	Matt card cover	Matt card cover	Glossy card cover	Glossy card cover	Matt cream thick paper cover	Matt white paper cover	Not known yet; previous edition matt white paper cover	Matt card cover

Other comments	On-line version with updates included in annual subscriptions				May be bought on-line and available instantly	Soft copy version on CD has hyper linked indices					Soft copy version on CD includes PDF and MS Word versions in English and Malay language