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TERMINATION OF CONTRACT ON THE GROUND OF NATIONAL INTEREST IN MALAYSIA

Parameswary Shanmugam^{1*}

¹Faculty of Law, National University Malaysia



p142685@siswa.ukm.edu.my



<https://orcid.org/0009-0005-9926-8414>

*Corresponding Author

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Abstract:

A government contract is very different from a private contract. It is notable that Government procurement contracts are peculiar in the sense that they have a special clause on termination whereby the Government is vested with special power to terminate a contract on a national interest basis. Under the said clause, the Government as an employer of a contract may end the contract by giving not less than thirty (30) days without any obligation to provide any reason if the Government considers that such termination is essential for national interest, national policy or national security. However, what constitutes national interest in the said clause is equivocal, dubious and subjective. This article explores the uncertainty and ambiguity of the concept of national interest under the contract document and insufficiency of law regarding the termination of contract under national interest basis. This article will provide a detailed analysis of case authorities and legal precedents about termination of contract on a national interest basis. In the meantime, this article will provide proactive measures that can be taken to mitigate the emergence of legal issues that arise due to ambiguity of concept of national interest.

Keyword:

Government Contracts; National Interest; Malaysia; Termination



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Introduction

In Malaysia, Government Contracts Act 1949¹ is the statute which gives authority to the minister and public officers and chief minister of the State to enter a contract on behalf of Government and State Government with any parties. It is an Act for the making of contracts on behalf of the Government, and the Governments of the States, and for matters connected therewith. The Government of Malaysia and the respective State Governments are allowed to enter into contract and/or agreements with any parties if the government needs services of the third party for the purpose of the development of the country. Even though the authority to sign the contract is given to the government under the Government Contracts Act 1949, the determination of the terms and conditions of the contract and/or agreement shall lie with the respective government agencies based on the nature of works and services required by the government agency.

Generally, the respective government agencies will be using a standard form of contract which has been prepared earlier for the parties to draw upon conclusion the tender process to save the costs and time of the parties especially in construction industry. The types of conditions of contract used by Government of Malaysia in construction industry are such as Public Works Department Form 203A², Public Works Department Form 203, Public Works Department Form 203N³, Public Works Department Form 203P⁴, Project Delivery Partner Agreement⁵, Agency Agreements and etc. Most public sector projects use the Public Works Department Forms (PWD) Forms under the traditional system of procurement where the design of the works is produced by the Government.

It is pertinent to note that under the said standard forms of contract, the Government is given a unique power to terminate a contract on a national interest basis before the term of the contract expires. Such power is given to the Government by way of incorporation of a clause called "*Termination of Contract on National Interest*" such as follows: -
Clause 52 PWD Form 203A

Termination on National Interest Basis

Termination

- a) Notwithstanding any provision of this Contract, the Government may terminate this Contract by giving not less than (30) days written notice to that effect to the Contractor (without any obligation to give any reason thereof) if the Government considers that such termination is necessary for national interest, national policy or national security.
- b) For the purpose of this clause, what constitute "national interest", "national policy" and "national security", shall be solely made and determined by the Government and such determination shall be final and conclusive and shall not be open to any challenge whatsoever.

¹ Government Contracts Act 1949 (Malaysia)

² Public Works Department. (n.d.). P.W.D. Form 203A (Rev. 1/2010): Standard form of contract to be used where bills of quantities form part of the contract.

³ Public Works Department. (n.d.). P.W.D. Form 203N (Rev. 1/2010): Standard form of nominated subcontract contract.

⁴ Public Works Department. (n.d.). P.W.D. Form 203P (Rev. 1/2010): Standard form of contract for design and build

⁵ Project Delivery Partner Agreement

The essence of the clause 52.1 is as follow: -

- a) The Government may terminate the contract by giving at least 30 days' written notice without any requirement to provide reasons to the contractor if such termination is necessary to protect the national interests, national policy or national security.
- b) Secondly, what constitutes national interests, government policy, or national security shall be determined solely by the Government, and such determination shall be final and conclusive and shall not be subject to challenge by the contractor.

It is regretted to note that what constitute national interest in the said clause is equivocal, dubious and subjective. In the meantime, the Government is given a power to exclusively decide what constitute national interest and such a decision might be final for all expectations and purposes and might not be challenged by the other party to the contract if the Government ends the contract on a national basis. The lack of a definition or explanation of what constitutes "national interest" may lead to various interpretations by government officers and the agencies involved, which may ultimately result in costly litigation before the courts or arbitration tribunals.

Literature Review

In the case of *Dhaya Maju LTAT Sdn Bhd vs Kerajaan Malaysia & Anor [2021] MLJU 1149*⁶, the learned High Court Judge had allowed a leave application filed by the Applicant. In this case, the Government terminated the Applicant's contract on a national interest basis. The notice of termination was issued on 19.10.2018 soon after the 14th General Election on 9.5.2018. Nevertheless, after lengthy discussion with the Government, the Applicant was reappointed. Unfortunately, in or around March 2020, after formation of new Government by Pakatan National Coalition, due to some disagreement with the Government, the Applicant was terminated on the ground of national interest. The Applicant had challenged the said decision on the ground of breach of natural justice and impropriety because the Government had failed to provide the grounds for its decision. In this case, the learned High Court Judge was of the view that the determination of whether the termination clause had been exercised reasonably and in good faith by Government as a public authority and in exercising their statutory function, in principle, subject to judicial review. Thus, it is crucial to note that the termination on the ground of national interest shall be exercised in good faith and in a reasonable manner to prevent wrongful and arbitrary termination by the public authority failing which the said decision might be challenged in court which can put the Government at risk. However, in the said case, the learned High Court Judge did not provide a detailed explanation or definition of the concept of "national interest." Instead, the Court primarily examined the Government's intention and whether the power had been exercised in good faith before arriving at its conclusion.

Further in the case of *AK Kontraktor Sdn Bhd vs State Government of Sabah & Anor [2023] 6 CLJ 379*⁷, the learned Judicial Commissioner was of the view that the decision made by the State Government of Sabah to terminate the contract was not necessary for national interest, national policy or national security under clause 52.1 (a) of the Conditions of Contract and was in fact not based on consideration of national interest, national policy or security conditions. Further, the learned Judicial Commissioner was of the view that the decision to terminate the

⁶ Dhaya Maju LTAT Sdn Bhd v Kerajaan Malaysia & Anor [2021] MLJU 1149

⁷ AK Kontraktor Sdn Bhd v State Government of Sabah & Anor [2023] 6 CLJ 379

contract was wholly misconceived, excess of jurisdiction, in breach of the principle of natural justice, irrational and manifestly unreasonable and was made in bad faith with ulterior motive and improper purpose and therefore unlawful, invalid and null and void. The learned Judicial Commissioner arrived at the said conclusion after examining the evidence which shows that the said State Government of Sabah had awarded the contract to another party three months after they terminated the contract on a national basis. The learned Judicial Commissioner was of the view that the State Government of Sabah had acted unconstitutionally in having wrongfully applied discriminatory treatment against the first party when terminated the contract on a national interest basis. Based on the aforesaid case by the authorities, it is apparent that the Government has absolute power to terminate a contract on a national basis without providing a justification and/or grounds to the other party under the contract. However, it is crucial for Government to exercise the said power with utmost care and diligence to avoid wrongful termination of contract. The Government agencies must be able to provide cogent and reasonable grounds to substantiate their ground for termination on national interest basis if the decisions are challenged in courts, arbitration tribunals and mediation centres. Nevertheless, in the said case, the learned Judicial Commissioner did not provide a detailed interpretation or definition of the concept of "national interest," which remains inherently subjective and ambiguous. The absence of a specific definition and/or interpretation of the term in the contract may result in public authorities exercising their powers arbitrarily or unconstitutionally, thereby increasing the risk of wrongful termination and subsequent legal challenges.

In contrast, in the recent case of **Sri Ledang Ventures Sdn Bhd (In Liquidation) v Kerajaan Malaysia [2024] MLJU 1952**⁸, on 13.8.2018, the Minister of Youth and Sports made a public announcement on the discontinuance of the national service program PLKN and the closure of the camps. One month after the said announcement, the Government issued a notice of termination to Sri Ledang Venture Sdn Bhd by invoking clause 36 of the contract which allows the Government to terminate the contract on the national interest basis. Sri Ledang Ventures Sdn Bhd challenged the decision made by the Government by filing a suit in the High Court. The primary issue on the said case was whether clause 36 of contract offends the Federal Constitution and Contracts Act 1956. The Plaintiff argued in the said case that clause 36 of the said contract is void and contravene section 29 of the Contracts Act 1950 by absolutely restricting the Plaintiff from enforcing its rights. In contrast, the learned High Court dismissed the claim filed by the Plaintiff and was of the view that the language used in clause 36 of the contract is clear and unambiguous where the said clause provides for the early termination of the contract between the parties under specific circumstances. The learned High Court Judge was of the view that clause 36.2 stipulates what amounts to "national interest", "national security", "Government Policy" and "public policy" shall be solely decided by the Government, and such decision shall be final and shall not be challenged. The abolishment of a national program like PLKN inherently involved considerations of national policy and interest. The court found that the Government had fully complied with the procedural and substantive requirements of clause 36 in terminating the contract and the termination was carried out in accordance with the terms that both parties had freely agreed to act at the outset of their contractual relationship. It is evident from the said decision that it is hard and/or difficult to challenge the decision made by the Government because the Government has been given an absolute right under the contract to act so. Thus, it seems like it does not contravene with the Contracts Act 1950 and Federal Constitution. In this case, the learned High Court

⁸ Sri Ledang Ventures Sdn Bhd (In Liquidation) v Kerajaan Malaysia [2024] MLJU 1952

Judge declined to interfere with the Government's decision, taking the view that the determination of what constitutes national interest falls entirely within the discretion of the relevant government agency. Consequently, the case does not provide any substantive interpretation or definition of the concept of "national interest."

Prita Amalia (2021)⁹, the author held the opinion that *although national interest is not a legal concept, it is a well-established idea in international relations*. The author also held the opinion that *national interest should have a meaning determined by government policymaking because it is too vague and ambiguous to be a legal phrase*. So, from the said article, it is understood that national interest is not a legal concept. However, the article does not address the relationship between national interest and commercial contracts. In particular, it does not examine how the concept of national interest may be invoked, interpreted, or applied as a ground for the termination of commercial contracts by public authorities. As such, the article provides limited guidance on the role and application of national interest within the context of contractual relations.

Dr. Darko Trifunovic & Milica (2021)¹⁰, stated that *"In Security Science, the national interest is a quality analytical tool that, from a concept from the corpus of political fashion and a vague catchphrase, has become a framework that provides guidelines for assessing the security policies of the state. In that way, decision-makers are reminded that conducting an active and smart security policy necessarily implies prudent articulation of the national interests of the state"*.

The authors explain that in the field of security science, the concept of national interest was once regarded as a vague expression and political slogan, but it has since evolved into a high-quality analytical tool. It functions as a framework that provides guidance for evaluating a state's security policies. Through this framework, policymakers are reminded that implementing an active and intelligent security policy requires the careful and clear formulation and articulation of national interests. The authors emphasise that national interest is not merely a general political idea, but rather a crucial strategic analytical instrument in designing and assessing national security policies. It helps ensure that security policies remain grounded in the state's fundamental interests rather than being driven by arbitrary actions or mere slogans. Nevertheless, the article is confined to the field of security science and does not examine the application of the concept of national interest within the context of contract law. In particular, it does not address how national interest may be invoked or interpreted as a ground for the termination of commercial contracts. Accordingly, the article offers limited assistance in establishing a legal connection between the concept of national interest and the law of contract.

In **"Words, Phrases and Maxims of Lexis Nexis"**¹¹, the concept of national interest had been discussed in the context of Internal Security Act, Dangerous Drugs Act and Multimedia and Communication Act 1998. Nevertheless, there was no specific definition given with respect to termination of contract of national interest. Normally, the Government contracts shall be for development purposes which rarely relate to "national security", "national policy" and "national interest". BUT how will the Government relate the "national security" "national

⁹ Amalia, P., & Pratama, G. G. (2021). National interest and trade commitment under Indonesian law. *Volume 4*.

¹⁰ Trifunovic, D., & Curcic, M. (2021). *National interest in security science: A realist perspective*

¹¹ LexisNexis. (Year). Words, phrases and maxims (Edition)

policy" and "national interest" when decide to terminate the contract on a national interest basis?

Roger Tan Kor Mee, (2000)¹² has written about the FIC Guidelines. In this article, the writer had stated that "what constitutes national interest" is always for the executive to decide and not for the court. The writer was of the view that national interest is interwoven with public policy. Nevertheless, there is no specific definition and/or interpretation given on what constitutes national interest. Letting the executive decide on what constitutes national interest may cause abuse of power by public authority as the context of national interest is too wide and vague under the said clause. Furthermore, the lack of a clear definition or interpretation of the concept of "national interest" may create significant uncertainty for the contracting parties, particularly in cases involving allegations of wrongful termination. In such situations, the public authority would bear the burden of demonstrating that its decision to terminate the contract was justified. Specifically, it must show that the continued performance of the contract would pose a threat to national security, public welfare, or other fundamental national interests, thereby warranting termination on the grounds of national interest.

Associate Professor Dr.Vugar Mammadzada & Lieutenant Colonel Eljan Ramiz stated in "National Interest in the Context of Ensuring National Security 1s/2024"¹³ that *"To find out components of forming national interests, of course is related to its further perception. General overview is that national interests emerge under the influence of objective factors and based on the needs of individuals, societies and states. As well, two group of geopolitical factors influence on this process: 1. Objective geopolitical factors – territory of a country, geographic location, natural reserves, population, economic growth, level of political stability, military power, culture which is formed through history, level of science and technology, international conditions; 2. Subjective geopolitical factors – political regime, political leadership, managerial experience of the leadership, social consciousness, level of development of legal and political mentality. Sever role of objective geopolitical factors is undeniable in the formation and development of national interests. So any factors have to pass through the mentality of individuals to form national benefits, in an- 29 National Interests in the Context... other world it should turn into social perception act"*.

According to the authors, the formation of national interests involves a combination of objective and subjective geopolitical factors. Objective factors include elements such as a country's territory, geographical location, population, economic development, political stability, military strength, cultural heritage, scientific and technological advancement, and international conditions. Subjective factors, on the other hand, include the political regime, leadership capacity, administrative experience, social consciousness, and the level of legal and political development within society. The authors further explain that national interests are shaped through both individual and societal perceptions influenced by these factors. Accordingly, the concept of national interest is broad and multifaceted, as it incorporates various political, social, and economic elements in its formation. However, the article remains focused on the security and geopolitical dimensions of national interest and does not address its application within legal frameworks such as contract law or the termination of commercial agreements.

¹² Tan Kor Mee, R. (2000). The FIC guidelines—To comply or not to comply that is the question. *Malayan Law Journal*, 2, CXIV–CXXX

¹³ Mammadzada, V., & Ramiz, E. (2024). National interests in the context of ensuring national security. *Voenen Zhurnal*, 131(1s), 26–32

Ejitu N.Ota and Chinyere S.Ecoma, in “Power and National Interest in International Relations” [Volume 2.No.4] 2022¹⁴” has stated that **“National Interest could be categorized into three, namely: core or vital national interest, secondary or tertiary interest, and general interest”**. In the article, the authors categorize national interest into three types, namely core or vital national interest, secondary or tertiary interest, and general interest. The authors explain that core national interest refers to matters of utmost importance that cannot be compromised, such as national security, sovereignty and territorial integrity, political continuity, and the survival of the population. This includes situations involving border defense, threats to national security, food and water security, airspace protection, and the safeguarding of public interests. However, the said article does not demonstrate a clear nexus between commercial contracts and the concept of national interest.

Adeniran (1983:191) in **“Introduction to International Relations, Lagos, Macmillan Press”**¹⁵ has stated that **“When statesmen and bureaucrats are expected or are required to act in the national interest, what is meant is that they are being called upon to take action on issues that would improve the political situation, the economic and social well-being, the health and culture of the people as well as their political survival. They are being urged to take action that will improve the lot of the people rather than pursue politics that will subject the people to domination by other countries...policies which are likely to make them unable to stand among other nations”**.

This passage explains the meaning of national interest by emphasising that when political leaders or bureaucrats are required to act in the national interest, their actions should be directed towards improving the political condition, economic and social welfare of the people, including health and cultural development. It also highlights the importance of ensuring the political survival of the state and its government, as well as improving the overall well-being of the population. Furthermore, such actions should avoid policies that may lead to foreign domination or weaken the country’s ability to stand as an equal among other nations. However, it does not establish a clear nexus between commercial contracts and national interest.

In the case of **BP Petroleum Developments Ltd v Ryder and Ors, Chancery Division**,¹⁶ it has been held that **“the rights to exploit petroleum was in the national interest because it had the potential to bring economic benefits to the nation in terms of employment, output and government revenue”**. From this perspective, economic interest is regarded as a component of national interest, as it contributes to state revenue, which is essential for sovereignty and national security. Without a strong economy, a state may face financial difficulties in providing basic public services such as education, healthcare, and other essential facilities. Accordingly, economic interest may also be implicitly regarded as an aspect of national security. However, despite these interpretations, there remains a lack of clear legal definition or doctrinal consistency, particularly in the context of commercial contracts. This gap highlights the ambiguity of the concept when transposed into contractual frameworks, thereby raising

¹⁴ Ota, E. N., & Ecoma, C. S. (2022). Power and national interest in international relations. International Journal of Research and Innovation in Social Science,

¹⁵ Adeniran, T. (1983). Introduction to international relations. Macmillan Press

¹⁶ BP Petroleum Developments Ltd v Ryder and Ors [1987] RVR 211; [1987] 2 EGLR 233.

concerns regarding its potential for subjective interpretation and arbitrary application by public authorities.

In the case of **Mohamad Ezam Mohd Nor v Inspector General of Police [2001] 2 MLJ 481¹⁷**, it has been held that “*by virtue of Art 151(3) and s 16 of the Internal Security Act 1960 (ISA), a police officer or a minister cannot be required to furnish facts which disclosure would in their opinion be against the national interest*”. In this case, the concept of national interest was considered and analysed primarily from the perspective of national security. However, none of the aforementioned journals and case authorities provides a clear definition or consistent indication of what constitutes “national interest.”

Methodology

This article aims to discuss the concept of national interest, the consequences of termination on a national interest basis and proactive measures that can be taken to mitigate the emergence of legal issues arising due to ambiguity of concept of national interest. The study will be using the doctrinal legal approach to understand the legal doctrines that underpin termination of contract on a national interest basis and will be focusing on interpretation of law and legal principles applied by courts in cases involving termination of contract on a national interest basis. To determine the current laws governing contract termination based on national interest, this study uses a qualitative research approach that examines a variety of legal documents, including legislation, pertinent policy and practice evidence, case authorities and other legal documents.

Termination Of Contract on A National Interest Ground After General Election-14 In Malaysia

Termination clause is a general clause which normally contained in all types of agreements. Parties to the agreement shall be given a right to exit and/or end the contract in accordance to the termination clause. A wrongful termination may lead to dispute which will either be litigated in court or resolved by way of alternate dispute resolution i.e arbitration, adjudication or mediation. Generally, termination of a contract can be done in several circumstances, i.e termination due to default of either party, termination due to corruption, unlawful act, termination due to insolvency, termination for convenience and etc. However, government agencies are allowed to terminate a contract on a national interest basis by relying on the special clause of “Termination of Contract on National Interest” which exist in government contracts. Prior to 14th General Election in Malaysia, the said clause was rarely used by Government; however, after the 14th General Election, the termination on national interest became more popular especially when Government contracts axed by newly formed Government on the ground of national interest by claiming that it ought to be done to safeguard the nation. The contract which was affected by the said decision was Project Delivery Partner Agreement for Pan Borneo Highway Projects both in Sabah and Sarawak.

¹⁷ Mohamad Ezam Mohd Nor v Inspector General of Police [2001] 2 MLJ 481

Ambiguity Of Concept of National Interest Under the Clause and Insufficiency of Law with Regards to Termination of Contract on National Interest Basis

It is notable that the concept of national interest is not explicitly defined and/or interpreted either under the clause with regards to termination of national interest or in **Contracts Act 1950**¹⁸ or **Interpretation Act 1948 and 1967**¹⁹ or **Government Contracts Act 1949**²⁰. It is also stated in the said clause that the Government has the right to determine what constitutes national interest when deciding to terminate the contract. The Government had been given absolute power to determine what constitutes national interest before the termination takes place. It is regret to note that the term of national interest is too wide and/or vague under the said clause which can lead to wrongful termination if the power is exercised arbitrarily or unreasonably by the Government authorities.

Implication Of Terminating Contract on National Interest Ground by Government

In Malaysia, it is important to note that even though the Government has been given an absolute power to terminate the contract on a national interest basis, the said power and/or decision can be challenged in court by the innocent party. In another word, the Government is not immune from legal proceedings and the decision to terminate the contract can be challenged in any courts in Malaysia. Thus, careful consideration shall be given when Government decides to terminate and/or end a contract on a national interest basis. This is because the issue as to whether the termination had been conducted in good faith and/or in a reasonable manner would be raised at the later stage by the innocent party and the court has the discretionary power to review the decision made by the Government agencies. The innocent party may challenge the said decision by filing an application for judicial review pursuant to **Order 53 of the Rules of Court**²¹ within three months from the date of the decision or initiate an action on the ground of breach of contract against the government. Judicial Review serves as an easily available check on the jurisdictional error, a way to hold public entities accountable, a way to provide redress when they behave unlawfully, a way to increase transparency, and a way to enforce public responsibility. It stands for both the advancement of common welfare and the defence of a private citizen's interest.

As a democratic country, Malaysia is exercising principle of natural justice where all parties will be treated equally before the law and right to be heard will be given in court if there are any discrimination in sense of treatment. Thus, it is crucial to have a legal framework and unambiguous statutory provision to enlighten the concept of national interest which may help to mitigate the risk of wrongful and unconstitutional termination by Government agencies. This will be helpful for courts to interpret the concept of national interest and to identify the events and/or circumstances which may lead to termination of contract on a national interest basis.

Findings and Discussion

The power to terminate the contract on a national interest ground vested in various governmental bodies or authorities depending on the nature of the contract and specific circumstances. It is a complex matter because it involves legal, economic and political

¹⁸ Contracts Act 1950 (Malaysia)

¹⁹ Interpretation Acts 1948 and 1967 (Malaysia)

²⁰ Government Contracts Act 1949 (Malaysia)

²¹ Rules of Court 2012, Order 53 (Malaysia)

considerations. Typically, national interest can be invoked to terminate the contract if it is deemed to be necessary for the welfare, security or economic development of the nation. It is imperative to note that the exclusive power to determine what constitute national interest is absolutely vested with Government wherein the said power is unchallengeable under **clause 52 of PWD Form 203A**²². The said clause 52 shall give *domino effect* to the remaining PWD Forms entered between the contractor, sub-contractors and nominated suppliers under **clause 34 of PWD Form 203N** and **clause 23 of PWD Form 203P** respectively if the main contract between the employer and the contractor is terminated by Government. Thus, the termination of contracts by Government will consequently affect the subcontractors, suppliers and other parties to the main contractor. Further, it is well established that there is no specific definition and/or interpretation given to the word "national interest", "national policy" and "national security" in the said clause 52. Ambiguous clauses in contract can lead to various implications, often resulting in disputes or misunderstandings between the parties involved. In the meantime, it can result in costly legal battles to determine true intention of the parties to find the intended meaning of the clause.

In Malaysia, the law on the termination of contract on a national interest basis is not comprehensive on the following grounds: -

- i. Absence of specific definition and/or interpretation in PWD Forms on what constitute national interest may lead to wrongful termination by Public Authority (if) the power is used arbitrarily by public authority; and
- ii. Absence of specific provisions in statutes and lack of *stare decisis* with regards to termination of contract on a national interest basis may cause wrongful and unconstitutional termination if the power is used unfairly by public authority

By clause 52.1(a), the Government is empowered to terminate the Contract by a 30-day notification in writing served upon the contractor to that effect premised on national interest, policy or security. The Government is not bound to give any reason in substantiation and by clause 52.1(b), the Government has the sole discretion to determine the meaning of national interest, policy and security. Such determination is final, conclusive and not open to challenge whatsoever. Such authority is crucial for the welfare of the nation to protect public safety, economic stability or national security. Interestingly, what constitutes national interest, national policy and national security would be determined by the Government and it shall not be open to challenge whatsoever. Taking into consideration the fact that the Government operates as the protector of the nation, the said clause was incorporated in the Government contracts to give some flexibility and immunity in terms of contractual obligations. Nevertheless, flexibility and immunity will end in a wrongful and unconstitutional termination if the power is not handled in good faith. So, it must carry a genuine meaning according to the context in which it is used. The true intention and meaning of "national interest" "national policy" and "national security" in the context of termination of contract in PWD Forms are not expressly defined under the said clause. The words "national interest", "national security" and "national policy" in the said clause which is too generic and ambiguous without any specific definition and/or interpretation may lead to unconstitutional and wrongful termination by public authority.

²² Government of Malaysia. (2010). Public Works Department standard form of contract (PWD Form 203A Rev. 2010), Clause 52: Termination on national interest

The concept of national interest is a general concept that is adopted by all countries, both domestically and globally. National interest is a complex term for which there is no single interpretation accepted by any country. In the researcher's view, a country's government will prioritise national interest when making decisions in the fields of economics, politics, and security to ensure that national interests are not compromised. However, what is meant by national interest and what elements are contained within the concept of national interest remain open questions. In addition, how a government evaluates the concept of national interest when making important decisions is also a matter of inquiry.

From a global perspective, national interest serves as a foundation for a government's administration. Most countries use the concept of national interest as a principal guideline when negotiating with other countries on issues relating to politics, economics, technology, socioeconomics, and others. This means that national interest is the primary objective, whereby any negotiation and decision made by a country's government must achieve and align with that objective. However, there is still no precise definition of what constitutes national interest. One of the controversial concepts that frequently arises in international relations is the concept of national interest, which carries different meanings and interpretations depending on how it is defined by analysts, policymakers, scholars, and practitioners.

Generally, the concept of national interest is a rudimentary principle and/or bedrock to guide the welfare and security of the nation. National interest encompasses security, sovereignty, economic well-being, social welfare and public health, political stability and governance, cultural identity and values, strategic interest and global standing. These elements collectively work as a guideline to Government to frame Government policies and Government contracts. Thus, how do Government as a party to the Standard Form of Design and Built Contract PWD Form DB (Rev.1/2010) and Project Delivery Partner Agreement interpret the concept of national interest when decide to terminate a contract on a national interest basis would be crucial because there is no specific definition and/or interpretation given under the said clause in the contract document. If the termination is done on bad faith, it may lead to wrongful termination. The public authority must be able to establish that the continuity of the contract will be a threat to nation to justify that the termination was done to protect the nation. This would be challenging to the public authority in the absence of specific definition on the concept of national interest in the contract document.

The Government may consider defining the concept of national interest in detail in the contracts to prevent ambiguities and vagueness in the concept of national interest. A specific definition and/or interpretation may become a guideline for the executive to rely on the same when making decision to terminate the contracts. If the grounds fall under the specific definition, it will be unlikely to be challenged by the other party as it falls within the four corners of the contract. Further, it would be easier and trouble free for judiciary to interpret the contracts in the case of disputes in court.

Contracts involving government entities or national interests are terminated through executive decisions rather than judicial processes. These decisions may be influenced by policy considerations and lack transparency and consistency, adding to the legal uncertainty. The executive ought to make a rational and reasonable decision when it comes to termination of contracts. However, since there is no specific guidelines and/or legal framework on the concept of national interest, the executives might face difficulties invoking the said clause as their decision can be challenged in court.

Wrongful and unconstitutional termination will lead to costly and lengthy litigation in court and may lead to arbitration proceedings under this modern era. Normally a contract will usually state how the power to terminate the contract to be exercised. It is settled law that clauses such as termination clauses will be construed strictly, and their strict compliance will be sought by the courts. Therefore, if the clause provides for specific events of default to be included in the notice of default, then it is to specify the breach in question. Failure to comply with the contractual procedures will likely render the termination invalid and unlawful. In the absence of any such procedural requirements, whilst no formality is necessary, there has to be some act which is sufficient to inform the other party that the power has been exercised, for such a power must be exercised in an unequivocal and unambiguous manner. Under the existing termination on national interest basis clause, the Government is entitled to terminate the Contract by giving not less than (30) days written notice to that effect to the Contractor (without any obligation to give any reason thereof). This seems to be unfair because in every termination, grounds must be stated clearly in the notice of termination. Thus, the Government may consider including and/or state the grounds for termination in the Notice of Termination to prevent any wrongful termination.

In Malaysia, law of contract is generally governed by **Contracts Act 1950**. Termination of contracts can be done in numerous ways as stipulated under the Contracts Act 1950. **Section 57 of the Contracts Act**²³ states about discharge by way of frustration. This section envisages two main instances of frustration i.e when a contract becomes impossible or when a contract becomes unlawful. **Section 63 of the Contracts Act 1950**²⁴ states that if parties to a contract agree to substitute a new contract for it, or rescind or alter it, the original contract need not be fulfilled. **Section 40 of the Contracts Act 1950**²⁵ deals with discharge by way of breach. Where a party fails to fulfil its obligations under a contract, the innocent party has certain remedies.

Generally, when a party has refused to perform, or disabled himself from performing his promise, the innocent party has the option to terminate or rescind the contract or to go ahead with the enforcement of the contract and seek for damages. A common consequence of termination is that the party alleging that the termination is wrongful will be released from performing its remaining obligations under the terminated contract and that the innocent party may proceed to sue for all losses and damages arising from the breach by the defaulting party, such as loss of profit which shall be proved. Where the contract has been terminated prematurely and unlawfully by the employer or main contractor, the contractor or sub-contractor may claim direct and indirect costs which are not too remote and are foreseeable because of the premature termination. Where the employer wrongfully terminated the contract, the contractor is also entitled to avail itself of remedies provided to it under the contract in the event of the employer's default. Thus, the Government may pay losses and damages to the other party to the contract if it's proven that the termination was done wrongfully and arbitrarily by Government agencies.

It is pertinent to state that the primary legislation governing contracts in Malaysia is the **Contracts Act 1950**. Despite that, the **Contracts Act 1950** does not define and/or provide interpretation or illustration to address the termination of contracts on the grounds of national interest. General principles such as frustration of contract may be relevant, but they do not

²³ Section 57: (Contracts Act 1950, s. 57)

²⁴ Section 63: (Contracts Act 1950, s. 63)

²⁵ Section 40: (Contracts Act 1950, s. 40)

specifically cater to national interest scenarios. Even though, parties to an agreement are free to negotiate on the terms and conditions of the contract, such contract shall be subject to the relevant law to enable parties to reserve their rights under the law. Unfortunately, there is no specific provision in **Contracts Act 1950** to safeguard the parties in the case of termination of contract on a national interest basis.

As for Government contracts, we do have **Government Contracts 1949** in Malaysia. **Government Contracts Act 1949**²⁶ provides that all contracts made in Malaysia on behalf of Government must, if reduced to be writing, be made in the name of the Government of Malaysia and may be signed by a minister or by any public officer duly authorized in writing by a minister either specially in any particular, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization under **section 2 of the Government Contracts Act 1949**. Thus, whenever a breach of contract occurs against the contracting party, the Government of Malaysia shall be sued by the innocent party which is deemed to be risky especially if a contract terminates arbitrarily public authority. However, there are no specific provisions with regard to termination of contract on a national interest basis contained in the **Government Contracts Act 1949**.

Further, it is regret to note that there are lack of stare decisis and/or precedents of higher courts in Malaysia on the issue of termination of contract on a national interest basis to become authoritative to lower courts on similar issues because the said concept had become popular just recently after the 14th General Election. The Malaysian courts have dealt with contract termination primarily through the lens of breach, frustration, and statutory provisions. However, there are limited cases reported on the issue of termination on the grounds of national interest. Courts generally rely on established principles, which can lead to unpredictable outcomes when national interest is invoked without clear statutory guidance. The reliance on judicial discretion in the absence of explicit legal provisions adds to the uncertainty. Judges may interpret the concept of national interest variably, leading to inconsistent rulings and may put the Government at risk even though the Government is protected under the Government Proceedings Act 1956.

In Australia, the government uses the “Termination for Convenience” clause in all contracts, including government contracts, particularly defence contracts. This clause may be enforced by the government in the event of a policy change based on the doctrine of executive necessity. **Major Anthony Lenze dan Dr Colete Langos (2021)**²⁷ states that “*Notably, caution is exercised in utilizing the term, primarily because of its deep-rooted historical connection to the common law doctrine of executive necessity: the government can break a contract on the basis of acceptable government reasons (e.g significant change in government policy, war)*”. The above statement means that the term “Termination for Convenience” should be used cautiously and carefully because it has a deep historical connection with the common law doctrine known as the doctrine of executive necessity. The doctrine of executive necessity grants the government the authority to terminate or discharge a contract unilaterally if there are reasonable governmental grounds, for example, when there is a significant change in government policy or extraordinary circumstances such as war. In other words, the government is permitted to terminate a contract without being considered in breach if the decision is made in the interest of the nation. Although the provision in the clause is not entirely the same as a

²⁶Government Contracts Act 1949 (Malaysia)

²⁷ Lenze, A., & Langos, C. (2021). Government contracts and distance learning: How the United States can improve convenience termination by looking to Australia. Spring 2021 publication

termination clause based on national interest as practised in Malaysia, in the researcher's view, the purpose of implementing the clause is similar, namely, to safeguard national or public interests. However, the concept of "national interest" is not expressly stated in the clause. This indicates that although the terminology used may differ between legal systems, the underlying principle remains the same to grant the government the power to terminate a contract where there is a necessity involving national interest or a broader public policy consideration.

In Australia, the Government is advised or required to exercise such a clause in good faith. However, in Malaysia, there are still no prior cases or statutory provisions that clearly define the concept of national interest or outline the elements that the courts would consider in assessing the Government's decision to terminate a contract on that ground. Therefore, Malaysian courts may adopt the concept of good faith as a basis for evaluating the Government's decision to terminate a contract on the grounds of national interest. At the same time, the Government, as the executing party, should state the reasons for termination in the official notice to clarify the necessity relating to national interest, thereby avoiding potential legal challenges in the future.

Conclusion

Despite, the importance of termination on national interest to Government and private parties, there is a lack of comprehensive law, guidelines and frameworks to navigate the termination of contract on a national interest ground in Malaysia. The uncertainty with regards to the laws on the termination of contracts on a national interest basis in Malaysia can be attributed and contributed to several factors, including legislative ambiguities, judicial interpretations, and the lack of specific provisions addressing such terminations directly. Thus, the concept of national interest in the context of contract termination ought to be given a specific definition and/or interpretation by way of regulations, policies and legal frameworks to aid the Government agencies and to safeguard the rights of parties to the contract. This is crucial to give an early notification and/or alert the contractor who signs the contracts with Government to show that there are risks in Government contracts. This will enable the Contractor to understand the nature of termination on a national interest basis. Thus, the Government may consider introducing explicit legislative provisions that address the termination of contracts on the ground of national interest. This could involve amendments to the Contracts Act 1950, Government Contracts Act 1949, Interpretation Act 1948 and 1967 or introduction of new statues on the concept of termination of contract on national interest basis. On the other hand, the judiciary may consider developing a body of case law with clear judicial guidelines on the application of national interest in contract termination which can help to reduce uncertainty. Courts may consider making consistency in interpreting and applying the concept of national interest in termination of Government contracts.

In conclusion, the ambiguity of the concept of national interest in the Government Contract Termination ought to be defined clearly and specifically to prevent any miscarriage of justice and/or unconstitutional act which may lead to breach of contract by Government.

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