



Munich Personal RePEc Archive

Security of payment regime in construction industry: are Malaysian sub-contractors ready?

Supardi, Azizan and Adnan, Hamimah and Mohammad,
Mohammad Fadhil

University of Salford

2011

Online at <https://mpra.ub.uni-muenchen.de/34025/>
MPRA Paper No. 34025, posted 19 Oct 2011 17:46 UTC

Security of Payment Regime in Construction Industry: Are Malaysian Sub-Contractors Ready?

Supardi, A., Adnan, H. and Mohammad, M.F.

aziza012@salam.uitm.edu.my

Faculty of Architecture, Planning and Surveying, Universiti Teknologi MARA, Shah Alam, Selangor, Malaysia

Abstract

In Malaysia, the particularly small sized sub-contractors are definitely benefited from payment provisions in the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act), but need to enhance their knowledge in order to improve their awareness of the benefits of the Act. Accordingly, this on-going research attempts to introduce proper guidelines to the sub-contractors, in giving the knowledge, to claim for payment. Firstly, the research explored the problems and legal issues relating to payment default in law cases and standard forms of contract. By downloading from the *Malayan Law Journal*, cases that indicated the issues of payment to the sub-contractors, were analyzed. It is found that on its relevancy, the adjudicator shall be equipped enough with the knowledge on the issues to become a good and reliable adjudicator, as well as sub-contractors will need to enhance their knowledge on the issues of payment in order to be successful in benefitting the proposed CIPA Act. However, as long as the CIPA Act remains in proposal, the sub-contractors have to bear with the knowledge of the current structure of payment mechanisms in the standard forms of contract, which are payment upon certification, direct payment from the employer, and contingent or conditional payment.

Keywords: construction industry, Malaysia, readiness, security of payment, sub-contractors

Introduction

In any country's progress development, an essential function is acted by the construction industry which is both growth-initiating and growth-dependent (Abdullah, 2004, preface). Buildings and infrastructure works is established by the industry which give to the large economic increase required for social economic development. Disposal incomes which generate extra construction activities will be further guided to a raise by the achievement of economic development. (Sin, 2006, p. 1).

In Malaysia, construction spans a broad range of activities which stretch from easy private homes' renovation works to huge construction projects. Each of such building activities may produce its individual exceptional criteria of needs and conditions. Dissimilar sectors plus employer groups, contractors, suppliers, manufacturers, professionals contain their individual welfare which are extremely and frequently different and rival in character. The dissimilar and yet contrasting objectives of the employer and contractor, is the most excellent representation of this separation (Rajoo, 1999, p. 3).

To Cite This Paper: Azizan Supardi, Hamimah Adnan and Mohammad Fadhil Mohammad (2011) Security of Payment Regime in Construction Industry: Are Malaysian Sub-Contractors Ready?. *The Built & Human Environment Review*, Volume 4, Special Issue 1, pp.122-137

In usual engineering and construction contracts in relation to the contract entered into by the parties, it is the contractor's consideration to deliver the works, e.g. construction, installation, material supply, etc. This represents his piece of the bargain or the promise made. In reciprocation, the employer should maintain his essential consideration or part of the his bargain by furnishing the which is in the most cases in the shape of money (H. Singh, 2002, pp. 82-84; 2006). In another words, the employer main duty is payment of the monetary consideration in favour of the contractor's performance (apart from that of provision of the site). If the employer fails in delivery, it is regarded as a potentially primary breach (Robinson, Lavers, Heng, & Chan, 1996, p. 332).

Payment has been believed to be the life-blood of the construction industry. However, payment default particularly delayed and non-payment, is known by the industry to stay as a main problem (Ameer Ali, 2006, p. 4). A. L. May & Siddiqi (2006, p. 158) states that well-timed run of money is required for the achievement of a construction project, commencing the owner in the direction of the contractor downwards to the subcontractors, sub-subcontractors, suppliers, and vendors. However, they further added that in the subcontract, contractors frequently try to transfer the risk of the owner's non-payment to subcontractors. This is done by including contingent payment provisions, for instance pay-when-paid or pay-if-paid clauses.

The proposed research will attempt to introduce guidelines to the sub-contractor, in giving the knowledge, to claim for payment. In doing so, first the research will identify the payment provisions in the standard forms of contract as well as in domestic sub-contract especially on Contingent Payment, and identifying the problems and legal issues relating to payment default by analyzing law cases. Then, by determining the level of knowledge that the sub-contractors have to the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act), and by determining various avenues which improve the payment problem in the construction industry by measuring the effectiveness of those have been incorporated in the construction contract or statutes in the other developed countries as well as the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act), the aim will be achieved.

Malaysian Legal System

Hamzah & Bulan (2003, p. 6) states that Malaysia is a multi-ethnic, multicultural, multi-religious country. This varies cultures is reflected the national legal structure which has been formed and influenced by the native cultures in addition to the outsiders. In Summary, the Malaysian legal system is an integration of the common law, Syariah law and customary law traditions.

The National legal structure is based principally on the common law habit. When the British came to the Malay Peninsula, this common law and rules of equity of England together with British administration were received. (Hamzah & Bulan, 2003, p. 6). However, prior to the British came, the Malay *adat* (customary) law and the customary laws of the a variety of communities were the pre-existing rule. In the mid-fifteenth century and when the prime of the Melaka Sultanate, the fundamental law of the territory was this Malay *adat* law (Hamzah & Bulan, 2003, p. 7).

On the contrary to customary laws, Islamic law continuous to develop in significance. Hamzah & Bulan (2003, p. 8) further added that this is due to the Islamic renaissance in Malaysia and the government policy of absorbing Islamic ethics in administration, for instance, in the introduction of Islamic Banking and Islamic insurance.

Principles Methods of Paying Sub-contractor

There are three principle methods of paying the subcontractor in consideration for the work executed: 'payment upon certification', 'direct payment', and 'contingent payment'. Even though the main contractor disbursing the required payment to the sub-contractor in the first and third methods, the second method is only an employer and sub-contractor deal. As much as the payment of the amount due is concerned, the main contractor being a sheer concerned third party or 'bystander' in the second method (H. Singh, 2006).

Payment upon Certification

Under this payment regime, the receiving of the interim payment certificate by the main contractor is the conditions precedent for the sub-contractor's right to payment, as well as the after that lapse of the distinct 'window-period' for payment. The main contractor not having received from the employer the supposed amount or his honouring period to repay the sub-contractor is longer than the grace period being specified to him is irrelevant. The clock starts ticking against him once he receives the pertinent certificate, in view to his obligation to pay (H. Singh, 2006).

Direct Payment from the Employer

Under this payment regime, payments are paid straight to the sub-contractor concerned by the employer, even though the payments payable to the sub-contractor are incorporated in the Interim and/or Final Certificates to the main contractor. This is due to the fact that such payments are unpaid, as in the conventional way, through the main contractor. However, the main contractor is disbursed only the pertinent profit and attendance for the supposed sub-contractor (H. Singh, 2006).

Contingent Payment or Conditional Payment

'Contingent payment' is a third ordinary method available for paying sub-contractors, which encompasses a numeral of labels such as 'pay if paid' clauses, 'pay when paid' clauses, and 'back-to-back' clauses" (H. Singh, 2006). Loulakis & Santiago (1998) added that 'contingent payment' is one of the additional contentious types of clauses in today's construction contracts which commonly main contractors apply to assign the risk of an owner's non-payment to between subcontractors .

Loulakis & Santiago (1998) further explain that contingent payment clauses, depending on the phrasing, are interpreted as either firstly, delaying payment for a number of sensible period if nothing is given or for a contractually set period ("pay when paid") or secondly, creating a terms precedent to payment ("pay if paid").

In contrast, A. L. May & Siddiqi (2006, p. 158) state that the risk may not be efficiently transferred by a generally drafted contingent-payment terms to the degree projected by the contractor. Most courts differ very much on their keenness to put into effect contingent payment provisions, and such enforcement depends on the exact phrasing of the clause.

Therefore, the construction afforded to the understood type of contingent payment clauses under dissimilar jurisdictions does not demonstrate some uniformity. Furthermore, the instant the circumstances is so gloomy that no common main beliefs can be distilled. In sight of the present vague point of the whole understanding procedure, it is maybe helpful to glance at the related case law and/or authoritative pronouncements to shed some illumination on this subject and give several direction to practitioners” (H. Singh, 2006).

Nature of Construction Disputes

Eight (8) areas/nature of construction disputes had been recognized and shown by Figure 1 below which are payment (51%), delay (19%), termination (18%), variation (13%), damages (11%), performance bond (8%), default (8%), and defect (1%)” (Abidin, 2007, p. 80).

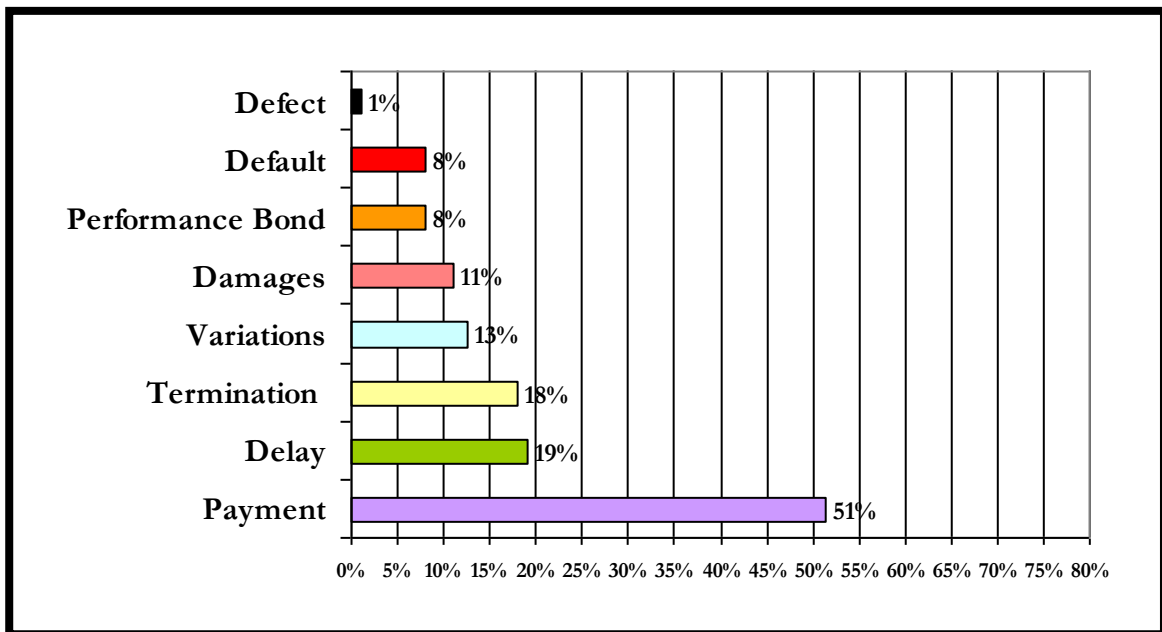


Figure 1: Nature of Construction Disputes in Malaysia (Source: Abidin, 2007, p. 80)

In addition, from Figure 2, the majority payment problems can be recognized are connected to giving the wrong impression about or misinterpretation in payment process among main contractor and sub contractor or among

subcontractor and sub-subcontractor; and non payment for certified sum which stand for 13.5%. This is followed by dispute of the sum to be paid (10.8%), delay in progress payment, and unpaid for more payment due to money owing settlement (8.1%), over deduction of the total payment and claim for payment of work done (5.4%) whereas the others payment problem simply represents 1%.

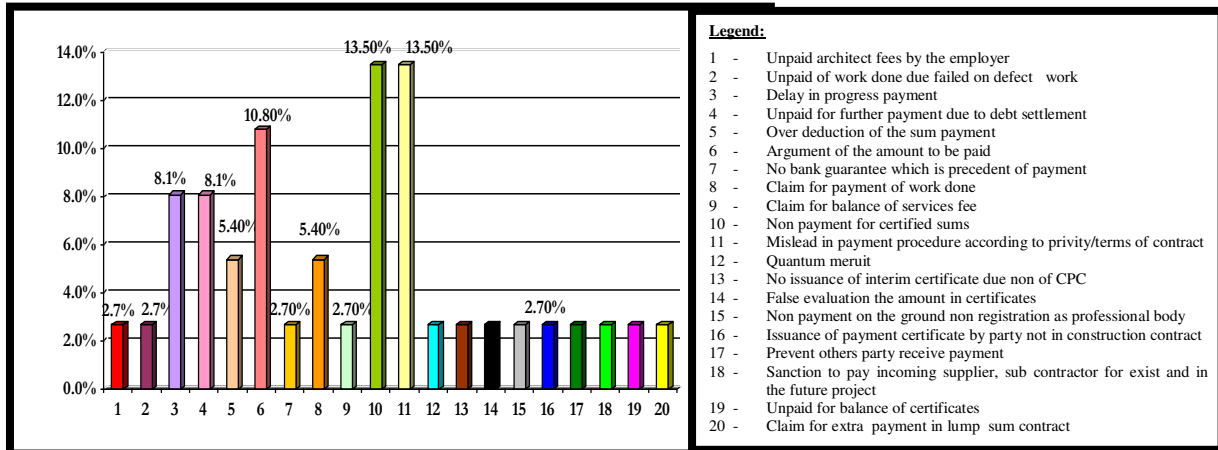


Figure 2: Types of Payment Disputes in Malaysian Construction Industry (Source: Abidin, 2007, p. 73)

Advance investigation, in order to decrease payment disputes, should be made in view of the fact that payment had been recognized as the ordinary nature of construction disputes, for examples, to detail discovery on the way to improve contract management and examination on the causes of payment disputes (Abidin, 2007, p. 138).

Proposed Malaysian Construction Industry Payment and Adjudication Act (CIPA Act)

In 2003 and 2004, at meetings chaired by the Malaysian Minister of Works, captains of the Malaysian construction industry jointly gathered by the Construction Industry Development Board Malaysia (CIDB). A Malaysian ‘Latham Report equivalent’ was well thought-out and 10 areas of main concern were recognized and working groups produced. Technology, human resources, health and safety, industrialised building systems, productivity and quality, and payment were amongst the areas of main concern recognized (Ameer Ali, 2007, p. 18). Following the meeting on 24 June 2003, the initial outline of the consolidated master plan were formed by them and called the ‘Malaysian CIMP Framework 2005 – 2015’ (*Construction Industry Master Plan Malaysia 2006 - 2015*, 2007, pp. 3-5).

Consequently, the manuscript were further improved by CIDB into a 10-year Master Plan spans commencing from 2006 to 2015 (*Construction Industry Master Plan Malaysia 2006 - 2015*, 2007, p. 5). Under strategic thrust 2 of 7 (Strengthen the construction industry image), at present, by working jointly with the industry, the

Construction Industry Payment and Adjudication Act by CIDB is built up (*Construction Industry Master Plan Malaysia 2006 - 2015*, 2007, p. 137).

The contents of a *Construction Industry Payment and Adjudication Act* (CIPA Act) (Ameer Ali, 2006, p. 9) are as below:

- A method for regular payment where there is no condition for a payment means in a construction contract
- Prohibition 'pay-when-paid' and 'pay-if-paid' clauses in construction contracts
- The rights for suspension of works by a party who has not been paid
- The condition of a quick dispute resolution method called adjudication for disputes relating to a construction contract
- The condition of remedies for the recuperation and security of payment under a construction contract

At the moment since its introduction in 2006, the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) is still under development and the draft can be seen in CIDB website. It is expected the Act is enacted before the Master Plan ceases in 2015.

Avenues to Improve Payment Problems

In the construction industry, there are a variety of avenues that are offered to improve the payment problem. A few of these options have been included in the construction contract or statutes in the other developed countries. The most excellent solutions should be opted and implemented which best suits and serves the Malaysian construction industry (Sin, 2006, p. 67). In summary, these avenues include:

Payment of stipulated interest

In referring to Clause 42.9(b) of CIDB 2000 Form of Contract, the contractor's claim for interest is one probable remedies to breach of contract by Employer in not paying or not paying on time. This affords a number of relief to the contractor. By doing thus, the employer will not definitely commit a breach of contract, however, will efficiently allows the employer to suspend payment. tract (Oon, 2000; Sin, 2006, p. 25).

Suspension of work or going slow

Clause 30.7 of the Agreement and Conditions of PAM Contract 2006 (With Quantities) and Clause 42.10 of the CIDB Standard Form of Contract for Building Works 2000 Edition provide for suspension of work. In general, there are no right for suspension of work in common law (Ameer Ali, 2006; A Contractor's Point Of View On Security Of Payment," 2006; Fong, 2005, p. 80) for non-payment. In the *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448 case (as cited in Fong, 2005, pp. 80-81), Low Hop Bing J succinctly held:

“In my judgment, it is trite law that a contractor can only terminate his contract with his employer (at common law, as opposed to the exercise of an express termination clause) if he shows, inter alia, a repudiatory breach by the employer has evinced an absolute refusal not to perform his side of contract.

There is no intermediate right in a building contract to suspend works”.

By suspending works without valid legal cause, the plaintiff has in fact repudiated its contractual obligations.

Eradication of “pay when paid”

The standard forms of construction contract do not provide for such a remedy other than the CIDB Standard Form of Contract for Building Works 2000 Edition under Option Module C Clause C3.(c). If the sub contract is subjected to a “pay when paid” form, the correct of suspension is ineffective. Except of the contractor has absconded with money paid by the employer, this is somewhat ordinary (Fong, 2005, p. 81).

Adjudication

Adjudication is provided in the Agreement and Conditions of PAM Contract 2006 (With Quantities) under Clause 34.0. Following that a judgment is obtained, in the United Kingdom, the adjudication procedure does not create the claimant a secured creditor. Summary judgment must be applied to the court by the successful claimant and after that, the decision in the common ways must be performed (Fong, 2005, p. 81).

Liens

No construction contract elsewhere provide clause on lien, but the United States of America and Canada addressed it by way of mechanic lien statutes that is absent in Malaysia. “Any try to give security for payment to a contractor, subcontractor or supplier through a lien (Fong, 2005) or charging order method may not be in the most excellent public importance and by numerous of the parties – mainly the purchasers” (Ameer Ali, 2006, p. 14).

Trust

The trust concept is not alien in Malaysia in respect of retention of monies. It is provided in Clause 30(6)(a) of the Agreement and Conditions of PAM Contract 2006 (With Quantities) and Clause 42.3(c)(i) of the CIDB Standard Form of Contract for Building Works 2000 Edition. Nevertheless, the trust is a conditional one. It permits allowable deductions to be set off by the contractor or the employer (Fong, 2005, p. 82).

Payment bonds

Clause 42.1(e) of the CIDB Standard Form of Contract for Building Works 2000 Edition provide for payment bond. The payment bond is unquestionable to be one of the most excellent remedies offered to contractors. Nevertheless, in addition to the performance bond that the contractors have to give to the developer, the contractors also has to provide payment bonds to their subcontractors and suppliers. This double bond terms will unavoidably decrease the contractor's monetary liquidity. As a result, for securing the bonds, more cash flow is required for the project channelled to the bank ("A Contractor's Point Of View On Security Of Payment," 2006, p. 17).

Supardi, Yaakob & Adnan (2009) states that after discussing on the interpretation on application of injunction relief in performance bond, as in payment bonds, it is noticed that very careful choice of words should be adopted by the constructor of a performance bond so that a clear understanding of its conditionality can be achieved and undisputable.

Therefore, Supardi, Adnan, & Yaakob (2009) further stated that to be an undisputed meaning of the words in the performance bond, as in payment bonds, the performance bond itself should be either purely conditional or purely unconditional 'on-demand' bond. The best examples for this are in the cases of *Eso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 and *IE Contractors Ltd v Lloyd's bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 296.

Direct payment from principal

Direct Payment is provided in the P.W.D. Form 203A (Rev. 2007) Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract under Clause 60.1. The right of direct payments to all subcontractors and suppliers is actually optional and not statutory ("A Contractor's Point Of View On Security Of Payment," 2006, p. 17).

Contractor's project account

The prospect of creating a 'contractor's project account' have been 'creative' suggestions by REHDA. However, this has so far to be explored in detail" (Ameer Ali, 2006, p. 13).

Subcontractors on Security of Payment

There has been no widely local study, in the Malaysian environment, on security of payment regime. Instead, the study undertaken is on the likely introduction of a Malaysian Construction Industry Payment and Adjudication Act (Ameer Ali, 2006) and attention to the Malaysian Government on the choices for its requirements (Constable, 2006). This study in the perspective of the Malaysian construction industry, given the lack of study relating to this matter, has the prospective to offer a realistic understanding and better theoretical of the probable usefulness of the security of payment regime (Che Munaaim, 2009, p. 1630).

The followings are some of research activities have been undertaken that seems related with the undergoing research on the security of payment regime and the sub-contractors .

Abidin (2007, Abstract) recognized payment as the ordinary nature of construction disputes and misled in payment method according to conditions of standard form of contract and non-payment of certified sums are connected to the disputes. Che Munaaim (2006, Abstract) concluded that in the Malaysian construction industry. delayed and non-payment trouble have been experienced by numerous local contractors and when it comes to government clients, the state of affairs is extreme inferior. In fact, huge amounts of money are involved in this difficulty and the image and performance of the construction industry could have affected by other problems from this.

Git (2007, Abstract) shows a variety of foundation of challenges to oppose enforcement of the adjudicator's verdict that are offered to the distressed parties. Mohd Nazir (2006, Abstract) specify the clients-related type key factors of delayed payments problems that are appeared. Rosli (2007, Abstract) revealed that because of the non-standard form, the domestic subcontractor faced problems with payment phrase, termination part, variation and also arbitration. However, the most often problem is connected with payment phrase. Sin (2006, Abstract) shows the main worry in the construction industry has been the subject of payment. Yin (2007, Abstract) proposes that in the main conditions, the employer is not the repudiator or breach of contract because of non-payment.

Uher & Brand (2008, p. 1284) concludes that the force of the Act has been an optimistic one from subcontractors' viewpoint. Subcontractors, mainly those making lesser payment claims, have been extremely winning at adjudication under the Act,. Nevertheless, subcontractors usually have been revealed to have a little level of understanding and operational knowledge of the adjudication procedure. In order to improve the knowledge of the Act, extra attempt to develop their awareness of the benefits of the Act is essential amongst mainly small sized subcontractors.

In Malaysia, the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) has been discussed back in 2003. The draft proposal is up to now also been made known to the public through the Construction Industry Development Board Malaysia (CIDB) website. However, being small in size, the level of knowledge of sub-contractors in Malaysia is yet to be determined. This is significant for the benefit of bringing the Security of Payment legislation in enforcement since sub-contractors are the most beneficiary of the proposed Act.

Research Methodology

In order to its reliability, the research methodology proposed to be employed for this research consists of the following strategies:

Phase 1: Literature Review: Researchers typically look at the literature, prior to scheduling the particulars of a study, to discover what has been printed concerning a subject they are attracted in investigating. Attention is given to both the view of experts in the field and other research studies (Mahmud, 2009, p. 14).

The literature part of this study, that gives a thorough understanding what is this research is all about in order to achieve its two of the objectives, is done by two parts. The first is to identify the current legal aspect of the payment provisions in the standard forms of contract as well as the domestic sub-contract, especially on Contingent Payment. This is done by exploring the current and past research on the subject-matter locally and internationally through books, articles, internet, standard forms of contract, acts, etc..

Secondly, the literature is also to identify the real problems and legal issues disputed by the sub-contractor relating to payment by analyzing judgment made in law cases. The method that is used here is the legal research through qualitative case studies. All of these will identify the variables available that can be used in the research survey.

Table 1: Research Methodology

Research Methodology	Literature Search	Law Cases	Questionnaires	Interviews	Focus Group Validation
Objective 1	✓	✓			
Objective 2	✓	✓	✓		
Objective 3		✓	✓	✓	
Objective 4			✓	✓	
Aim	✓	✓	✓	✓	✓

Legal or law study frequently refers to the study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Yaqin, 2007, p. 3).

Phase 2: Evaluation: Based on the literature review, the assessment of the various avenues used to overcome payment problems in the construction industry is done in this phase that tries to answer two questions. First, it will determine the level of knowledge that the sub-contractors have to the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act). The medium of evaluation is by quantitative questionnaire survey that will be sent out to various sub-contractors. Since some domestic sub-contractor handles some projects by nominated or main, or vice versa, survey will be done to small-sized contractors in general. However, the survey is piloting first for its validity and reliability.

The methodology in quantitative investigation involves choosing subjects, data collection techniques, procedures for gathering data, and data analysis techniques (P. Singh, Fook, & Sidhu, 2006, p. 107).

Explanatory triangulation to the survey is done through qualitative in-depth semi-structured interview. This is done to the senior manager of the sub-contractor's firm to clarify the questionnaire survey as well as to determine various avenues available for the sub-contractor by measuring the effectiveness of those have been incorporated in the construction contract or statutes in the other developed countries, which improve the payment problem, with the Malaysian construction contract and legal issues as well as the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) that has yet to be introduced in the industry.

Thus, qualitative investigation often refers for research studies that examine the quality of relationships, activities, situations, or materials (P. Singh, et al., 2006, p. 107).

Phase 3: Production: This will be the main aim of this research which is to introduce, in giving the knowledge, on ways for the sub-contractor manages to claim the necessary payment. The introduction of mock-up analysis might be suitable for discussing the acceptance of the guideline.

Focus Group validation will be held to complete triangulation by validating the findings (questionnaire survey and in-depth semi-structured interviews) on the acceptance of the frameworks produced .

An essential part of undergoing a post-graduate study course is writing a thesis, a paper or report resulting from an original study submitted by a candidate for a degree. It is not correct that the inscription of a thesis comes in the last part of the study course. As the candidate starts the study course, thesis writing begins at the earliest (Abdul Talib & Ariffin, 2007, p. 1).

Findings and Discussion

Analysis from the judgment made in law cases is done to identify the real problems and legal issues disputed by the sub-contractor relating to payment. By using the words 'Payment', 6,717 cases from the judgment date as early as the Malayan Law Journal has reported to be analyzed further. First screening is done by using the words 'Sub-contract' or 'Subcontract' from the cases downloaded and 273 cases did state payment and the sub-contract works. From second reading and screening of the 273 cases, the court of 186 cases did hold cases in the construction industry. Further third screening was done from the 186 cases whereby only cases which the judge discussed on the relationship between payment and the sub-contract works and from this, 126 cases were identified. However, only 23 cases, that indicated the issues of payment to the sub-contractors as their main judgment, will be further analyzed to be further consumed.

In *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7, the issue of claim for work done is whether payment claimed by subcontractor subject to 'pay when paid' clause, whether subcontractor entitled for payment only upon main contractor receiving payment from employer, and whether 'progress payment' includes final payment. In *Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd* [1978] 2 MLJ 22, the issue of contract to build steel frames by a Sub-contract Works is whether payment to be by gross or by nett weight of steel used. The terms of sub-contract is clear, but whether reference can be made to terms of main

contract. In *Sime Engineering Sdn Bhd & Anor v Public Bank Berhad* [2004] 7 MLJ 475, the issue of securities for advances or the Performance bond which is delay by guarantor bank to make payment under banker's guarantee. Whether it is justified and whether claim for damages for late payment be allowed. In the issue of claim for exemplary damages, whether delay was motivated by malice.

In *ABB Transmission and Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor* [2009] 7 MLJ 644, the issue of outstanding payments, whether first defendant breached subcontract by diverting and pocketing assigned payments from second defendant. In addition, whether first defendant breached subcontract when it delayed and disrupted plaintiff's performance of subcontract causing latter to suffer various losses and expenses. In *Ryoden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33, the issue of failure of main contractor to make payments duly certified by architect, whether liability contingent upon receipt from employer of the sums certified by payment certificates pursuant to main contract clause and whether it is incorporated in sub-contract. Further issue is whether main contractor entitled to be indemnified by sub-contractor for loss suffered from late completion by sub-contractor. In *Hanshim Corp Sdn Bhd v New York Plastic Co Pte Ltd* [1990] 1 MLJ 345, the issue of agreement by parties to undertake sub-contracting work on the terms of payment for 'additional work', whether 'additional work' or requests for extra work part of sub-contract agreement.

In *MP Factors Sdn Bhd v SuangYan Projects Sdn Bhd & Ors* [2007] 8 MLJ 602, the issue of a party did not pursue the payment of the alleged sum due until after the filing of the action of counter claim, whether would negate the first defendant's counterclaim. In *Ooi Boon Teong (Trading as Mitsu-Da Construction) v MBF Construction Sdn Bhd* [1994] 3 MLJ 41, the issue of claim of work done by sub-contractor under certificates of payment issued by contractor where sub-contract not in RIBA form, whether contractor could raise set-off and cross-claim. In other words, whether rule that there cannot be any set-off or cross-claim when an amount is due under a certificate of payment applies to contractor and sub-contractor. In *Seloga Sdn Bhd v UEM Gynisys Sdn Bhd* [2007] 7 MLJ 385, the issue of Employer became insolvent and proposed a scheme of arrangement which main contractor accepted scheme as full and final settlement, whether sub-contractor obliged to accept payment in kind as accepted by main contractor, where no privity of contract between respondent and employer and it is a Pay when paid clause.

In *Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd* [1996] 1 MLJ 857, the issue of progressive payments where failure by plaintiff to deliver possession on time, whether defendant entitled to withhold progressive payment. In *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 2 MLJ 70, the issue of payment of interim certificates, whether appellants entitled to deduction under SIA Conditions clauses 1 (7) and 30 (4). Another issue is whether respondents entitled to interest from due dates of payments of interim certificates under SIA Conditions, Clause 37(6). In *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216, the issue of interim certificates, whether revised certificates to replace original certificates valid and whether valid to delay certificate. Furthermore, the issue of payment under interim certificates to be enforceable by summary judgment, whether set-off allowed against payment.

In *Schindler Lifts (Singapore) Pte Ltd v People's Park Chinatown Development Pte Ltd (In Liquidation)* [1990] 3 MLJ 406, the issue of supply and installation of materials where materials installed but not commissioned and an agreement to defer payment, whether materials became fixtures and whether property had passed under privity of contract. In *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2002] 3 MLJ 321, the issue of claim for work done on term that sub-contractor would be paid in accordance with the PAM form of payment, whether sub-contractor may be paid according to a different form of payment. In *Artic Building and Civil Engineering Sdn Bhd v Ahmad*

Zaki Sdn Bhd & Ors [2009] 9 MLJ 328, the issue of claim for payment on contract of goods sold and delivered by plaintiff appointed by third defendant to supply sand and earth is whether plaintiff had right of action against first and second defendants.

In *Jallcon (M) Sdn Bhd v Nikken Metal (M) Sdn Bhd (No 2)* [2001] 5 MLJ 716, the issue of claim for work done and merit of counterclaim on progressive payments made to defendant without any objection to delay, whether time extended to the defendant and whether defendant to succeed in counterclaim against plaintiff. In *The Brightside Mechanical And Electrical Services Group Ltd & Anor v Standard Chartered Bank & Anor* [1989] 3 MLJ 13, the issue of performance bond, whether performance guarantee required, whether guarantee invalidated on the ground of mistake, duress or lack of consideration. On the allegation that demand for payment was fraudulent, the standard of proof for fraud, the demand to comply with terms of guarantee, the requirement for beneficiary to determine that there was a breach of contract, and the beneficiary's demand referring to belief, whether 'belief' equivalent to 'determination'. In *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204, the issue of mode of 'Pay when paid' clause, whether clause prevented plaintiff from pursuing claim against defendant.

In *Wong Ho Enterprise Sdn Bhd & Ors v Tiong Hoo Teck* [2008] 3 MLJ 321, the issue of Mareva injunction on the risk of final payment certificate for works done by subcontractor not finalised, whether claim premature. In *Tradebond (M) Sdn Bhd v Halim-O Construction Sdn Bhd* [2005] 7 MLJ 624, the issue of winding up validation order, whether payment to incoming suppliers, sub-contractors and service providers for existing and future projects should be sanctioned under Companies Act 1965 Section 223. In *Joo Yee Construction Pte Ltd (In Liquidation) v Diethelm Industries Pte Ltd & Ors* [1990] 2 MLJ 66, the issue of provision for direct payment to nominated sub-contractors by employer after Main contractor wound up, whether provision binds the liquidators of main contractor, and application by liquidators to determine question whether direct payment provision contravenes company law under Companies Act (Cap 50, 1988 Ed), Sections 280(1) and 327(2).

In *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609, the issue of claim for work done under sub-contract works, whether sub-contractor rectified defects when JKR had not issued Certificate of Making Good Defects, whether parties agreed on final sub-contract sum, whether such failure justified refusal to make payment for work done, and whether respondent had right to make unauthorized deductions. In *JKP Sdn Bhd v PPH Development (M) Sdn Bhd and another appeal* [2007] 6 MLJ 239, the issue of claim for payment for work done under sub-contract under interim certificates issued by project architect after progress payment claims were submitted and failure of defence to plead that quality of work and materials supplied as mentioned in interim certificates were unsatisfactory, whether defendant could question architect on the works at trial.

The above cases set up the issues and judgment on related matters on payment mechanism to sub-contract works. The issues are listed as follows:

- a) Agreement on the terms of payment
- b) Counter claim
- c) Delay
- d) Direct payment
- e) Final payment and certification

- f) Injunction
- g) Insolvency or winding up
- h) 'Pay-when-paid' clause
- i) Performance bond
- j) Progressive payments and certification

The contents of the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) might be in line with some or all the items above. However, it is recommended that, apart from its contents, the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) shall cater the above issues.

On its relevancy, the adjudicator shall also be equipped enough with the knowledge on the above issues to become a good and reliable adjudicator, as is required by the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act). This due to the fact that adjudicators will be the party to resolve payment issue in a speedy manner.

On the part of sub-contractors, they will need to enhance their knowledge, especially on the discussion on the issues of payment to them, in order to be successful in benefitting the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act).

In summary, this research focuses on the need of entertaining the sub-contract's payment dispute and the way the judgment being made that is significant as payment is the most disputed area in the Malaysian construction industry. Secondly, the need of awareness and knowledge from the subcontractors are significant for the benefit of bringing the Security of Payment legislation in enforcement since sub-contractors are the most beneficiary of the proposed Act. Thus, with the listed issues and the judgment that had been made, the relevant parties in the construction industry can benefit if the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act) is enacted.

In the standard forms of construction contracts, currently, the payment structure to the sub-contractors are divided into three: payment upon certification, direct payment from the employer, and contingent payment or conditional payment. As long as the Malaysian 'Security of Payment' Regime remains in proposal, the sub-contractors have to bear with the current structure of payment mechanisms. However, they have to have the knowledge of the Act to benefit from it.

Conclusion and Further Research

Recently studies on the payment issues in the construction industry become popular because of the proposed *Construction Industry Payment and Adjudication Act* (CIPA Act).

This research will focus on the remedial measures for the payment problem from an international perspective that offer a significant contribution to the pool of knowledge. First, the need of entertaining the sub-contract's payment dispute and the way the judgment being made is significant as payment is the most disputed area in the

Malaysian construction industry. Second, the need of awareness and knowledge from the subcontractors are significant for the benefit of bringing the Security of Payment legislation in enforcement since sub-contractors are the most beneficiary of the proposed Act. Other than that, avenues to resolve payment problems from other developed country are also significantly needed to be learned and justified to suit the Malaysian Construction Industry, especially on the small sized sub-contractors.

This research hopefully will provide good base for future discussion about payment in construction contract and the balance and proper avenues available, in giving the knowledge, for the sub-contractor to claim the payment in questions. Given the most disputed issues in Malaysian construction contract, this research also hopefully will reduce the present problems on payment in construction contract, and will provide the ways to improve construction contract practice and management.

It is believe that, this research contents will be very useful to practitioner of both legal and construction contract community as well as the students especially to those involves in construction contract management.

References

- A Contractor's Point Of View On Security Of Payment. (2006). *Master Builders*, (3rd Quarter), 16-17.
- Abdul Talib, S., & Ariffin, J. (2007). *Thesis Writing and Preparation for Viva-Voce*. Shah Alam: University Publication Centre (UPENA) Universiti Teknologi MARA.
- Abdullah, F. (2004). *Construction Industry and Economic Development: The Malaysian Scene*. Skudai: Universiti Teknologi Malaysia.
- Abidin, A. (2007). *The Profile of Construction Disputes*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Ameer Ali, N. A. N. (2006). A "Construction Industry Payment and Adjudication Act": Reducing Payment-Default and Increasing Dispute Resolution Efficiency in Construction. *Masters Builders*, (3rd Quarter), 4-16.
- Ameer Ali, N. A. N. (2007). One step at a time. *Construction Journal*, (November/December), 18-21.
- Che Munaaim, M. E. (2006). *Payment Woes Among Malaysian Contractors*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Che Munaaim, M. E. (2009). *The security of payment regime in Malaysia: will it be effective?* Paper presented at the Construction and Building Research Conference of the Royal Institution of Chartered Surveyors, University of Cape Town.
- Constable, A. (2006). Construction Industry Payment and Adjudication Legislation: The Choice That Lies Ahead for Malaysia. *International Construction Law Review*, 78-88.
- Construction Industry Master Plan Malaysia 2006 - 2015*. (2007). Kuala Lumpur: Construction Industry Development Board.
- Fong, L. C. (2005). The Malaysian Construction Industry - The Present Dilemmas of Unpaid Contractors. *Master Builders*, (4th Quarter), 80-82.
- Git, T. S. (2007). *Challenges to the Adjudicator's Decision*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Hamzah, W. A., & Bulan, R. (2003). *An Introduction to the Malaysian Legal System*. Shah Alam: Penerbit Fajar Bakti Sdn Bhd.
- Loulakis, M. C., & Santiago, S. J. (1998). Court Rules Against Subcontractors in Contingent Payment Clause Dispute. *Civil Engineering*, 68(7).

- Mahmud, Z. (2009). *Handbook of Research Methodology: A Simplified Version*. Shah Alam: University Publication Centre (UPENA) Universiti Teknologi MARA.
- May, A. L., & Siddiqi, K. (2006). Contingent-Payment Provision Puzzle - Safeguarding against an Unintended Outcome. *Journal of Architectural Engineering*, (December), 158-162.
- Mohd Nazir, N. Z. (2006). *Late Payment Problems Among Contractors in Malaysia*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Oon, C. K. (2000). *Standard Construction Contracts in Malaysia - Issues and Challenges*. Paper presented at the Contract Formation, Documentation, Issues and Challenges: Half Day Seminar.
- Rajoo, S. (1999). *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)* (2nd ed.). Petaling Jaya: LexisNexis.
- Robinson, N. M., Lavers, A. P., Heng, G. T. K., & Chan, R. (1996). *Construction Law in Singapore and Malaysia* (2nd ed.). Singapore: Butterworths Asia.
- Rosli, N. M. (2007). *The Use of Standard Form of Domestic Subcontract in Malaysian Construction Industry*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Sin, T. A. S. (2006). *Payment Issues - The Present Dilemmas of Malaysian Construction Industry*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.
- Singh, H. (2002). *Engineering and Construction Contracts Management: Law and Principles*. Kuala Lumpur: LexisNexis.
- Singh, H. (2006). Construction of Contingent Payment Clauses: Is There Light at the End of the Tunnel? *The Malayan Law Journal Article*, 3, 9.
- Singh, P., Fook, C. Y., & Sidhu, G. K. (2006). *A Comprehensive Guide to Writing a Research Proposal*. Batu Caves: Venton Professional.
- Supardi, A., Adnan, H., & Yaakob, J. (2009). Legal Analysis on Malaysian Construction Contract: Conditional versus Unconditional Performance Bond. *Journal of Politics and Law*, 2(3), 25-34.
- Supardi, A., Yaakob, J., & Adnan, H. (2009). *Performance Bond: Conditional or Unconditional*. Paper presented at the 2nd Construction Industry Research Achievement International Conference, Legend Hotel, Kuala Lumpur.
- Uher, T. E., & Brand, M. C. (2008). *Impact of the 'Security of Payment' Act in New South Wales on clients, contractors and subcontractors*. Paper presented at the CIB International Conference on Building Education and Research, Heritance Kandalama, Sri Lanka.
- Yaqin, A. (2007). *Legal Research and Writing*. Kelana Jaya: LexisNexis.
- Yin, L. S. (2007). *A Repudiatory Breach in the Construction Industry – Non-Payment*. Unpublished Masters Dissertations, Universiti Teknologi Malaysia, Skudai.