

**PAYMENT ISSUES – THE PRESENT DILEMMAS OF
MALAYSIAN CONSTRUCTION INDUSTRY**

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ABSTRACT

The construction industry plays an important role in Malaysia development process. The industry establishes buildings and infrastructure works required for social economic development which contribute to the overall economic growth. The industry also provides works for many ranging from professionals such as architects, engineers and surveyors to main contractors, subcontractors, suppliers and ultimately manual labourers who are employed by these contractors. However, there remains a chronic problem of delayed and non-payment in the Malaysian construction industry affecting the entire delivery chain. This research therefore set out to study the profiles of Malaysian court cases in relation to payment disputes in construction industry. The research is also to address the legal issues in relation to payment disputes based on the court cases. The result shows that payment has been an issue of major concern in the construction industry. One of the reasons is that the dispute amounts involved are large. It also reflects the inadequacies and shortfalls of litigation process which take a long duration to determine the dispute. Also, it is common for employer to defend their cross claim by alleging defective works and delayed completion. As consequences, the payment due is postponed until the resolution of the dispute. It is choking the financial lifeline of the contractor with dire consequences. In summary, findings of this research may assist the relevant parties in addressing problems associated to late and non-payment in an effective and timely manner to create a win-win situation for all parties in the Malaysian construction industry.

ABSTRAK

Industri pembinaan memainkan peranan yang penting dalam proses pembangunan Malaysia. Industri ini menyediakan bangunan dan infrastruktur yang diperlukan untuk pembangunan sosio-ekonomi yang menyumbang kepada pembangunan ekonomi secara keseluruhan. Industri pembinaan juga menawarkan pekerjaan kepada pelbagai pihak sama ada profesional seperti arkitek, jurutera dan juru ukur termasuk kontraktor, sub kontraktor, pembekal dan juga buruh yang diupah oleh kontraktor tersebut. Namun begitu, situasi ini masih dalam keadaan rumit disebabkan oleh kelewatan dan ketidakbayaran di Malaysia yang mengganggu keseluruhan rantai pembayaran tersebut. Penyelidikan ini adalah bertujuan untuk mengkaji profil kes-kes mahkamah di Malaysia yang berkaitan dengan masalah pembayaran di dalam industri pembinaan. Selain itu, penyelidikan ini juga untuk mengemukakan isu-isu undang-undang yang berkaitan dengan industri pembinaan berdasarkan kepada kes-kes mahkamah. Keputusan daripada penyelidikan ini menunjukkan bahawa isu bayaran merupakan suatu isu yang dititikberatkan dalam industri pembinaan. Salah satu sebabnya adalah kerana jumlah bayaran yang terlibat adalah tinggi. Ini termasuklah ketidakpuasan terhadap proses mahkamah yang mengambil masa yang lama untuk menyelesaikan kes-kes tersebut. Selain itu, sudah menjadi kebiasaan bagi majikan untuk mempertahankan pendakwaan terhadap mereka dengan menggunakan alasan kecacatan kerja dan kelewatan penyiapan pembinaan. Keadaan ini menyebabkan kontraktor mengalami masalah kewangan yang berterusan. Secara kesimpulan, keputusan dari penyelidikan ini dapat membantu pihak-pihak yang berkenaan dalam mengenal pasti masalah-masalah yang berkaitan dengan kelewatan dan ketidakbayaran dan mengatasinya dalam keadaan yang lebih efektif dan dalam masa yang singkat untuk menyediakan keadaan yang bahagia kepada semua pihak dalam industri pembinaan.

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LIST OF ABBREVIATIONS

AC	-	Appeal Cases
AIR	-	All India Reports
Bing	-	Bingham Reports
BLR	-	British Law Reports
CIDB	-	Construction Development Industry Board
Con LR	-	Construction Law Reports
ISM	-	Institute of Surveyor Malaysia
MBAM	-	Master Builders Association Malaysia.
MC	-	Malayan Cases
MLJ	-	Malaysia Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Work Department
UTM	-	Universiti Teknologi Malaysia

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CHAPTER 1

INTRODUCTION

1.1 Background of Study

The construction industry plays an important role in any country's development process; it is both growth-initiating and growth-dependent¹. The industry establishes buildings and infrastructure works required for social economic development which contribute to the overall economic growth. The success of economic development will further lead to an increase in disposal incomes, generating demand for additional construction activities.

The industry also provides works for many ranging from professionals such as architects, engineers and surveyors to main contractors, subcontractors, suppliers and

¹ Fadhliln Abdullah. (2004). *Construction Industry and Economic Development: The Malaysian Scene*. Johor: Universiti Teknologi Malaysia.

ultimately manual labourers who are employed by these contractors. The construction industry is an important cog in the wheel propelling the Malaysia economy².

The Malaysia Construction Industry Master Plan (CIMP) (2005 – 2015) has a vision for the Malaysia Construction Industry to be WORLD CLASS by 2015. Outlined with the CIMP are the vision, mission, critical success factors, seven (7) strategic thrusts and twenty one (21) strategic recommendations that will guide the development of the Malaysian Construction Industry through the following decade.

Under strategic thrust No.2, it is aimed to strengthen the construction industry image. It is recommended that an Act be enacted to address non-payment, late payment and other payment related issues in the construction industry. Therefore, Construction Industry Development Board (CIDB) Malaysia in collaboration with the construction industry has moved forward for the enactment of Construction Industry Payment and Adjudication Act to improve cash flow problem in the Malaysian construction industry.

1.2 Problem Statement

Payment has been said to be the life-blood of the construction industry. Yet there remains a chronic problem of delayed and non-payment in the Malaysian construction industry affecting the entire delivery chain³. In addition of that, the quantum of payment for works and services rendered in the construction industry are often huge in the

² Consultation Forum on Construction Industry Payment & Adjudication Act. (2006). Kuala Lumpur: CIDB.

³ Noushad Ali Naseem. (2005). *Construction Industry Payment and Adjudication Act*. International Forum Construction Industry Payment Act and Adjudication. Kuala Lumpur: CIDB and ISM.

millions of Ringgit. The industry works and will only continue to work provided that those works and services are properly paid.

However, the construction industry is always in dispute prone one. It is therefore common for the claimant pursuing his claim for works and services rendered to meet with a cross claim instead for defective work, delayed completion etc. So payment is always postponed until the resolution of the dispute⁴.

The common mechanisms for dispute resolution in Malaysian construction industry are presently by way of arbitration and litigation. These mechanisms have always involved the judicial system and a complex body of rules as to procedure. It is no secret that these mechanisms of dispute resolution leave much to be desired. Criticisms are frequently made as to its many inadequacies and shortfalls. Litigation is affordable but it takes too long. It may be heard after a long delay by a judge with little or no experience in the field of construction⁵. On the other hand, arbitrator is faster but it is expensive. In any case, both modes will still take a considerable length of time as the disputes will have to be determined and disposed in accordance with the law, which must amongst others require affording the disputant natural justice in the presentation of their respective case⁶

The situation is getting worse when there are only limited security of payment and remedies pending dispute resolution for the unpaid claimant in Malaysia. There is no general common law right of suspension of work for non payment⁷. The unpaid

⁴ Lim Chong Fong. (2005). *The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors*. International Forum Construction Industry Payment Act and Adjudication. Kuala Lumpur: CIDB and ISM

⁵ Sundra Rajoo. (2003). *Why Arbitration is Popular in Malaysia?* Malaysia: Seminar Issues in Construction Contract. Kuala Lumpur: KLRCA

⁶ Lim Chong Fong. (2002). *Construction Contract Disputes - Arbitration or the Courts?* The Surveyor. Malaysia: ISM

⁷ *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1977] 1 CLJ Supp 448

claimant is left with the option of progressing with the work concurrent suing for payment with interest or if the non payment is so serious to constitute a repudiatory breach, then there is the option terminating the contract.

There can be multitude of reasons for the dispute ranging from under capitalisation of the respondent to in-competency of the claimant. Even though, standard forms such as PAM 1998 and CIDB 2000 contain express provisions for determination of employment. However as matter of practice, many unpaid claimants are reluctant to go on the route of determination of employment⁸. These are the dilemmas of the unpaid contractor as its cost flow and profitability are often in put in jeopardy.

1.3 Aims and Objectives

The objectives of this research are:

- a. To determine the profiles of Malaysian court cases in relation to payment disputes in construction industry which are most likely brought to the court.
- b. To address the legal issues in relation to payment in construction industry.

⁸ Lim Chong Fong. (2005). *The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors*. International Forum Construction Industry Payment Act and Adjudication. Kuala Lumpur: CIDB and ISM.

1.4 Scope and Limitation of Study

The provisions of payment in standard forms of building contract are mostly referred to PAM 1998 Form of Building Contract (main contract only). However, some references are also made to other standard forms of building contract such as CIDB 2000 and JKR 203A when necessary.

The primary data of this research is based on court cases relating to payment disputes in construction industry. The relevant court cases are limited to those reported in Malaysia Law Journal (MLJ) and available in the database of *Lexis Nexis* website⁹ through its own search engine¹⁰ from the year of 1990 - 2005.

Due to the time constraint and length of the report, it does not warrant the author to discuss the intensity of other closely related and collateral matters such as:

- a. The legal issues and civil procedures relating to summary judgement, garnishing and injunction.
- b. The legal issues and problems in relation to subcontracting
- c. The legal issues in relation to liquidated damages, variations, direct loss and expense and etc.

⁹ <http://www.lexisnexis.com>.

¹⁰ The relevant court cases are collected by browsing the keyword of “building contract, payment.”

1.5 Significant of Study

The multitudes of difficulties associated with payment are generally faced by all participants in construction industry: main contractor, sub-contractor and professionals. Therefore, it is strongly believed that the topic area of this research would provide both personal interest and be beneficial to the participants in the construction industry.

This research should increase the awareness of both contractors and employers in relation to the payment issues. It will also provide the contractors with a better understanding of their rights to payment and their legal position if payment is in default. The research is also expected to grab the attention of the employers in making their payments promptly and timeliness. This will lead to improved working relationship between the contractors and employers.

This study addresses the current problems in relation to late and non-payment issues encountered by contractors in the local construction industry. Findings of this study may assist the relevant parties in addressing problems associated to late and non-payment in an effective and timely manner to create a win-win situation for all parties in the Malaysian construction industry.

1.6 Research Methodology

Careful thought and planning in the preparation of the research methods, data collection techniques and measurements is very important for conducting research.

Initially, a literature review was undertaken to study and understand the problems of payment in construction industry and review the contractual provisions in relation to payment in building contract. It was carried out using published journals, textbooks and PAM 1998 Form of Building Contract. This was extended further using the research and information papers from the Master Builders Association Malaysia (MBAM) and Construction Industry Development Board (CIDB).

In order to meet the goals and objectives, the primary data collection was based on the Malaysia Law Journal (MLJ) court cases. It was carried out using the university's library online e-database¹¹ via the *Lexis-Nexis* website¹². Difficulties were experienced in collecting and identifying the sample court cases from the online e-database due to the large number of irrelevant court cases and lack of time. The selection of sample court cases involved a depth study rather than a random sample.

1.7 Organisation of Research

Briefly, this research is related to the present problems of payment and associated legal issues in the Malaysian construction industry. The outline for this research includes:

¹¹ <http://www.psz.utm.my>

¹² <http://www.lexisnexis.com>

1.7.1 Chapter 1: Introduction

This chapter provides a perspective of the issue related to payment-default in construction industry. It develops the problem statement and outlines the objectives of this research.

1.7.2 Chapter 2: Payment Issues in Construction Industry

This chapter studies and examines the present dilemmas in relation to payment-default in the Malaysian construction industry. Its problems and effects to the construction industry are discussed.

1.7.3 Chapter 3: Legal and Contractual Background of Contractor's Right to Payment and Remedies of Non-Payment

This chapter considers the contractor's right to payment and remedies under common law. Related contractual provisions in standard forms of building contract are also highlighted.

1.7.4 Chapter 4: Payment Provisions in PAM 1998 Standard Form of Building Contract

This chapter provides an overview of the payment terms and conditions in the PAM 1998 standard form of building contract. Issues associated with the contractual payment provisions are included.

1.7.5 Chapter 5: Profiles of Court Cases in relation to Payment Disputes in Construction Industry

This is the most important part of the whole report. It provides the primary data information. The analysis and findings based on the court cases are discussed and illustrated.

1.7.6 Chapter 6: Recommendations and Conclusion

This is the conclusion chapter on the report. It provides summary of the major findings, recommendations for the payment issues, the conclusion of the study and the recommendations for further works.

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