

# Is Late Or Non-Payment A Significant Problem To Malaysian Contractors?

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## Abstract

Some developed countries have drawn up construction-specific statutory security of payment acts/legislations typically known as Construction Contracts Act to eliminate poor payment practices and to assist continuous uninterrupted construction works. Malaysia too cannot pretend not to have these problems. This paper presents findings of a study conducted amongst Malaysian contractors with the aims to determine the seriousness of late and non-payment problems; to identify the main causes and effects of late and non-payment; and to identify ways to sustain the payment flows in the Malaysian construction industry. The study focused on contractual payments from the paymaster (government or private) to the contractors. The main factors for late and non-payment in the construction industry identified from the study include: delay in certification, paymaster's poor financial management, local culture/attitude, paymaster's failure to implement good governance in business, underpayment of certified amounts by the paymaster and the use of 'pay when paid' clauses in contracts. The research findings show that late and non-payment can create cash flow problems, stress and financial hardship on the contractors. Amongst the most appropriate solutions to overcome the problem of late and non-payment faced by local contractors include: a right to regular periodic payment, a right to a defined time frame for payment and a right to a speedy dispute resolution mechanism. Promptness of submitting, processing, issuing interim payment certificates and honouring the certificates are extremely important issues in relation to progress payment claims. Perhaps, an increased sense of professionalism in construction industry could overcome some of the problems related to late and non-payment issues.

**Keywords:** *Construction contracts, Cash flow, Dispute, Late and non-payment*

## Introduction

Malaysia sets to be a fully developed nation by 2020 and its construction industry has set its own vision to be 'among the best in the world' by 2015 (President's & CEO's, 2004). Many challenges and problems within the construction industry have to be overcome to enable the vision be achieved in time. One of the problems identified as a priority is that which relates to payment problems in the construction industry. The practice of efficient and timely payment in construction projects is a major factor that

can contribute to a project's success. A smooth cash flow brings an effective delivery, on time and within budget so that projects can be completed within the planned time and with quality (CIOB, 2004). Late and non-payment issues or rather contractors' payment woes are considered to affect many players in the local construction industry and is referred to as financial problems by those affected by it, whether in public or private funded projects (Abdul-Rahman *et al.* 2006).

The problem of late and non-payment is experienced not only in fast developing economies, as in the case of Malaysia, but also in developed countries, such as the United Kingdom. For instance, a survey of the Payment Performance in Britain has shown that the construction industry, in particular, is prone to late-payment culture, with payment of debts due to subcontractors and suppliers being made, on average, 53 days after invoices or applications for payment have been rendered (Johnston, 1999).

In the local scene, Class F contractors (the smallest category of contractor classification) who are eligible for projects costing RM200,000.00 and below; such as village or 'kampung' roads, repair and restoration of schools, police stations, drains, and stores, often face payment-related problems besides lack of jobs (Suhaini, 2005). In 2005, about 16,000 Class F contractors were on the brink of bankruptcy when several umbrella contractors failed to pay them for rural roads they had built, despite the government having paid the umbrella contractors in full (Suhaini, 2005).

Several related studies have been conducted in other developed countries which addressed the problems related to payment issues in the construction industry. For example in the United Kingdom the so-called Latham Report (Latham, 1994) has introduced some radical measures to resolve problems related to payment issues in the construction industry by introducing the Construction Contracts Act, establishing mandatory trust funds for payments and suggesting that adjudication should be the normal method of dispute resolution. Some of the recommendations have been incorporated in the Part II of the Housing Grants, Construction and Regeneration Act 1996.

Payment problems have prompted some countries like United Kingdom, Singapore, New Zealand and some states in Australia, e.g. New South Wales, to legislate their construction specific statutory payment security regime. These legislations were

purposely enacted to address issues on prompt payment in the construction industry to eliminate poor payment practices and smoothen the contractor's cash flow (Lip, 2005; Ameer Ali, 2005). Acts and the respective countries and states, which enacted them to address the problem of late and non-payment, are listed as follows:

- i. Housing Grants, Construction and Regeneration Act 1996 – United Kingdom
- ii. Building and Construction Industry Security of Payment Act 1999 (NSW) - New South Wales, Australia
- iii. Building and Construction Industry Security of Payment Act 2002 (VIC) - Victoria, Australia
- iv. Building and Construction Industry Payments Act 2004 (QLD) - Queensland, Australia
- v. Construction Contracts Act 2002 - New Zealand
- vi. Building and Construction Security of Payments Act 2004 - Singapore.

Owing to lack of research on the issues of late and non-payment in the Malaysian construction industry, a study was conducted to identify the problems and effects of late and non-payments in the construction industry. The research coincided with the local Construction Industry and Development Board's intention to seek pointers on payment issues. This paper presents results of a study on late and non-payment issues facing the Malaysian contractors. Another portion of the study, that describes the same issue facing consultants, is presented elsewhere (CIDB, 2006).

## **Problem Statements**

There are mechanisms provided in many standard forms of construction contracts dealing with payment from the client to the contractor, yet there remains a chronic problem of late and non-payment issues in

the Malaysia construction industry (Ameer Ali, 2005b). Lim (2005) indicated that there are various avenues available to improve the payment problems in the industry and some of these options have been incorporated in the construction contracts or statutes in other developed countries such as payment of stipulated interest, suspension of work, eradication of "pay when paid" clause, adjudication, liens, trust and payment bonds. The main issues that require particular attention are as follow:

- a) despite adequate mechanisms in place why do Malaysian contractors still experience late or/and non-payment situation, and
- b) what can be done to alleviate this problem which will ultimately improve the delivery time of end products.

This paper attempts to address the above issues that could become a major setback in achieving the Malaysian construction industry's vision of becoming amongst the best in the globe by 2015.

### **Aim and Objectives of Research**

The aim of this study is to address the problems of late and non-payment by way of providing evidence about the seriousness of late and non-payment issues in the Malaysian construction industry. This aim is supported by the following objectives:

- a) To determine the seriousness of late and non-payment problems among Malaysian contractors and sub-contractors;
- b) To study the causes of late and non-payment in the local scene;
- c) To investigate the effects of delayed and non-payment to the payees down the contractual payment chain; and
- d) To identify and establish contractual and/or statutory remedies to resolve or mitigate contractors' payment woes.

### **Research Methodology**

The principal method used for the study was a questionnaire survey. The questionnaire was designed to meet the objectives of research by reviewing literatures dealing with late and non-payments issues in construction. Subsequently, several research meetings were held with representatives from the Institution of Surveyors Malaysia (ISM) and Construction Industry Development Board (CIDB). The meetings were held to further improve the questionnaire by taking into consideration the views from the construction industry players.

#### *Target Respondents*

This section describes the questionnaire survey conducted on a sample of contractors registered with the CIDB. Six thousand (6,000) active contractors from Grade G1 through G7 were randomly selected using the CIDB database. Of the 6,000 fielded questionnaires, 333 replies were received, which represents a response rate of around 5.6%. The low response rate may have been contributed to the short response period given to respondents or simply because the prospective respondents were not interested in providing feedbacks.

#### *Questionnaire Structure*

The questions in the questionnaire were designed to have three types of answering methods, namely: rating-based, selective-based and open-based formats. For the rating-based questions, the statements were devised to measure the respondents' opinions by registering them on a four-point scale ranging from "never to very frequent" and "not serious to very serious." The selective-based questions only required respondents to tick the appropriate box or boxes in the questionnaire. The open-ended questions allowed respondents to record down their answers to the questions. Findings of the survey were analyzed to provide a better understanding of the issues of late and non-payment in the Malaysian

construction industry. The Statistical Package for the Social Sciences (SPSS) was used to handle the statistical calculations.

### **Scope and Limitation**

The questionnaire survey undertaken in the study is based on the opinions and experience of contractors in Malaysia about the seriousness of the issue of late and non-payment and the contributing factors for its existence. The contractors' favourable remedies in securing payment debt from their respective clients were also recorded in this survey. This survey does not consider late and non-payment problems faced by the local consultants or views from the clients.

### **Literature Review on Late and Non-Payment Issues**

In order to give a better understanding about the issues of late and non-payment, it is appropriate to discuss the causes, effects and possible solutions related to the issues of late and non-payment in the global construction industry.

#### *Causes and Effects of Late and Non-Payment*

Based on the literature reviews the following factors have been identified as some of the potential causes of late or non-payment in the construction industry:

- a) **Paymaster's Poor Financial Management**  
Qualified contractors often are unwilling to bid on projects for employers whose financial capacity and credit rating are not widely known (The Associated General Contractors of America, 2003). Thus, it is extremely important for the employer to manage his financial aspect in a good manner as it is a major factor in determining the project's success. It is anticipated that

paymasters' poor financial management could cause contractors insufficient operating funds when the latter are obliged to pay the payees. The late payment or even non-payment therefore could arise.

- b) **Paymaster's withholding of payment**  
As provided in many standard forms of contract, the employer/paymaster may withhold payment to the main contractor or sub-contractor for a variety of reasons. Such reasons are defective construction work, disputed work, failure to comply with any material provision of the contract, third party claims filed or reasonable evidence that a claim will be filed, and failure to make timely payments for project resources (Rourke & Gentry, 2002). These reasons may cause the employer/paymaster to refuse in making payments which will result in late payment.
- c) **Local culture / attitude**  
An attitude if commonly accepted by the industry or society in general can become a culture. In this regard, we do not want negative attitude to be accepted as a culture in the industry. As explained previously, the Britain construction industry is prone to late payment culture with payment of debts due to subcontractors and suppliers being made, on average, 53 days after invoices or applications for payment have been rendered. (Johnston, 1999)

Possible effects of late or non-payment have been identified as follow:

- a) **Creates negative chain effect on other parties**  
As stated by Davis Langdon & Seah Consultancy (2003), the construction payment blues have domino effects. A delayed payment by one party may affect the whole supply chain of payment of a construction project. For instance, if an

employer delays in making payment to the contractor this in turn will result in contractor's delay in making payment to the sub-contractors and suppliers.

- b) Results in delay in completion of projects  
Late payment causes cash flow problems which in turn can affect the overall progress of works (Ameer Ali, 2005a). According to Abdul-Rahman and Berawi (2002) financial problem is confirmed by the top management as the main cause of delay in addition to manpower shortage.
- c) Leads to bankruptcy or liquidation  
Late payment may affect the financial status of the contractor. A local newspaper reported that 16,000 F-class contractors were on the brink of bankruptcy when several umbrella contractors failed to pay them for rural roads they had built, despite the government having paid the umbrella contractors in full (Suhaini, 2005).

### *Alternative Remedies for Securing Payment Debt*

Based on the literature reviews the following have been identified as the possible remedies for securing payment debt from the defaulting client:

- a) Payment of Stipulated Interest  
The issue of whether the contractor is entitled to claim for loss of interest due to delay and default of the employer in making payment is still unclear. In *FG Minter Ltd v Welsh Health Technical Services Organization* (1980) 13 BLR 1, a claim for interest due to late payment was upheld by the Court of Appeal. The reason for this is because claim on interest for late payment is considered as direct loss and/or expense equivalent to a claim for damages as decided in *Hadley v Baxendale* (1854) 9 Ex 341 and which has been codified

under section 74 of the Contracts Act 1950. However, the test in *Hadley v Baxendale* as to whether damages in the forms of interest can be paid for, is dependent on the question of whether the likelihood of the occurrence of damages was anticipated by both parties at the time when the contract was made, having regard to the knowledge of the parties at the time. Therefore, if the employer was aware that the contractor was forced to borrow the capital, the contractor may be able to claim interest or financing charges for late or unpaid payment. Therefore, a clear wording in the contract is required to provide contractual mechanism for the contractor to claim for interest or financing charges.

In Malaysia, only Sub-clauses 42.9(b) and 42.12 of CIDB2000 form comprehensively provides entitlement to claim for interest due to employer's late and unpaid payment as well as for any failure or delay by the Superintendent Officer in certifying any payment due. Such an express provision is essentially required in order to avoid disputes on this issue especially if it goes to unnecessary expensive arbitration or litigation proceedings.

- b) Suspension of Work  
It is universally known that there is no common law right of suspension of work due to non-payment. The contractor is obliged to proceed with the work in a regular and diligent manner notwithstanding the fact that he is not being paid for the works he has executed previously. The Court of Appeal of New Zealand in the case of *British Pipe Lines v Christchurch Drainage* (1986) 33 BLR 76 has held that a contractor has no implied right of temporary suspension following non-payment on the part of the employer. The decision was subsequently followed in the English case of *Lubenham v South Pembrokeshire*



(1986) 33 BLR 39 which affirmed the position of contractor's right of suspension. This fact has been expressly acknowledged by the local court in *Kah Seng Construction Sdn Bhd. v Selsin Development Sdn. Bhd.* [1997] 1 CLJ Supp 448.

According to Murdoch and Hughes (1996), it is not uncommon to find that a contractor or sub-contractor who has not been paid what is due threatens to suspend work under the contract until payment is made. It must be noted that without a clear contractual right to suspend the works, the contractor is not entitled to do so even though the employer has failed to pay him within the time stipulated in the contract. In this respect, if the contractor suspends the work the courts may find him guilty of repudiating the contract. This will in turn open for the other party to accept the repudiation and rescind the contract and sue for damages.

Hypothetically, a contractor is only entitled to suspend the works following non-payment if such a stipulation is expressly spelled out in the contract. However, the right to suspend the works can only be found in CIDB2000. For example, Clause 42.10 states that if the employer fails or neglects to pay the contractor the amount on any certificate within the Period of Honouring Certificate, and continues such default for fourteen (14) days the contractor can give a notice specifying his intention to suspend the execution of the works. If the employer still continues such default for another fourteen (14) days after the receipt of the notice, the contractor can suspend wholly or partly the execution of works or reduce the rate of execution of the works. It should be noted that there are no similar provisions regarding this matter in PAM1998 and JKR 203/203A Forms. Strangely, the PAM Nominated Sub-contract Standard Form provides the right to suspend the work to the sub-contractor in the event

of non-payment under Sub-clause 11(7).

Having discussed the importance of such right it is appropriate to include this provision in all the standard forms available in Malaysia. Perhaps by including this provision in the Malaysian Construction Contracts Act it would force the incorporation of the right to suspend the work in all the standard forms of contract, because once the Act is in force it will provide certain mandatory requirements that must be followed by any construction contract that falls within the ambit of the Act failing which a default scheme will kick in and both parties in the contract must comply with it. In the UK, Section 112 of the HGCRA provides that when the sum is not paid on the final day of payment and no withholding notice has been issued by the employer, in this circumstances the contractor is entitled to suspend his performance until the full payment is paid but strictly subject to the issuance of 7 days' notice stating his intention in suspending the work and grounds of suspension.

- c) Right to refer dispute to Adjudication  
Adjudication is defined as a process where upon request by one of the parties, an independent adjudicator steps in (even when work is ongoing or services are being provided) and makes binding decision on disputes within days or weeks. For example in the UK, the adjudicator is required to make a binding decision within 28 days.

The interesting feature of adjudication is that the dispute in question can be referred to an independent third party at any time provided that both parties are in contract. In practice a dispute is being referred to the arbitration when the project is completed. Ironically, in claims involving a large sum of money a contractor would struggle to sustain his cash flow before he can commence the arbitration proceeding. Even worse,

sometimes it is already too late to take this matter to court as the contractor may have suffered severe cash flow problem which could result in liquidation.

The policy of adjudication has been characterized as “pay now argue later” due to the nature of the decision which is binding and immediate enforceability until the dispute is finally determined by legal proceedings (or by arbitration if the contract so provides or the parties otherwise agree) or by agreement.<sup>1</sup> It means that the decisions are enforceable and the parties need to comply with the decisions whether they like it or not until the dispute is finally decided by court or arbitration. Due to this matter, some regarded adjudication as providing a “rough justice”.

Nonetheless, adjudication provides a speedy and cost effective mechanism in resolving dispute. It must be noted that the parties in dispute are likely to have commercial considerations in mind rather than a concern for extensive legal analysis.

## Findings and Discussion

The findings of the study are discussed according to the objectives formulated.

### *Finding 1: The Seriousness of Late and Non-Payment Problems*

The respondents were asked to state whether they have experienced late payment in government funded projects since January 2000. About 44% (147) of the respondents reported they have been paid in an untimely manner in government funded projects. When asked whether their companies have experienced any late-payment event in private funded projects since January 2000, 178 (54%) out of 333 respondents responded, “yes” to the question.

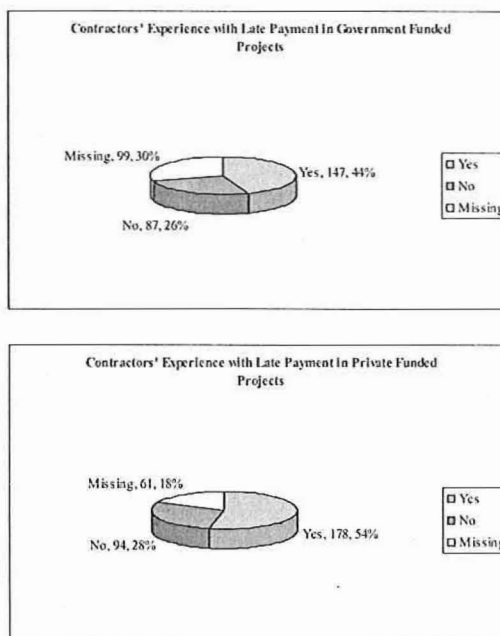


Figure1: Contractors' Experience with Late Payment in Government and Private Funded Projects

Figure 2 indicates 14% (48) of the total respondents affirmed that they have not been paid for the works executed on site in government funded projects. As for non-payment in private funded projects, 33% (111) of the respondents revealed that they have not been paid at all for the materials supplied and labour provided for the execution of the work. The reasons for such a situation could be due to paymaster's poor financial management and paymaster's failure to implement good governance in business. It can be deduced from the findings that late payment has become a culture in public and private funded projects and the situation is much worse with the latter. As for non-payment, the number of non-payment cases in private funded projects is double from the government funded projects. It is appropriate to say that Malaysian construction industry is prone to late and non-payment culture.

To determine the seriousness of the late and non-payment problem in terms of

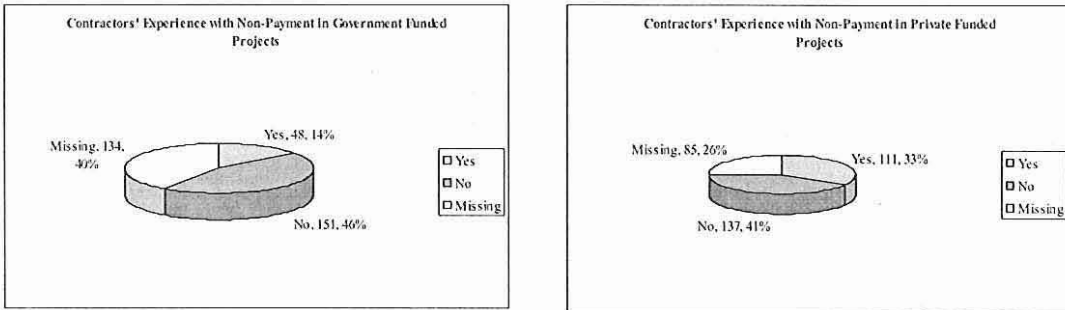


Figure 2: Contractors' Experience with Non-Payment in Government and Private Funded Project

monetary aspect, the questionnaire was drafted to enable respondents to state the amount of late or non-payment which remains owed by their paymasters since January 2000. The amount of money still owed by the paymasters to contractors is nearly RM370 million for government-funded projects and about RM510million for private funded projects as shown in Table 1.

These figures represent feedbacks from 113 and 160 respondents who are involved in public and private sectors projects, respectively. These statistics show that late and non-payment issue has become a syndrome in the Malaysian construction industry and immediate measures must be introduced to minimise the cash flow problems in the construction industry.

Table 1: Total Amount Which Remains Overdue for Contractors since January 2000 to Date of Response

Statistic Item	Amount remains overdue in government funded projects	Amount remains overdue in private funded projects
Valid	113	160
Missing	220	173
Mean	3,240,797.24	3,197,641.92
Sum	366,210,087.60	511,622,706.80

**Finding 2: Causes of Late and Non-Payment**

Figure 3 presents some general observations that may be made on causes of late and non-payment. For the purposes of these observations five most frequent causes of late payment are "Delay in certification," "Paymaster's poor financial management," "Local culture/attitude," "Paymaster's failure to implement good governance in business" and "Underpayment of certified amounts by the paymaster" with their overall means of 1.826, 1.734, 1.63, 1.63 and 1.565, respectively. Score of three (3) represents the most frequent cause and zero (0) represents never. The reason why mean was used as the data analysis method in most of the questions as opposed to ranking the factors using number of responses because the former provides consistency with the hypothesis that if the same question was asked to a separate set of respondents the answers would be very much similar or of slight variance.



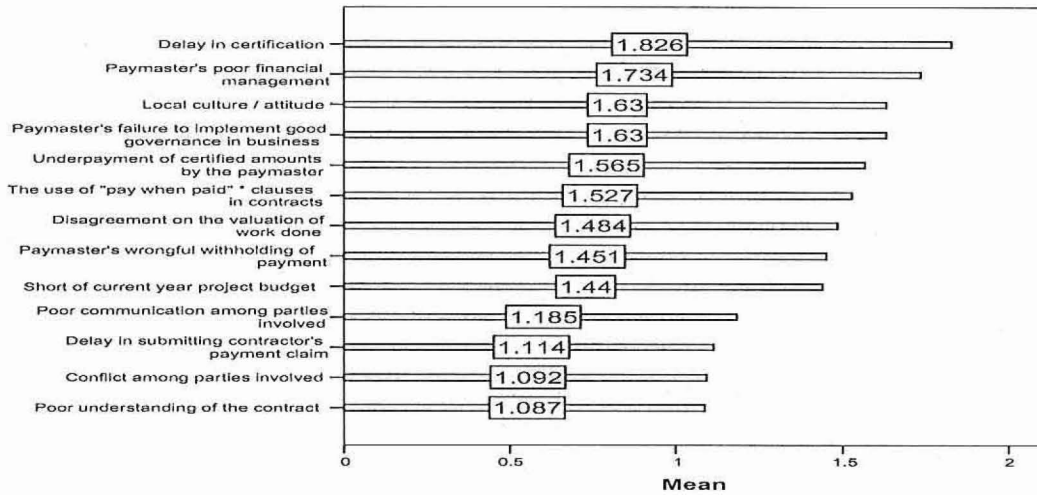


Figure 3: Causes of Late Payment

Figure 4, shows the responses on the question about the causes of non-payment. Based on Figure 4, three most frequent causes of non-payment are "Paymaster's poor financial management," "Paymaster's failure to implement good governance in business," and "Delay in certification," with their overall means of 1.896, 1.848, and 1.768 respectively.

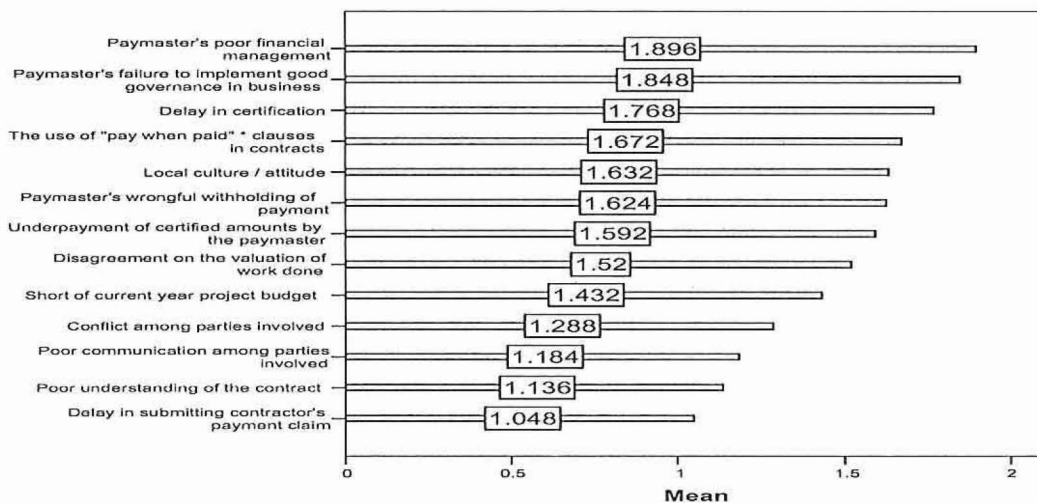


Figure 4: Causes of Non Payment

Delay in Certification

It is a norm in the construction industry where a consultant delays in certification although an appropriate claim has been made by the contractor. The contractor however can easily recover the payment debt if the adjudication provision is provided in the standard form of contract. If there is an adjudication provision in place, the aggrieved party can take the matter to a neutral third party who can decide based on materials submitted to him and this problem can be resolved in matters of days. Thus, the contractor's cash flow will not be disrupted.

Paymaster's Poor Financial Management

Financial management is a major factor in determining the project's success. It is anticipated that paymaster's poor financial management could cause him insufficient operating funds when they are obliged to pay the payees. Thus, late payment or even non-payment therefore could arise.

Local Culture/Attitude

"Local culture/attitude" has been ranked as one of the main causes of late and non-payment predicament in Malaysian construction industry. It is generally accepted that our industry is prone to late and non-payment culture. The situation in Malaysia now is somewhat similar to the UK construction industry before the introduction of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The construction industry in the UK was prone to late payment culture where delay of 53 days of making payment after the receipt of invoice was not uncommon (Johnston, 1999).

**Finding 3: Effects of Late and Non-Payment**

Respondents were also asked to rate the effects of late payment based on the extensive list given. A further analysis of the effects of late payment revealed that, three most grave effects of late payment based on Figure 5 are "Create cash flow problems," "Create stress on contractors" and "Creates financial hardship" with their overall means of 2.377, 2.185 and 2.135, respectively.

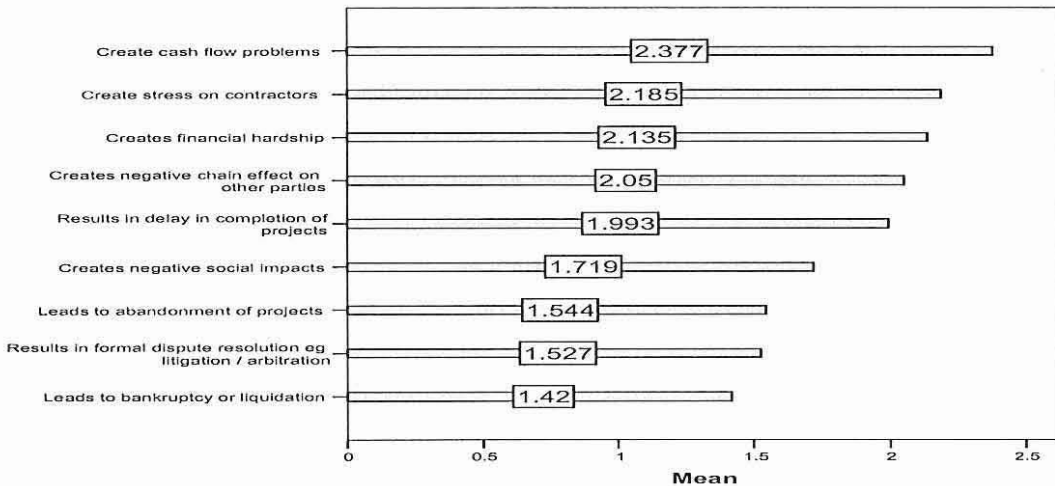


Figure 5: Effects of Late Payment

As for the effects of non-payment, the three most prevalent effects of non-payment based on Figure 6 are "Create cash flow problems," "Creates financial hardship" and "Create stress on contractors" with their overall means as 2.546, 2.454 and 2.40, respectively.

## Is Late Or Non-Payment A Significant Problem To Malaysian Contractors?

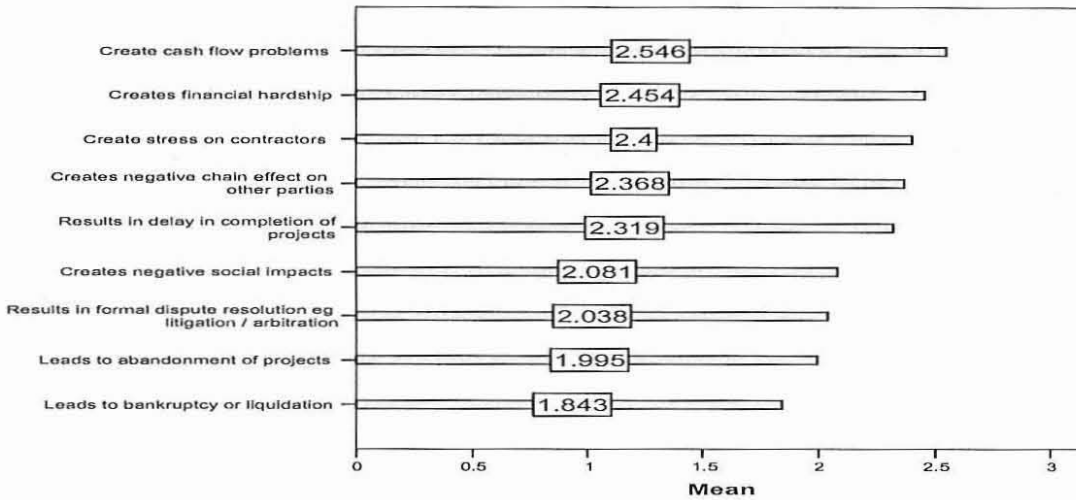


Figure 6: Effects of Non-Payment

### Cash Flow Problems Created

In the industry where cash flow has been regarded as a lifeblood of an enterprise, late and/or non-payment by the paymaster would have a devastating knock-on effect down the contractual payment chain as the cascade system of payment starts from the financial institution to main contractor, main contractor to sub-contractor and so on down the chain. The importance of cash flow is further amplified by the fact that the construction industry relatively involves long durations to complete, large amounts of money to spend and the widely use of credit payment term rather than payment on delivery in purchasing of materials (Ameer Ali, 2005b). Thus, it is anticipated the direct effect of late and/or non-payment would be cash flow problems.

### Create Financial Hardship

It is anticipated that late payment can create undue financial hardships on the contractor. For instance, the main contractor is still obliged to pay the sub-contractor/supplier for their work done even though he is not being paid under the main contract. This causes financial hardship to the contractor as he is not supposed to self-finance the job for his client.

### Stress on Contractors and Supplier Chain

Late and non-payment will surely create stress on contractors as they normally tender the project in competition with others and with a small profit margin with a hope to generate cash flow in the company. If the client pays the amount due in an untimely manner this will cause stress to the contractor as he needs to find the recourse to pay the subcontractors and suppliers. The situation is much worse when it involves non-payment.

### *Finding 4: Alternative Remedies for Securing Payment Debt*

This question asked the respondents about the alternative remedies to overcome or mitigate the problem of late and non-payment faced by local contractors. Some of the remedies posed to the respondents are already incorporated in Construction Contracts Act in many advanced

countries. The three most preferable remedies to counteract the payment problems based on Figure 7 are "A right to regular periodic payment," "A right to a defined time frame for payment" and "A right to a speedy dispute resolution mechanism, for example, Adjudication," with their overall means of 3.72, 3.695 and 3.509, respectively. For this question, four is the largest scale and one is the least. Interestingly, the overall nine possible solutions in the questionnaire were all given a high score of importance as the least score was even as high as 3.147 as shown in Figure 7.

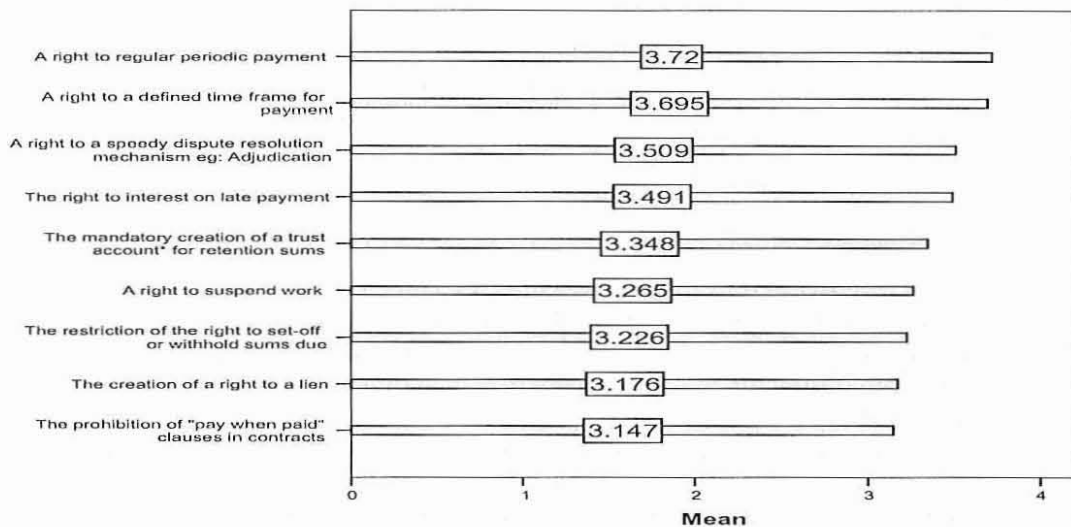


Figure 7: Alternative Remedies for Securing Payment Debt

### Right to Regular Periodic Payment

"A right to regular periodic payment" has been rated as the most favorable alternative remedy among the respondents. Such a right can be found in various standard forms of contracts in Malaysia. The right however does not resolve or mitigate the contractors' payment woes as the occurrence of late and/or non payment in construction contracts is quite common in Malaysia. This may be partly due to the laborious process in claiming for work done provided under standard forms of contracts and partly owing to the unprofessional attitude of the certifier who tends to delay matters. Starting with the contractor's claim until payment made by the employer during the period of honouring certificate the whole process could take up to 2 months. The delay in making payment to the contractor is further escalated if there is a dispute or disagreement about the value of work done or variation order. Consequently, there is an urgency to amend the standard forms of contracts to expedite the whole payment process so that the contractor would not be struggling with his cash flow while waiting for certification. Paymasters and its representatives must be sensitive towards promptness of submitting, processing, issuing interim payment certificates and honouring the certificates as these processes can generate negative impacts if not seriously attended to.

### Right to a Defined Time Frame for Payment

Again such a right has already been included in all the standard forms of contracts in Malaysia, unfortunately, however such a right is still inadequate to guarantee that the contractor will be paid promptly for the work executed on site. This may be due to the culture in our local scenario whereby the time frame for payment provided under the contract is not seriously adhered to by the consultants. Perhaps, severe penalty can be imposed in the contract to those consultants who tend to delay matters.

### Right to a Speedy Dispute Resolution Mechanism i.e. Adjudication

"A right to a speedy dispute resolution mechanism e.g. adjudication" has been perceived as the third favourable alternative remedy for securing payment debt from the defaulting paymaster with the overall mean of 3.509 out of 4.00. This shows that majority of the respondents strongly in favour of speedier method of resolving disputes i.e. adjudication. The key feature of the adjudication process is that an adjudicator will reach a decision within days or weeks of the date upon which the dispute is referred to him. The process is quick and relatively cheap, particularly in comparison to litigation and to those arbitrations that have somewhat unfortunately, for whatever reason, been allowed to become more time consuming and costly than they should have been (John L. Riches, Christopher Dancaster, 2005). An action in court or arbitration involving recovery of payment issues is normally time-consuming and expensive and in the meantime, the contractor would be struggling with his cash flow.

The Adjudication Reporting Centre (Kennedy, 2005) reveals that failure to comply with payment provisions is the main subject of disputes, amounting to 26% of the total subjects followed by valuation of variations and valuation of final account. It is, however, important to note that the subjects of the disputes are concerned with the contractors' cash flow. Construction adjudication as introduced by the Act provides a quick and interim but enforceable award which allows opportunity for improvements in cash flow. Based on the case of *Bouygues v. Dahl-Jenson* [2000] BLR 522, Chadwick LJ stated that the adjudicator's decision may give rise to an immediate payment obligation. It was designed to enable the contractor to obtain payment of interim payments. This was the intention of the UK Parliament when passing the Act in 1998.

## **Conclusions and Recommendations**

The questionnaire survey findings indicate that many local contractors have experienced late and non-payment problems in the Malaysian construction industry. Whilst late and non-payment problem is much more serious in the private sector, as the survey results indicate that the number of cases doubles that of the public, both the public and private construction sectors could affect the performance and image of the industry.

A majority of the respondents felt that local culture and attitude is one of the frequent causes of late and non-payment, thus it is recommended that contractors consider this problem as a major and high probable risk, and it should be reflected in preparing tender estimates. It is anticipated that late or non-payment incidences have caused undue cash flow problems on the contractors and this would have a devastating knock-on effect down the contractual payment chain.

The current situation concerning late and non-payment in the Malaysian construction industry indicates that present remedies or solutions available under the contract and in the common law are not adequate. Alternative solutions must be identified to protect the contractor's interest against the possibility of late and/or non-payment situation.



It is suggested that the employer's financial capacity and credit rating be made transparent to facilitate contractors to assess the employers' ability to pay and to increase chances of the latter getting paid. It is perhaps timely for Malaysia to consider introducing its own legislation on the Payment and Adjudication Act. Nevertheless, introduction of such an act cannot be regarded as a panacea for all ills, rather it must be regarded a means to an end. Professional bodies and government agencies should study and amend the existing standard forms of contract to provide protection and promote a balanced allocation of risk and fair contract to all related parties. Promptness of submitting, processing, issuing interim payment certificates and honouring the certificates are extremely important issues in relation to progress payment claims. Perhaps, an increased sense of professionalism in the construction industry could overcome some of the problems related to late and non-payment issues. Another crucial issue that needs to be addressed is why and how to change the sometimes lackadaisical attitude on payment issues in the construction industry.

## References

- Abdul-Rahman, H., Berawi, M.A., Berawi, A.R., Mohamed, O., Othman, M. and Yahya, I.A., (2006), *Delay Mitigation in the Malaysian Construction Industry*, Journal of Construction, Engineering and Management, American Society of Civil Engineers (ASCE), Vol. 132, Number 2, February 2006, pp. 125-133.
- Ameer Ali, N.A.N. (2005a), *Payment in the Construction Industry – Towards Zero-Default*, QS National Convention 2005, 10 – 11 August 2005, Hilton Kuala Lumpur.
- Ameer Ali, N.A.N. (2005b), *Construction Industry Payment and Adjudication Act, Reducing Payment Default and Increasing Dispute Resolution Efficiency*, International Forum On Construction Industry Payment Act And Adjudication, 13&14 September 2005, Kuala Lumpur Convention Centre, Kuala Lumpur, Malaysia.
- Bouygues v. Dahl-Jenson* [2000] BLR 522.
- British Pipe Lines v Christchurch Drainage* (1986) 33 BLR 76.
- CIDB (2006), *A Report of a Questionnaire Survey on Late and Non-Payment Issues in the Malaysian Construction Industry*, March 2006
- CIDB Standard Form of Contract for Building Works 2000 Edition.
- CIOB (2004), *Construction Act Consultation: "Improving Payment Practices"*, 14 October 2004 [Retrieved August 8, 2005] [http://www.ciob.org.uk/ciob/siteRoot/News\\_Room/Construction\\_Industry\\_News/Article.aspx?id=724](http://www.ciob.org.uk/ciob/siteRoot/News_Room/Construction_Industry_News/Article.aspx?id=724)
- Davis Langdon & Seah Consultancy (2003), *Construction Payment Blues-Why That Domino Effect. Executive Summaries for the Practitioner. Volume 3, Issue 3, September 2003*, Singapore.
- FG Minter Ltd v Welsh Health Technical Services Organization* (1980) 13 BLR 1.
- Hadley v Baxendale* (1854) 9 Ex 341.
- Johnston, S. (1999), *Debts and interest in the construction industry: A guide to The Late Payment of Commercial Debts (interest) Act 1998*, Thomas Telford Limited, London.
- Kah Seng Construction Sdn Bhd. v Selsin Development Sdn. Bhd.* [1997] 1 CLJ Supp 448.
- Kennedy, P. (2005), *Statistics and Trends in Statutory Adjudication in the UK since 1998*, International Forum On Construction Industry Payment Act And Adjudication, 13&14 September 2005, Kuala Lumpur Convention Centre, Kuala Lumpur, Malaysia.
- Latham, M. (1994), *Constructing the Team: Final Report – Joint Review of Procurement and Contractual Arrangements in the UK*, HMSO, UK.
- Lim, C. F. (2005), *The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors*, International Forum On Construction Industry Payment Act And Adjudication, 13&14 September 2005, Kuala Lumpur Convention Centre, Kuala Lumpur, Malaysia.
- Lip, E. (2005), *The Changing Role of the Quantity Surveyor under the Security of Payment Legislation in Singapore*, QS National Convention 2005, 10 – 11 August 2005, Hilton Kuala Lumpur.
- Lubenham v South Pembrokeshire* (1986) 33 BLR 39
- Malaysian Contracts Act 1950.
- Nicholas, N. (2005), *Late Payment Culture Creates Domino effect*, Accountancy Age, 30 Jun 2005, [Retrieved February 13, 2006] <http://www.vnunet.com/articles/print/2139274>
- PAM1998 Standard Form of Building Contract.

- President's & CEO's Roundtable Discussion (2004). *The Way Forward Towards Global Competitiveness – Malaysian Construction Industry Master Plan (MCIMP)*, organized by the Construction Industry Development Board Malaysia, 24 June 2004, Legend Hotel, Kuala Lumpur.
- PWD203A/203 Standard Form of Contract.
- The Associated General Contractors of America/American Subcontractors Association, Inc./Associated Specialty Contractors (2003), *Guidelines for a Successful Construction Project: Guideline on Owner's Ability to Pay*, [Retrieved July 31, 2005] <http://www.constructionguidelines.org/pdf/A2OwnersAbilitytoPay.pdf>
- Riches, J.L., Christopher D. (2004), *Construction Adjudication*, second edition, Blackwell Publishing, Oxford
- Rourke, J.W. & Gentry, C.A. (2002), *Missouri Prompt Payment Laws Applicable to Construction Projects*, *Journal of the Missouri Bar* Vol58 (3) [Online] May-June 2002 [Retrieved September 1, 2005] <http://www.mobar.org/journal/2002/mayjun/rourke.htm>
- Suhaini, A. (2005), *No joy for the small builders*, *The Star Online*, 8 May 2005. [Retrieved June 13, 2005] <http://thestar.com.my/news/list.asp?file=/2005/5/8/focus/10890860&sec=focus>

## Notes

- <sup>1</sup> See section 108(3) of the HGCRA and paragraph 23(3) of part 1 of the Scheme of Construction Contracts (England and Wales)

