SECURITY OF PAYMENT LAW: A STUDY OF LATE PAYMENT AND NON-PAYMENT IN CONSTRUCTION CONTRACTS

BY

MR. PAVID YONGPANICH

AN INDEPENDENT STUDY PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (BUSINESS LAW)

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ABSTRACT

The late payment, withholding payment, or non-payment by the employer that there is causing the contractor does not receive any progress payment becomes due and payable because the Civil and Commercial Code: Hire of Work, Section 587 to 607, lacking specific provision to provide contractor’s right to claim based on documentary research, and the freedom of contract leads to unfair contract termed drafted by the party that has bargaining power to take advantage or allocate a lot more risk to the other party in particular as existing in construction industry.

Although, the Building and Construction Industry Security of Payment Act, in Singapore, is provided that the progress payment shall be secured in construction work. The contractors and subcontractors shall be granted the rights to be paid and it must be reducing the risks of the contractors and subcontractors while they encounter late payment, withholding payment, or non-payment. They will be granted the procedure to claim and entitlement to receive payment quickly to carry out the completion of work efficiency.

Based on the study of Singapore law, the result of the study found that Thailand should be introducing the Security of Payment Act to secure payments for contractors and subcontractors in construction contract including supply of goods and services or a contract for services. Therefore, the Security of Payment Act granted the right for payment claims, entitlement to make adjudication applications, and suspension of work. The late payment and non-payment may occur multiple times while the dispute resolution should be fast and effective in particular construction contract.
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Chapter 1

Introduction

1.1 General Background and Statement of the Problems

A Construction industry is the main industry being a major role to economic growth in Thailand. For the past ten years, the value of investment in construction business is in a large amount and lead to higher gross domestic product (GDP) accordingly. The reasons are that the construction has a special characteristic relating to other business chains such as businesses of construction materials, real estate development, machineries, and tools manufacture including rental business, hire of those related works and employment of manpower.

Construction projects in Thailand can be separated by types of project owners or employers into 2 categories; the first one is in the public sector, i.e. the government or state agencies and the second is in private sector, i.e. business proprietors. Mostly, in public sector, the government mostly aim to invest in infrastructure projects that there are large projects with high-value investment, where small and medium-sized enterprises (SMEs) are unable to meet the requirement to be a main contractor, but they will be hired to be subcontracts for several parts of project works which affect increasing of employment under those infrastructure projects. However, major contractors of the public sector project are pleased to take part in the private sector for other construction projects for more profit with less complicated. Construction is a duty of the contractors doing construction business for high-value framework and employment that need to deal with many groups of people. Then, there are many risks and problems no matter if it’s management, staff, materials, machinery, and especially financial processes as delay payment or non-payment that effects inadequate cash flow. There are causes and consequences of problems as delay or late completion, default, and lead to disputes arising.

The aforementioned two categories of construction projects have two contract models in common based on the manner of payments. The first one is a lump sum

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contract upon which the contractor is responsible to complete the project under a fixed total cost including material and labor costs, management cost, overhead and profit, tax and etc. The second one is a measurement contract (or re-measurement contract) where the contractor shall complete the project in compliance with drawings and specification under an estimate total price whereby the contract shall provide unit rates for several items of works under which the actual amount to be paid for the total works will be determined by a method of measurement (or re-measurement) for the actual work carried out and calculated by the rates provided.

Moreover, the payment terms of those construction contracts are much more complicated than other contracts. Mostly there are two types of payment, i.e. the first one is monthly progress payment to be paid each month by actual work done, the second one is installment payments to be paid upon a completed work in each stage provided in the contract. Whatsoever, a preliminary obligation of contractors is to be responsible to pay for all costs of the pre-construction phase for staffs, machinery, materials and labor force since entering into the contract. On the other hand, the contractor does not assume to pay for all costs of the whole project until completion, but the employer has the duty to pay for the works done periodically at each due date or period to support or maintain the contractor’s cash flow all along the course of construction. If late payment or non-payment has been made, it inevitably impacts the contractor’s cash flow and result in consequence loss to subcontractors who are entrusted to complete several parts of the contract work. Due to the various type of works included in construction, the contractor needs specialist subcontractors in several key area of works such as pilot piles, escalators, communication system, and landscape.

As late payment and non-payment are practically happening which impacts the entire construction industry, they lead to cost reduction and standard construction decrease, that is contractors will use its effort to execute work upon the cost reduction in labor force, below standard materials and workmaships and others. The consequence then leads to income insecurity of labors and subcontractors and the occurrences of labor shortage appear continuously. In particular of subcontractors being SMEs, who have no bargaining power to deal with the employer in the non-payment or late payment issues, it will lead to the problems of limitation of tendering for future works to expand or develop their construction business. Moreover, construction businesses are highly competitive between building companies by which lead to under-estimated pricing to receive contract award with risks of losses at the end of the contracts or collusive bidding for contract
award controlling by a few large construction companies which at present being attributable to a monopoly of the construction industry in Thailand.

To secure those payments to solve the problems in construction industries that the employers practically make late payment or non-payment, there are some financial tools such as letters of credit, bonds or bank guarantees\(^2\). However, these tools are hardly accepted by employers except for international construction projects.

Regarding laws applied to construction contracts in Thailand, there are two main contracts based on the status of the owners or the employers i.e.: governmental contracts and private contracts. At present, a governmental construction contract form and other related contract are provided by the Regulation of Public Procurement and Supplies Administration Act, A.D.2017 under the Notification of the Policy Committee in charge of Public Procurement and Supplies Administration and parts of them are administrative contracts which are under the Act Establishing Administrative Courts and Administrative Courts Procedure, A.D.1999 and the jurisdiction of Administrative Court. The laws governing the rights and obligations among parties of the administrative contracts are not applied to private construction contracts. The private contracts are subject to the Civil and Commercial Code on part of general contract laws and the law regarding Hire of Works\(^3\) which was designed for general hire of work contracts but not specifically for construction contracts. Those laws are purposed for general hire of works which at this moment are unable to cope with complicated work under construction contracts which have been developed into the construction industry for medium and large construction projects. It can be concluded that Thailand has no specific law which establishes a specific legal measure and procedure to secure payments and remedies for construction industries as implemented in some developed countries which resulted in sustainability to construction industries.

All above-mentioned facts evidence the result of no effective law or legal procedure in Thai legal system to secure contractors or subcontractor’s rights to remedies against the employers or to enforce the employers to pay for actual work done by them within a reasonable time. This results in a hindrance to developing of the construction business to be a stable and better standard for all who were involved in the industry.

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2 Alex Guy and Kate Papailou, “Performance Security: Bonds, Guarantees and Letters of Credit,” DLA Piper, Asia Pacific Projects Update.

Law to secure payments for construction contract was first established in Great Britain. Then its colonies and some other countries such as Singapore, Australia, New Zealand, and Malaysia established similar laws. The laws enforced in Australia, Singapore, and Malaysia are known as “Building and Construction Industry Security of Payment Act” which have defined the principle that the Acts are to provide entitlements to progress payments of any person who carried out construction work or supplied related goods and services for construction and provide a mechanism for speedy resolution and recovery through adjudication system. In New Zealand, a similar law is known as “Construction Contract Act”.

Lack of specified security of payment law may affect construction contract, there is no procedures to facilitate payment for contractors or subcontractors who invested in the construction project. In addition, the right of contractors or subcontractors is often not stipulated in a governmental and private construction contract in Thailand. They are unavoidable enter into unfair contract terms, if they have been awarded. The Security of Payment Act will cover all types of construction contracts to ensure the contractors and subcontractors cash flow by granted the right to receive payment, even in dispute resolution procedure.

This paper aims to study should Thailand introduce the law and what the law of construction contract should be.

1.2 Objectives

1.2.1 To study problems on payments in construction of Thailand and Singapore related to the Security of Payment Law.

1.2.2 To study implemented applicable law which related to the Security of Payment Law in Singapore.

1.2.3 To study the requirement and problems of Security of Payment in Thailand.

1.2.4 To seek solutions and suggestions on guidance for enacting law on Security of Payment in construction.

1.3 Hypothesis

Thailand shall be applied Civil and Commercial Code, Hire of Works, for construction contracts which are lacking specified legislation that there must be
insufficient to construe for the construction contract, are detailed and filled with complicated. Therefore, the security of payment law shall be secure and facilitate payment for contractor and subcontractor to receive progress payment by entitlement and adjudication system. For that reason, the measure of the law is to force the employer to make payment for the contractor to have a positive cash flow, by introducing the security of payment law to the construction contract in both public and private sectors.

1.4 Methodology

The methodology of this independent study is documentary research which focusing on the Security of Payment in case of Late Payment and Non-Payment, and compiling information from different sources such as legal textbooks, legal articles, theses, research papers, provisions, regulations, and other related documents in order to reach the comparative laws in Construction Contracts between Thailand and Singapore.

1.5 Scope of the Study

This independent study is to study legal measures of Security of Payment Law in Construction Industry in case of private construction industry related to terms of payment for both Thailand and Singapore. And also comparing the legal principles and suggestions to introduce Security of Payment Law as guidance for establishing in Thailand.

1.6 Expectations of Study

1.6.1 To understand the problem of payments in construction industry and construction contract in Thailand.

1.6.2 To understand the implemented applicable law related to Security of Payment Law in Singapore.

1.6.3 To understand the legal measures of Thailand and Singapore related to the Security of Payment Law.

1.6.4 To obtain solutions and suggestions for enacting the Security of Payment Law in Construction implementation of contracts.
Chapter 2
Background and Concept for Construction Industry

Construction Industry has existed for a long time upon it was the world’s main industry to this day. There is a significant part of the economy to increase the employment rate of the country. The relationship in the construction project are binding agreement based on policies and conditions in construction contract.

2.1 Construction Contracts

There are two main contracts based on the status of the owners or employers. Firstly, a governmental construction contract that the laws governing the rights and obligations among parties of the administrative contracts are not applied to private construction contracts. Secondly, the private contracts are subject to the Civil and Commercial Code on part of general contract laws and the law regarding Hire of Works which was designed for general hire of work contracts but not specifically for construction contracts. Those laws are purposed for general hire of works that are unable to cover with complicated work under the construction contract. It can be concluded that Thailand has no specific law which establishes a specific legal measure and procedure to secure payments and remedies for construction industries.

2.1.1 Nature of Construction Contract Project

Construction projects in Thailand have two contract models based on the type of payments. The first one is a lump sum contract upon which the contractor is responsible to complete the project under a fixed total cost including material and labor costs, management cost, overhead and profit, tax and etc. The second one is a measurement contract (or re-measurement contract) where the contractor shall complete the project in compliance with drawings and specifications under an estimate total price whereby the contract shall provide unit rates in the bill of quantities for several items of works which the actual amount to be paid for the total works will be determined by a method of measurement for the actual work carried out and calculated by the rates provided.

In addition, the payment terms of those construction contracts are much more complicated than other contracts. If late payment or non-payment has been made, it
absolutely impacts the contractor’s cash flow and result in consequence loss to subcontractors who are entrusted to complete several parts of the contract work due to the various type of works included in construction.

Construction Industry is a major business in Thailand. The Average Gross Domestic Product (GDP) of Construction business industry is 8.1% of the value of investment. Mostly 80% are infrastructure projects of the public sector are awarded to only a few certain of large construction companies. Meanwhile, the private sector are focusing on construction for housing residence that is 56% of the value of private sector construction and some other buildings such as plants, superstore, etc., of which the competition are among large construction companies and small and medium size enterprises (SMEs) because of higher profit and less complication in construction process\(^4\). Additionally, construction industry is a crucial part for Thai economy system by reason that it can activate supply chain in manufacturing of construction materials, equipment and tools, transportation business, insurances, banking and others as well as create jobs for personnel in several levels of education including labors. However, the development of construction at present is being more complicated not only in process and procedure of the construction but also regarding the patterns of relevant contracts to provide rights and obligations in detail. These complexities are easily attributable to arising of disputes while most SMEs contractors in construction business are rather conservative in management and methodology of construction including analysis and evaluation of the agreement before entering into as well as in contract administration. Such advanced technology and contractual obligation development under the present competitive situation resulted in unfair contract terms which being taken advantage by the project developers or owners. It can be seen that the existing laws are unable to provide justice to contractors and subcontractors under the present construction contracts and the advanced technology anymore and attributable to construction dispute under the unfair situation to them. As a result, the law to be applied to them is to be developed to

cope with the present conflicts and disputes actually arisen in the modern construction industry as well.\textsuperscript{5}

2.1.2 Contractor Risks

The Construction business has many risk factors that might impact its success in business.\textsuperscript{6}

1. Risk from Being a Subcontractor

Construction work in the field of mechanical, electrical, and plumbing (MEP) in a project frequently been subcontracted by the main contractor who is directly awarded the whole project by the project owner or developer. Those MEP subcontractors have to work in parallel with civil and structural works executed by the main contract under the same contractual condition of the main contract. Therefore, the subcontractor has to rely upon the main contractor in all aspects, i.e. to be awarded for subcontract works, in technical matters, in payment receipt, etc. at its own risk under less bargaining power.

2. High Competition Risk

Construction business consists of small companies with a few staff, medium and large companies (up to 1,000 staffs),. There are unlimited and no barrier to entry into the business but to be awarded for large projects, some high qualifications are required for bidding. Some companies have a policy to enter into the project by underpricing, which shall impact to inadequate cash flow to cover expenses during construction. This results in a decrease of construction entrepreneurs.

3. Income Continuity Risk

As a result of high competition by underpricing, construction companies are always taking risk on discontinuous income if they are unable to be


\textsuperscript{6} Vintage Engineering Public Company Ltd., Annual Report 2013, p.16.
awarded new projects continuously or be awarded underpricing projects with low profit rates. As a result, they always earn low income and profit under cash flow problems.

4. **Credit Risk from the Late Payment or Non-Payment of the Employer**

SMEs with a few staffs and limited fund are hard to carry on several projects at the same time. If the employers make late payment or non-payment, they might impact significantly their financial credit while they have to bear a long term risk on the uncertainty of the outcome seeking in the dispute resolution for payment.

5. **Change in Cost of Material Risks**

The contractors or subcontractors have to steady the price of materials throughout the construction period, especially for materials in a large quantity. Those will affect contractor’s loss that cannot make profit according to their purposed.

6. **Risk from Unable to Control Cost or Misconduit**

Mostly construction work is executed in compliance with drawings and related specifications upon material quantities and cost estimated in advance practically during construction period, it is needed to purchase materials in quantities and prices that are different from the estimation and affect cost to be over budget. This might cause by wrong estimation, inability to control purchase costs and material quantities, or fraud in purchase process.

7. **Relied on Experienced Engineers and Executives Risk**

Construction is difficult and complicated works much more than other works. As a result, contractors and subcontractors need to rely on group of experienced engineers and professionals in construction management for completion on time, compliance with the requirements of the projects and control the budget apart from considering of tender reasonable price.

8. **Labor Shortage Risk**

Construction needs labor forces, which mostly of them come from agricultural sector, that fluctuate under seasons of each year. Contractors and Subcontractors shall encounter labor shortage problems in the growing seasons, harvesting seasons, and other festivals. These factors effect project management being unable to keep on track and incurred increased costs, or delayed penalties.
9. **Natural Disasters Risk**

Contractors and subcontractors can be impacted by an unexpected event occurred at the construction sites and surrounding areas that impact project costs and time such as the previous major flood disaster.

Regardless of the risks to be under the management of contractors, some certain risks are not attributable to contractors’ default and out of control by them, however, all burdens are fallen upon them under contracts as a matter of facts. Nowadays construction contracts under the law of Thailand cannot provide any fair measures to allocate some certain risks between parties but in contrary to take chances to protect owners or developers as employers of the contracts to take advantage from contractors on those events which impact further to all related subcontractors. Thus, to develop construction industry to be more sustainable than the present status, it is necessary to consider establishment of a specific law that can provide fair measure for right and obligations between parties of construction contracts and to control those contracts to be more standardized upon fairness with reachable justice procedure.

2.1.3 **Hire of Work Principles**

Construction contract should be specific and suitable manner directly because there must be clarify detailed and cover all aspects, it will reduce and solve the advantageous of the parties. If a contract is ambiguous, it means that the parties have a question or doubt in a general or particular condition, word, or definition because of vague or unclear. Then, unfair issues can happen such as change in drawing, variation, suspension, penalty, termination of the contract, non-payment and etc. The importance reason of the parties is construed the contract condition for more benefit themselves than fairly, the court litigation happened. The relevant law enforcement in construction field according to the Civil and Commercial Code on part of general contract laws and the law regarding Hire of Works Section 587\(^7\) to Section 607, are insufficient to cover the detail of construction work in this time from the aforementioned. Other matters will be implemented by juristic act and contract law.

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\(^7\) Civil and Commercial Code, Section 587 “A hire of work is a contract whereby a person, called the contractor, agrees to accomplish a definite work for another person, called the employer, who agrees to pay him a remuneration of the result of work.”
2.1.4 Contracting Principles

The doctrine which states that people have the right to legally bind them is known as freedom of contract\(^8\) including general contracts and hire of work in Thailand, and restricted scope with reasonable caused under the Civil and Commercial Code Section 150\(^9\) and Section 151\(^10\). The parties are freedom to enter into contract with whoever, a person or a company, and any purpose or formation of the contract in verbal or writing. Moreover, the parties are freedom to express or stipulate the contract condition by the law principle “Pacta Sunt Servanda”\(^11\).

2.2 Payment

Construction projects have two types of payment: lump sum fixed price and re-measurement contract that there is different method of calculation in each month for interim payments. The lump sum fixed price is a fixed total cost to complete the project including material and labor costs, management cost, overhead and profit, tac and etc. On the other hand, the measurement contract or re-measurement contract that the contractor shall be complete the project with the actual amount to be paid by the employer for the total works, calculated the rates by a method of measurement in each items for the actual work, in compliance with drawings and specifications under an estimate total price but the contract shall provide only unit rates in the bill of quantities.

The construction project is a long term contract that there is necessary to pay many times in a restrict timeframe. The parties are needs to agree term of payment for advance payment, progress or interim payment, retention payment and final payment.

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\(^8\) Pimvimol Vipamaneerut, John King, and David Duncan, Bangkok, Thailand, “Restrictive Covenants: Laws and Types of Restrictions,” Tilleke & Gibbins International Ltd.

\(^9\) Civil and Commercial Code, Section 150 “An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.”

\(^10\) Civil and Commercial Code, Section 151 “An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.”

When the contractor work done in each months, the contractor needs to submit the progress payment to the employer or the employer’s representative to certify the correction of the progress payment. Then, the employer or the employer’s representative shall be issuance the interim payment certificate to allow the contractor to submit invoice in the same certified amount, the employer shall be made payment until the due date of the invoice. If the progress payments are mistake or incorrect that the employer or the employer’s representative shall be order the contractor to revise or check the progress payment to submit again, it might be impacted the contractors that they cannot receive interim payment in one month. The late payment, withhold payment, and non-payment will affect huge impact to the contractor and subcontractor to complete project because they will be facing a negative cash flow in the construction project.

The Fair payment practices\textsuperscript{12} are an important part to accomplish the construction project. The fair payments practice must be transparent and appropriate for the supply chain to receive full payment as and when due.

1. contractors and subcontractors shall be entitled to receive correct full payment;
2. the terms of payments shall be applied to all party with equally;
3. the process must be clear and transparent for the subcontractors to know when they will be paid;
4. any withholding of payment due to defect works must be deducted in proportion;
5. the interim payment period shall be not exceeding 30 days for ensure the contractor cash flow;
6. the parties shall be agreed the procedure of payment to avoid payment delays; and
7. the parties shall be agreed the dispute resolution also.

These are the model of fair payment practice relating to the integrated working in construction project.

Interim payment period or payment cycle in construction contract are different than other contract because each parties have own responsibility to evaluate the progress payment application. Begin with the contractor submits the progress payment work done in a month to the employer’s representative or quantity surveyor for approval of the

contractor’s payment application and issue the interim payment certificate. Then, the contractor shall be issue the invoice under the certificate of interim payment and the employer will be paid for the progress payment, all those processes should not be exceeding 30 days, to ensure effective and equitable cash flow of contractor. The fair payment practices is difficult to agree at all because the other factors of each party for business, such as conflict of interest or business relationship, will be make them to distort the ideal practice.

2.3 Security of Payment

The Security of Payment Act in each country has the same concept, these are the countries that establishing the act: developed country, Singapore, Australia and New Zealand, and developing country as Malaysia. So, Thailand can be established the act also by their models. They are enacting the act for a long time, but they are still proposals for amending to solve the problem and harmonize with the current era. The explanation and concept for Security of Payment in Singapore as follow;

Singapore known as the Building and Construction Industry Security of Payment Act (in brief "SOP Act") and supplemented is the Building and Construction Industry Security of Payment Regulations. The concept is a tool to support or help the contractor and subcontractor in industry business, while they facing difficulty to receive due payment from the clients or owners. Moreover, small and medium enterprises (SMEs) have less power to bargain or claim, it shall be lead to bad debts due to the time and money involved to court for enforcing the entitlement. SOP Act has policy objective seem safeguard to help contractors and subcontractors who are a sufferer of payment delay and dispute made in bad faith by contracting parties. Then, the contractor shall be entitled to receive payment from their works services and material suppliers, cover all related work done in construction building which would form part of the work, any long-term installations within those buildings or structures such as air-ventilation or water tank, and any operations which is closely-linked to work in either of the two categories. Both the provision of goods, such as building materials, and services, such as architectural services, are covered by the Act and adjudication regime provides parties "to obtain a quick, interim decision by an adjudicator that in binding on the parties to the adjudication until such time the matter is finally decided by an arbitrator or the courts (as the case may be). In other words, an unsuccessful respondent has the right to try to
reverse the temporarily final adjudication determination in subsequent court or arbitration proceedings."

The traces of the past found that the Security of Payment Act was inspired by the Constructing Team Report by Sir Michael Latham, United Kingdom, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, July 1994. This Final Report is suggesting an advice for solving problems in construction process and client receive better performance work as expected with more efficient construction industry and fairness in any construction company involved. There are two chapters that are inspired to proposal the Security of Payment Act; Chapter 3 Project and Contract Strategies and Briefing, and Chapter 9 Dispute Resolution.

In Chapter 3 clause 3.16, this report is concerning on managing contractor in the point of Key Date that should be in the scheduled of meeting for discussing cash flow and resources significantly. "A "Key Date" procedure for discussing cash flow and resources at a very high level is vital every three months or so, as well as normal project progress meetings. Payments should be made properly and on time, provided that milestones have been achieved. The Project Manager should also be aware of whether the main contractor is paying the subcontractors on time, so as to prevent problems on site."

In Chapter 9 recommendation in Dispute Resolution stipulated a system of adjudication in all standard form of contract and underpinned by legislation. There are 5 elements as follow:

- There must be no restrictions in the capable of being adjudicator, conciliator and mediator in any contracts,
- The adjudicator shall be appoint implemented immediately,
- Any appeals that litigation to the arbitration or the courts process, after practical completion only,
- The court shall be support a system of adjudication and agree the expedite interim payment concept,
- There shall be drawn and writing the training procedures and a code of practice for adjudicators.


14 Ibid., p.91-92.
So, Security of Payment Act was passed on 16 November 2004 and came into operation on 1 April 2005 by Parliament of Singapore in the same name of New South Wales legislation, Australia, as "the Building and Construction Industry Security of Payment Act". In the period of the Act was passed, construction industry was faced the troublesome at that time because the number of annual construction demand has decreased more than a half, 10 billion Singapore Dollar in 1997 from the peak of 24 billion Singapore Dollar. On the other hand, construction firms are increasing registered at the Singapore Building and Construction Authority's Contractors Registration System (CRS) by 8.5% since 1997 to 2004. From the comparison of the construction demand and the number of construction firms, they are demonstrating the intensive of competition in pricing, all construction firm are ready to take risks in term of losses and financial problems and effect to the subcontractors and suppliers. They encountered cash flow shortage by delays in payment and non-payment, the Act shall be safeguard to protect cash flow, especially subcontractors and suppliers.

The enactment of the Act more than a decade, the construction demand of Singapore is rising to be better construction industry because the total value of demand in 2016 to be between SG$27 billion and SG$34 billion, with approximately 65% being public sector demand. Meanwhile, private sector construction demand has decreased due to less favorable economic conditions, and an increased supply of completed private housing projects and offices (news release by the Building and Construction Authority 15 January 2016). Moreover, the Act is forcing to pay an interim payment and comply with adjudication, leading to develop the case law quickly.

2.4 Conclusion

Construction Industry is a major business and crucial part of economy system that it can activate supply chain in manufacturing of construction as well as create jobs for personnel in several levels of education including labors. There is increasing demand for hires contractors and subcontractors to work under construction contract.

Contractors and Subcontractors often encountered risks in many factors that might impact its success in business and the law cannot provide any measures to allocate some certain risks between parties.

Security of Payment Law is a tool to support or help the contractors and subcontractors to reduce the certain risks. They shall be entitled to receive payment from their work done and provide the procedure of adjudication for dispute resolution according to late payment and non-payment.
Chapter 3

Security of Payment Law in Singapore and Thailand

The studied of the background of construction contract and Security of Payment Law indicates that there is an efficiently and effectively to facilitate payments for contractors and subcontractors who invested in the construction project. In this chapter, the researcher will present the legal measures used in Singapore. For the benefit of study to introduce the law and what the law of construction contract should be.

3.1 Singapore law

3.1.1 Background

In the years prior to 2005, undesirable practices on delay, withheld or suspended payment under the construction contract were prevalent within the construction industry in Singapore and lead to interruption of cash flow on part of contractors and subcontractors. Moreover, some contract conditions drafted and applied by owners of construction projects or employers to contractors or by main contractors to subcontractors such as “pay when paid” clause which meant to make payment to subcontractors only when main contractors received payment from the owners or the employers led to unfair situation of delay payment, a limitation clause to prolong the procedure to claim and to seek for dispute resolutions led to late remedies, etc. Such “pay when paid” clause in an effort to deny or delay due payment to the contractors or subcontractors prejudiced their right to dispute for payment. The situation became even more acute during the financial crisis when numerous construction firms in Singapore faced financial demise. Instead of providing justice for fair and proper remedies, the time and cost consuming in the dispute resolution both by arbitration and in the court of justice impacted more delay and difficulties to contractors and subcontractors to receive payment for recovery.

Cash flow is a crucial factor in undertaking construction projects in construction industry. The contractors and subcontractors will be in critical circumstance

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to finance construction projects by their own money, without adequate cash flow. The lack of precise financial resources from payment under the contract will have a negative impact on the steady progress of these projects thereby causing a substantial delay in their completion. In most cases, building projects come to a complete standstill when the contractor, no longer able to bear the burden of its financial commitments, collapses into insolvency.

At that time annual construction demand in Singapore had decreased significantly from the peak of SG$ 24 billion in 1997 to SG$ 10 billion in early 21st century, however, the number of companies registered each year had not decreased thus affected an intense price competition to be awarded for works and resulted in decrease of profit including loss in business. Notwithstanding the aforementioned, it seemed to be a normal practice in construction industry that contractors and subcontractor always encountered delay payment on work executed during the course of construction as well as non-payment at completion of the works executed. As a result, the issue on establishing of security of payment to facilitate relevant parties in construction contracts had been raised and discussed by tracing principles and model laws regarding security of payment in construction contracts established in the United Kingdom since 1996.

In July 1994, Sir Michael Latham, a famous British Conservative Member of Parliament in late 20th century, issued “FINAL REPORT” on the UK construction industry, in the title of “CONSTRUCTING THE TEAM” (known as the Latham Report) by Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry. This Final Report recommended that the approach to obtain the high-quality projects required better performance, but with fairness to all involved which would lead to a brighter image and better rewards for a great industry. Legislative intervention was proposed to be designed to avert cash flow difficulties encountered by contractors with unintentional impact to their capacity in the construction industry in UK in order to “reduce the amount of time, money and other resources wasted on building contracts.”. Two prominent principles of the scheme of legislative intervention were proposed in the report, i.e.

(1) A party who seeks to be paid for construction work is entitled to make payment claim and the other party against whom the payment claim is made has to pay

M J Maritz, D C Robertson, “What are the legal remedies available to contractors and consultants to enforce payment?,” the Journal of the South African Institution of Civil Engineering.
the payment amount or state its reasons why payment should not be made to the extent claimed.

(2) An economical and fast track adjudication machinery of any dispute between parties to a construction contract is to be provided. The determination is to bind both parties until the time a decision is made by an arbitration or the judicial court.

Following from Latham Report, in the year 1996 Housing Grants, Construction and Regeneration Act 1996 was enacted in UK\textsuperscript{18} with one of its introduction statement was to amend the law relating to construction contracts and architects where Part II Construction Contract was added with and emphasized on the procedure of payment and claims in construction, right to suspend performance of works, prohibition of some specific clauses, etc. as well as a new dispute resolution machinery for payment claim under construction contract to be delivered by adjudication. The approach of this act had an influence on countries under common law system including Singapore to enact a similar act regarding security of payment in construction industry as follows:

\begin{tabular}{|l|l|}
\hline
\textbf{Australia} & \\
New South Wales & Building and Construction Industry Security of Payment Act 1999 \\
Victoria & Building and Construction Industry Security of Payment Act 2002 \\
Queensland & Building and Construction Industry Payment Act 2004 \\
Western Australia & Construction Contracts Act 2004 \\
Northern Territory & Construction Contracts (Security of Payment) Act 2004 \\
\textbf{New Zealand} & Construction Contracts Act 2002 \\
\textbf{Singapore} & Building and Construction Industry Security of Payment Act 2004 \\
\textbf{Malaysia} & Construction Industry Payment and Adjudication Act 2012 \\
\hline
\end{tabular}

The abovementioned acts have been amended from time to time to be more practicable and effective.

Singapore Building and Construction Industry Security of Payment Act (\textquotedblleft SOP Act\textquotedblright) was enacted on 16 November 2004 and came into force on 3 January 2005. SOP Act was modelled substantially on the Building and Construction Industry Security

of Payment Act of the New South Wales legislation under the same desire to improve payment behavior within the construction industry.


The Statute of the Republic of Singapore on Building and Construction Industry Security of Payment Act which was enacted on 16 November 2004 had been revised in the year 2005, 2007 and 2018. The Building and Construction Industry Security of Payment Regulations under SOP Act was enacted on 1 April 2005 to provide some specific details in particular of adjudication procedure. The preamble of SOP Act stated its objective that “An Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.”. The Act is summarized as hereunder:

1. Principle of law

There are four significant principles of law introduced through this Act.

1) Right to Progress Payments

SOP Act Part II Section 5 expressly attests the entitlement to a progress payment of the work and services done by any person who has carried out any construction, or supply any goods or services under a contract for construction or for supply of goods or services related to construction work (as their concise meanings are described in the following article). It is obvious that the Act is specifically established to apply to payment delay or non-payment in construction contracts and/or related supply contracts to solve cash flow problem incurred in construction industry. The attestation is provided as follows:

The progress payment is defined in Section 2.means a payment to which a person is entitled for the completion of construction work, or the supply of goods or services, and includes a single or one-off payment (including a final payment); or a payment that is based on an event or a date (including a final payment).

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19 Building and Construction Industry Security of Payment Act, Section 5 “Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.”
2) “pay when paid” clause

“pay when paid” clause in construction contracts is a common feature found in back-to-back contracts for construction where a main contractor seeks to pass its obligations and liabilities towards the employer through to its subcontractor. Generally, the said clause regarding payment provides that payment to the subcontractor will be conditional upon the main contractor receiving payment under the main contract. This is a major disadvantage to every tier of subcontractors or suppliers and results in cash flow difficulties in construction industry. However, under the SOP Act Section 9 (1), “pay when paid provisions” which provided in the contract for not only construction works but also supply of goods or services for construction is unacceptable and being unenforceable and having no effect.

3) Dispute Settlement by Adjudication and Enforcement of Determination

SOP Acts establishes special method of dispute settlement for construction industry in particular during construction to solve the problem of poor cash flow which might lead to failure to complete the construction. It intends to produce a quick process of resolving disputes for the parties who are entitled to progress payment with reasonable expenses for the settlement process including immediate enforcement process to the party who is disputed. The act provides the contractors, subcontractors or suppliers being entitled to initiate their claims on late payment or non-payment to be resolved during the course of construction.

Four significant principles to support the applicable adjudication process are set forth in SOP Act as follows:

(1) Entitlement to make adjudication applications

The act attests the right of the contractors or parties in relation to construction who are entitled to progress payment from the other party to make an adjudication application to settle the dispute under the adjudication process as a claimant who fails to receive payment by the due date of the payment response amount which he

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20 Building and Construction Industry Security of Payment Act, Section 9(2)

21 Building and Construction Industry Security of Payment Act, Section 2

“adjudication” means the adjudication of a payment claim dispute in accordance with Part IV, and includes and adjudication review under that Part;

22 Building and Construction Industry Security of Payment Act, Section 12.
has accepted in writing is entitled to make an adjudication application under Section 13 in relation to the relevant payment claim.

(2) Right to suspend work or supply\(^{23}\)

SOP Act also provided that under the adjudication process if the adjudicator determines an adjudicated amount to be paid to the claimant who claims for progress payment and no payment is made as determined, the claimant is entitled to suspend construction work or cease supplying goods or services after serving a notice of his suspension intention to the other party. Upon the suspension the claimant is not liable to loss or damage suffered by the other party (respondent) or by the principle who has liability to make payment to that other party, or by the owner who enters into the contract for construction work or services in relation to the construction or who owns the construction site. However, the claimant shall resume such work or the supply of goods or services within 3 days after being paid the adjudicated amount. The rights and obligations provided under SOP Act Section 26 and Section 23-1(b) are elaborated in the following context.

(3) Lien on goods supplied\(^{24}\)

To enforce the adjudication determination that required payment to be made to the claimant, SOP Act establishes lien on goods supplied by the claimant under the contract to the other party (respondent) that are unfixed and which have not been paid. The lien shall be effective 7 days following from the date the parties concerned receive the notice of his intention to exercise such lien as provided in Section 25(1) and Section 23-(1)(a).

(4) Direct payment from principal\(^{25}\)

SOP Act also attest the right of the principal which is defined as a person who is liable to make payment for the construction work or related goods or services to the party whom the dispute is raised against (respondent) as provided in Section 24. Thus, the principle despite of no contractual relation with the party who raises dispute (claimant) can legally pay the adjudication amount in whole or in part and deems as a payment made to the respondent under the contract between them or to be recovered as a debt due to the respondent. This will facilitate the claimant being able to carry on the construction work or services for its completion which serves the benefit of the principle.


\(^{24}\) Section 25.

\(^{25}\) Section 24.
4) Enforce as a judgement debt

Under SOP Act an adjudication determination shall be enforced by the aggrieved party Section 23(2) as if it were a judgement debt by applying for leave of the court as provided in Section 27.

2. Contract terms and conditions not acceptable under SOP Act

1) Progress payment amount

SOP Act provides that an adjudicator shall not be bound to any term and condition in the contract that provides any payment response or any assessment in relation to the progress payment is final and binding on the parties.

2) “No contracting out” provision

Basically, contract law respects the doctrine of freedom of contract or liberty of contract subject to requirement of good faith and public interest or good moral as well as a legal principle of “Pactasuntservanda” (in Latin) or "agreements must be kept" (in English). It is understandable that the law permits contracts to be drafted in contrary to provisions provided by law if not conflict to public order or public interest.

26 Building and Construction Industry Security of Payment Act, Section 23 and 27.

27 Building and Construction Industry Security of Payment Act, Section 17(4) “Indetermination an adjudication application, an adjudicator shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.”

28 Building and Construction Industry Security of Payment Act, Section 36 “36-1 (1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.

(2) The following provisions in any contract or agreement (whether in writing or not) shall be void:

(a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;

(b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.”
and being enforceable. The liberty of contracts leads to unfair contract termed drafted by
the party that has bargaining power to take advantage or allocate a lot more risk to the
other party in particular as existing in construction industry. Thus, to maintain fairness
provided under the specific provisions and principle of SOP Act, the provision of “No
contracting out” which stipulates that any terms and condition in an agreement related to
construction being applied by the Act if exclude, modify, restrict or prejudice to the
operation of the Act shall be void is provided in Section 36.

In conclusion, the Act provides enforcement to certain types of
construction contracts but it has not provided any exemption to use for construction
contract made by the state entities as a party on one part. Thus it is applied to both state
contracts and private contract of the same types as provided in the relevant section of the
Act.

3) Relevant Persons

All related person referred to in SOP Act are defined in Part I
Preliminary Section 2. Interpretation and other relevant sections as follows:

(1) Claimant\(^{29}\)

The “Claimant” is defined as a person who is or claims to be
entitled to a progress payment where in Section 5, a progress payment is a payment
entitled from construction work or supplied any goods or services under a construction
contract or related contract. Generally, these persons mean contractors, suppliers,
subcontractors.

(2) Respondent\(^{30}\)

The “Respondent” is defined as a person who is or maybe liable to make a progress payment under a contract to a claimant. Generally, these persons mean an owner of the construction site, an employer of a construction contract or other related contract, a main contractor of a subcontract, a service or a supply contract engaged by the main contractor, or a subcontractor who subcontracts its works to the others.

\(^{29}\) Building and Construction Industry Security of Payment Act, Section 2
“claimant” means a person who is or claims to be entitled to a progress payment under
section 5;”

\(^{30}\) Building and Construction Industry Security of Payment Act, Section 2
“respondent” means a person who is or maybe liable to make a progress payment under a
contract to a claimant;”
(3) Owner \[31\]

The “Owner” is defined as a person who enters into a contract, whether with the respondent or any other person, for the completion of construction work at or on, or for the supply of goods or services in relation to, the construction site concerned by the respondent or other person (as the case may be); and is not engaged by any other person to carry out construction work at or on, or to supply goods or services in relation to, the construction site concerned; or where there is no such person, a person who owns the construction site concerned.

Generally, it means the person who hires others for construction work or to provide services or supply for construction, or who owns the construction site.

(4) Principal \[32\]

The “principal” is defined as a person who is liable to make payment to the respondent for or in relation to the whole or part of the construction work that the subject of the contract between the respondent and the claimant and named in a payment claim served by a claimant under Section 10.

(5) Authorized Nominating Body (“ANB”) \[33\]

The “authorized nominating body” is defined as a person authorized by the Minister (Minister for National Development) to appoint adjudicators and undertake such other functions or as may be imposed under SOP Act in Section 2 and Section 28(1).

At present all construction industry adjudications are administered by the Singapore Mediation Centre (“SMC”), which is the authorized body under the SOP Act for maintaining a register of adjudicators, codes of conduct and practice, schedules of fees, providing training and administering construction adjudications.

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\[31\] Building and Construction Industry Security of Payment Act, Section 2 “owner”

\[32\] Building and Construction Industry Security of Payment Act, Section 2 “Principal”

\[33\] Building and Construction Industry Security of Payment Act, Section 2 “authorized nominating body” means a person authorized under section 28(1);”
(6) Adjudicator

The “adjudicator” is defined as a person appointed under this Act to make decision or judge a payment claim dispute including (a) a replacement adjudicator appointed under Section 14A(3); (b) a review adjudicator or a panel of review adjudicators appointed under Section 18(5)(b); and (c) a replacement review adjudicator or a replacement member of a panel of review adjudicators appointed under Section 18A(3).

(7) Review Adjudicator or a panel of 3 review adjudicators

“a review adjudicator” or “a panel of 3 review adjudicators” are an adjudicator or adjudicators appointed by ANB to review an adjudication determination as requested by a party of an adjudication against the other party under Section 18.

3. Contracts to be applied

1) Formality and governing law

Contract for construction or other related contracts to be applied under SOP Act Section 4(1) are required to be (a) in writing and (b) whether or not the contract is expressed to be governed by the law of Singapore. The meaning of “in writing” is defined in Section 4(3) and Section 4(4).

34 Building and Construction Industry Security of Payment Act, Section 2
“adjudication” means a person appointed under this Act to determine a payment claim dispute that has been referred for adjudication, and includes-
(a) replacement adjudicator appointed under section 14A(3);
(b) a review adjudicator or a panel of review adjudicators appointed under section 18(5)(b); and
(c) a replacement review adjudicator or a replacement member of a panel of review adjudicators appointed under section 18A(3);”


36 Building and Construction Industry Security of Payment Act, Section 4(3)
“(3) For the purpose of this section, a contract shall be treated as being made in writing —
(a) if the contract is made in writing, whether or not it is signed by the parties thereto;
(b) if the contract is made by an exchange of communications in writing;
2) Scope of Contract

Scope of contracts to be applied under SOP Act is provided through the definitions in PART I: PRELIMINARY as summarized hereunder:

“contract” to be applied under SOP Act is defined in Section 2 into 3 categories as a construction contract, supply contract, or a contract that has been terminated.

Definition of each category of contract is provided in Section 2, Section 3 as “construction contract” is defined in two categories of agreements one party undertakes to carry out for one or more other party the construction work, whether including the supply of goods or services or otherwise, or supply services.

“supply contract” is defined as an agreement made by one party to the other party to supply goods to any other party, who is engaged in the business of carrying out construction work or who causes to be carried out construction work, for the purpose of that construction work whereby the first party is not required to assemble, construct or install the goods at or on the construction site.

The meaning of construction works, goods and services referred to in each category of the contracts to be applied under SOP Act as provided in Section 3 and Section 4(2A) as herein summarized:

“construction work” means-

(I) construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling the buildings or structures (whether permanent or not) that form part of the land or any works that form part of the land, including walls, road works, inland waterways, pipelines, reservoirs, water mains, wells, sewers, power-lines, telecommunication apparatus, aircraft runways, docks and harbors, railways, industrial plan

(c) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party, with the authority of the parties thereto; or

 if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.”

37 Building and Construction Industry Security of Payment Act, Section 4(4)

“(4) Where a contract is not wholly made in writing, the contract shall be treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties thereto is in writing.”

38 Building and Construction Industry Security of Payment Act, Section 2.
(II) installation for the purpose of land drainage, coast protection or defense, in any building, structure or works of fittings that form part of the land, including systems of heating, lighting, drainage, sanitation, water supply or fire protection, air-conditioning, ventilation, power supply, and security or communications systems

(III) operation which forms an integral part of, is preparatory to, or is for rendering complete, including land reclamation, excavation, tunneling and boring, site clearance, earth-moving, laying of foundations, erection, maintenance or dismantling of scaffolding, prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere; and site restoration, landscaping and the provision of roadways and other access works.

(IV) cleaning and painting the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, repair, restoration, alteration, maintenance or extension; or the painting or decorating of the external or internal surfaces of any building, structure or works

“goods” means materials or components to form part of any building, structure or works arising from construction work; or plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work.

“services” means the conduct of feasibility studies, planning services, the submission of applications or other documents to any relevant authority, site supervision services, professional engineering services, or surveying or quantity surveying services, architectural, design, in relation to construction work; project management services in relation to construction work; building, engineering, exterior or interior decoration or landscape advisory services in relation to construction work; or the provision of labor to carry out construction work.

(V) Exemption of Application, SOP Act provides exemption of applying on the following contracts Section 4(2) for the carrying out of construction work at or on, or the supply of goods or services in relation to, any residential property (within the meaning of the Residential Property Act (Cap. 274)), which do not require the approval of the Commissioner of Building Control under the Building Control Act; for hire of an employee to under Employment Act to undertake to carry out construction work, or supply goods or services; or for construction work carried out outside Singapore, or goods or services supplied in relation to construction work carried out outside Singapore; for terminated contract where the contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until
a date or the occurrence of an event specified in the contract; and that date has not passed or that event has not occurred. For the prefabrication, in Singapore, of components intended for construction work to be carried out on a construction site outside Singapore, where any one of the parties to the contract is not a body corporate incorporated under any written law in Singapore; a limited partnership registered under the Limited Partnerships Act; or a person carrying on a business that is registered under the Business Names Registration Act 2014.

4. Payment Claim Procedure, Adjudication Process, Effect and Enforcement

1) Payment claim procedure\textsuperscript{39}

A claimant may serve a payment claim in respect of progress payment in whole or in part which has not been paid to another person who is or may be liable to make payment under the contract, stating the claim amount and related information, no later than the date specified in the terms of the contract; or no later than 30 months after the following in relation to the payment claimed occurred- i) goods and services were last supplied, ii) construction works was last carried out, iii) the last temporary occupation permit.

Under SOP Act Section 11, a respondent named in the payment claim shall respond to the payment claim by a payment response with reason and information stating response amount to pay the claim amount in whole or in part or raising objection in writing within the date specified in the terms of the contract, or 21 days after the payment claim is served under Section 10 whichever is earlier; or if no such provision is provided, within 14 days after the payment claim is served under Section 10.

2) Adjudication process\textsuperscript{40}

The claimant is entitled to make an adjudication application as provided in SOP Act Section 12. to ANB within 7 days after his entitlement to make an adjudication application under Section 13 (1), (2) and (3), if – (i) the claimant fails to receive payment by the due date of the response amount; (ii) the claimant disputes a payment response; or (iii) the respondent fails to provide a payment response. The

\textsuperscript{39} Building and Construction Industry Security of Payment Act, Section 10.

\textsuperscript{40} Section 12.
claimant has notified the respondent in writing of his intention to apply for adjudication of the payment claim dispute.

Under SOP Act Section 13 (4), Section14, and Section 15, ANB shall perform commence the proceedings as upon receipt of adjudication application, serve its copies to the respondent and a notice in writing that the application has been made to the principle and the owner; appoint an adjudicator to determine the adjudication application; confirm the appointment of adjudicator to the claimant, the respondent and the owner within 7 days after receipt of adjudication application; replace an adjudicator appointed who has cease to meet eligibility criteria for adjudicator or become unable to perform his duties and confirm the replacement to the respondent, the principle and the owner within 7 days after becoming aware of the matters for replacement.

A respondent shall lodge a response to the adjudication application with all related information to ANB within 7 days after receipt of a copy of an adjudication application as provided in Section 15.

ANB shall then upon receipt of an adjudication response, serve its copies to the respondent and a notice in writing that the application has been made to the principle and the owner as provided by SOP Act Section 15(4), and adjudication commence immediately upon the expiry of the period required respondent to lodge an adjudication response as provided in Section 16(1).

The adjudicator shall perform as provided by SOP Act Section 16. and Section 17. as an act independently, impartially and in a timely manner; avoid incurring unnecessary expense; and comply with the principles of natural justice; conduct the adjudication in such manner as he thinks fit; determine the adjudication application in writing within 7 days after the date of adjudication commencement or a longer period agreed by the claimant and the respondent; and shall not be bound by any term or condition in the contract which provided that a payment response or any assessment to be final or binding on the parties [Section 17(4)].

Either a claimant or a respondent who aggrieved by the determination of the adjudication may, within 7 days after being served the adjudication determination, may lodge an application for the review of the determination with ANB if- a) for the respondent, the adjudicated amount exceeds the relevant response amount; or b) for the claimant, the claim amount exceeds the adjudication amount. The adjudication review shall be in a similar way as the adjudication proceeding as provided in Section 18. and Section 19 of SOP Act.
3) Effect of adjudication determination

An adjudication determination and an adjudication review determination shall be binding on any person claiming through and on the parties to the adjudication or under them as provided in SOP Act Section 21, unless or until leave of the court to enforce the determination is refused under Section 27.; the dispute is finally determined by the court or tribunal or any other dispute resolution proceeding; or the dispute is settled by agreement of the parties.

The respondent shall pay an adjudication amount to the claimant within 7 days after the adjudicator’s determination is served on the respondent or by the date determined by the adjudicator, whichever is later as provided in SOP Act Section 22. For the adjudication review determination, the respondent shall pay within a similar way as the adjudication determination but with some different details as provided in the same section.

4) Measures to enforce payment of adjudicated amount

(1) Enforcement as a judgement debt

The procedure for enforcement by the court is provided in Section 27 as the aggrieved party files an application for leave to enforce an adjudication determination in court. The leave of the court if so granted, judgment may be entered in the terms of the adjudication determination.

Any party to an adjudication who commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs. In the court proceedings, the court may set aside an adjudication determination in whole or in part, or remit the adjudication determination to the adjudicator in whole or in part, or correct any clerical mistake in the proceeding.

41 Building and Construction Industry Security of Payment Act, Section 21.

42 Building and Construction Industry Security of Payment Act, Section 23(2) “where a party to an adjudication fails to pay the whole or any part of the adjudicated amount to any other party in accordance with section 22, the aggrieved party may apply for and enforce the adjudication determination as if it were a judgment debt in accordance with section 27.”

43 Building and Construction Industry Security of Payment Act, Section 27(1) “An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.”
adjudication determination, error arising from an accidental slip or omission, or a defect of form; and award costs to any party to an adjudication.

(2) Lien on good supplied\textsuperscript{44}

A respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with Section 22, the claimant may send a notice to the respondent in writing for expressing the claimant’s intention to exercise a lien under Section 25 on goods supplied by the claimant to the respondent under the contract concerned that are unfixed and which have not been paid for.

(3) Right to suspend work or supply\textsuperscript{45}

A respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with Section 22, a claimant may suspend the carrying out of construction work, or the supply of goods or services, under a contract if the claimant has serve a notice to the respondent in writing for expressing the claimant’s intention to suspend the construction work or supplying goods or services under the contract concerned as provided in Section 26(1).

In regard to liability for loss and damage incurred from suspension of work during the period of suspension exercised is provided in SOP Act Section 26(2) and (3) as the claimant is not liable to the respondent or the principal or the owner for any loss or damage suffered by the respondent, respectively, or by any person claiming through or under the respondent, the principal or the owner; and the respondent shall have no claim against the claimant for any loss or damage suffered as a result of the suspension, but the principal and the owner may recover liquidated damages or any other remedy from the respondent pursuant to any contract or under any law. If the claimant incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply the respondent is liable to pay the claimant the amount of any such loss or expenses; and any such loss or expenses may be recovered by the claimant as a debt due from the respondent.

Upon suspension of the construction work, supply of goods or services, under a contract in accordance with subsection (1), the claimant shall resume such work or supply within 3 days after being paid the adjudicated amount as provided in SOP Act Section 26(4).

\textsuperscript{44} Building and Construction Industry Security of Payment Act, Section 23(1).

\textsuperscript{45} Section 23(1)(b).
(4) Direct payment from principal

A respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with Section 22, the principal of the respondent may make payment of the amount outstanding in full or in part in accordance with the procedure set out in subsection (2). The procedure by which the principal may make payment to the claimant shall be as the principal shall serve a notice of payment on the claimant stating that direct payment shall be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner); the respondent shall, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and if the respondent fails to show proof of payment in accordance with paragraph (b), the principal shall be entitled to pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.

Any payment made by the principle under this section may be treated by the principal as payment to the respondent in reduction (by the amount of the payment) of any amount that the principal owes, or may in future owe, to the respondent in connection with the contract concerned; or may be recovered by the principal as a debt due from the respondent.

3.2 Thai law

3.2.1 Background

Construction industry in Thailand is similar to other countries. Several business and people are related to a construction project such as the owner of the project, the developer, contractors in several fields of construction, construction consultants or supervisors, engineers, subcontractors, suppliers or vendors, manufacturers, labors, etc. As a result, several types of contracts between those people are made for their binding. This section will focus on two major types of the following contracts related to payment in construction as follows:

1. Construction contract
2. Supply contract

Before A.D.1999, both types of contract were in the same category of contracts that is commercial contracts applied by contract law and specific contracts law.

of Civil and Commercial Code since 11 October 1999, “the Act on Establishment of Administrative Courts and Administrative Court Procedure A.D. 1999”, was enacted and separated a part of those classic commercial contracts the contracts made between state and a non-state person or juristic person under a certain objective of public interest to be administrative contracts as provided in Section 347 of the Act and the cases involving a dispute in relation to an administrative contract are under jurisdiction of the Administrative Court as provided in Section 9 of the Act. However, no provision is particularly provided legal rights and obligations for administrative contracts. Thus, the administrative court generally applies Civil and Commercial Code to administrative contracts as well.

Notwithstanding the law of Civil and Commercial Code, there is specific laws enacted to apply to private contracts, i.e. Unfair Contract Terms Act A.D.1997 which intends to protect end-users of goods and services to earn fair contract terms but it does not apply to construction contracts or supply contracts, where the parties of the contracts have equal bargaining power in entering into the contracts48. Another act enacted for construction is Building Control Act A.D.1979. It is related how to construct buildings to be safe in accordance with technical standards. Therefore, both acts will not be focused on in this section as well.

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47 the Act on Establishment of Administrative Courts and Administrative Court Procedure, Section 3 “administrative contract” include a contract at least one of the parties of which is an administrative agency or a person acting on behalf of the State and which exhibits the characteristic of a concession contract, a contract providing public services or a contract for the public utilities or for the exploitation of natural resources;”

48 The Unfair Contract Terms Act, Section 10 “In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:

1. good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition,

2. ordinary usages applicable to such kind of contract;

3. time and place of making the contract or performing of the contract;

4. the much heavier burden borned by one contracting party when compared to that of the other party.”
For dispute resolution on construction contracts under Thai law, there are two channels for resolution. The first one is court of justice under the law of organization of the court of justice and the second one is arbitration under the Arbitration Act A.D.2002. There is no other option of dispute resolution specifically for construction contracts or other related contracts.

In the year 2017, the Parliament had enacted Public Procurement and Supplies Administration Act A.D.2017 to provide methods to procurement of goods, supplies and services of the state including contract administration which the government entities have to comply with the Declaration of the State Committee of Procurement Policy and Administration had been issued in the same year to provide several standard forms for state contracts for procurement including construction contracts. However, the Act and the declaration are not provided rights and liabilities of the parties of the contracts but to enforce the government agencies to use state standard forms in procurement. Those laws are not contract law for administrative contract. Several terms and conditions provided in the state standard form for construction is unclear and provide opportunities to the state entities to take advantage of the other parties. The form was originated to be used as a guide line for state agencies in the Office of the Prime Minister on Procurement A.D.1992. The original form since 1992 had been raised to be enforced as the declaration as aforementioned with only some additional terms to earn more advantage to make final decision by the state agencies in the dispute between the parties of the contract. It is obviously seen that the terms and conditions provided in the forms are very different from the principle of international standard for construction contract such as FIDIC\(^{49}\) International Standard Contract for Construction. The laws had been criticized by law academy as improper forms which would lead to problems in construction industry.

3.2.2 Civil and Commercial Code

1. Construction contract
   1) Hire of Work

A contract for construction whether including supply of goods and services or a contract for services in construction a basically are applied by Civil and

\(^{49}\) FIDIC is a French language acronym for “Fédération Internationale Des Ingénieurs-Conseils”, which means the international federation of consulting engineers.
Commercial Code, Book III, Title 7: Hire of Work, where Section 587 provides that “The hire of work is a contract whereby a person, called contractor, agrees to accomplish a definite work for another person, called employer, who agrees to pay him a remuneration of the result of the work.” No provision provides that the contract is to be in writing for its effect and binding.

The law means to apply to all kinds of works being hired or services provided under the contract until accomplishment of such works or services. The works can even be a very small contract such as taxi services, dressmaking, car fixing or a large contract of project construction contract with several billion-baht value. It is not a specific law provided for industrial construction which have high value and huge responsibility with complicated technology and complex works under the contracts.

It seems that the law of hire of works mostly provides obligations on part of the contractors regarding the nature of general works and services such as to provide tools or instruments which are necessary for the execution of the work; to supply material in good quality if agreed to supply goods; use materials carefully and without waste if agrees to supply by the employer and return the surplus after work is completed; including liability and limitation for the contractors.

The obligation on part of the employer is provided in the law of hire of work only regarding payment for work that the remuneration is payable on taking delivery of the work. If the work is to be accepted in parts and the remuneration has been specified for the several parts, the remuneration for each part is payable at the time of its acceptance. It seems that mostly the law provided the employer’s right to enforce the contractor such as:

(a) to withhold payment in case of contractor’s delay in delivery or of delivery of a defective work; and

(b) to terminate the contract in case that the contractor does not begin to work in a proper time or delays in proceeding with it contrary to the terms of the contract.

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50 Civil and Commercial Code, Section 602 “The remuneration is payable on taking delivery of the work. If the work is to be accepted in parts and the remuneration has been specified for the several parts, the remuneration for each part is payable at the time of its acceptance.”

51 Civil and Commercial Code, Section 599 “In case of delay in delivery or of delivery of a defective work, the employer is entitled to withhold the remuneration unless the contractor gives proper security.”
contract, or if, without the fault of the employer, the contractor delays to proceed with it in a such a manner that it can be foreseen that the work will not be finished within the agreed period.\(^\text{52}\)

No specific provision of this law provides for the contractor to enforce the employer for delay payment, withholding payment or neglect to pay.

Therefore, if an employer delays or refuses to pay remuneration to the contractor as agreed in the contract, where generally being called as “progress payment”, in construction contracts, the first issue is to be consider whether the employer is entitled to do so by the aforesaid law or by any contract conditions.

Regarding subcontracts, the law provided that the contractor may appoint sub-contractor to work for him in all or in part, except in the major part of contract that required the ability of the contractor and the contractor is still responsible for the work and any mistake of the sub-contractor.\(^\text{53}\) The law of hire of work will be applied to a subcontract for construction in the manner that the contractor is the employer of the subcontractor.

2) General Principle of Contract Laws

In case of delay payment, payment withholding or non-payment to the contractor by the employer, the general principle of contract law provided in Civil and Commercial Code regarding “General Provisions” “Obligations” “Juristic Act” and “Contract” are to be applied to those cases.

The law related to juristic acts and contract by themselves accept the doctrine of freedom of contract as provided in Section 150\(^\text{54}\) and Section 151\(^\text{55}\) that It

\(^{52}\) Civil and Commercial Code, Section 593 “If the contractor does not begin to work in a proper time or delays in proceeding with it contrary to the terms of the contract, or if, without the fault of the employer, he delays to proceed with it in a such a manner that it can be foreseen that the work will not be finished within the agreed period. The employer is entitled to cancel the contract without waiting for the time agreed upon for delivery.”

\(^{53}\) Civil and Commercial Code, Section 607 “The contractor may appoint sub-contractor to work for him in all or in part, except in the major part of contract that required the ability of the contractor. The contractor is still responsible for the work and any mistake of the sub-contractor.”

\(^{54}\) Civil and Commercial Code, Section 150 “An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.”
can be inferred from the said provisions that parties of the contract are entitled to agree on any terms and conditions in contrary to the provisions of the laws if they are not regarded as prohibition by law or against public order or good morals. As a result, construction contracts in construction industries which mostly drafted by the employers or their consultant have payment terms and conditions that is tough for contractors to received payment regularly. Those contracts always provide several events entitled the employers to withhold payments or deduct payment or refuse to pay within the terms agreed to pay.

Therefore, if a contractor does not receive payment within the payment period and wishes to claim for such payment, other than the provision of Hire of work which provided that the remuneration is payable on taking delivery of the work, the following General Laws and Contract Law are considered to be applied to construction contracts in seeking for justice in dispute resolution:

(a) the principle of “good faith” of the Civil and Commercial Code provided in Section 5 that “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.”, in Section 6 that “Every person is presumed to be acting in good faith.” and in Section 368 that “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration;

(b) Under the provision regarding obligations and default payment, the right to receive payment is provided that the creditor is entitled to claim performance from the debtor and the performance may consist in forbearance
d and if the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning. If a time by calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may

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55 Civil and Commercial Code, Section 151 “An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.”

56 Civil and Commercial Code, Section 194 “by virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance.”
be reckoned by the calendar from the time of notice\textsuperscript{57}. If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it\textsuperscript{58}.

It can be seen that because of no specific provision for payment on construction contract, several general provisions are to be applied to the dispute as to payment claim. The law has no concise meaning to be expected for the effect but to leave interpretation to the court or arbitration when applying to the facts. It is difficult to know the concise determination regarding “good faith”.

3) Right to suspend work performance

A contract for construction is a reciprocal contract upon which the non-performance of obligation shall be entitled the other party to refuse to perform obligation on his part until the other party performs or tenders performance of his obligation, but this does not apply, if the other party’s obligation is not yet due\textsuperscript{59}. It seems that the law supports contractor’s right to suspend work performance under the contract against delay payment or non-payment by the employer. However, in practice the employer who drafts the construction contract always alter his obligation provided by law by adding that no suspension of work is allowed in any case even during the process of

\textsuperscript{57} Civil and Commercial Code, Section 204 “If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning.

If a time by calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice.”

\textsuperscript{58} Civil and Commercial Code, Section 213 “If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it.

When the nature of an obligation does not permit of compulsory performance, if the subject of the obligation is the doing of an act, the creditor may apply to the court to have it done by a third person at the debtor’s expense; but if the subject of the obligation is doing of a juristic act, a judgment may be substituted for a declaration of intention by the debtor.”

\textsuperscript{59} Civil and Commercial Code, Section 369 “A party to a reciprocal contract may refuse to perform his obligation until the other party performs or tenders performance of his obligation. But this does not apply, if the other party’s obligation is not yet due.”
dispute resolution. In a subcontract “pay when paid clause” as aforementioned is always added as well. Such those added or altered clauses are acceptable under the doctrine of freedom of contract as afore-mention. Therefore, the reciprocal right provided by law to protect a party of the contract is ineffective and unsuccessful. In this case, if the contractor or subcontractor suspend works performance, it may be interpreted in the dispute determination or decision that they are on default of the contract and to be liable for loss and damage sustained by the employer from the work suspension.

4) Preferential Lien

In performance of obligation, the contractor under a construction contract has to put an effort to construct any building or infrastructure as agreed by his own costs. However, if the employer delays payment or refuse to pay whether by any reason such as the work delay by default of the contractor or subcontractor in case of a subcontract, improper work executed, defective work or any others, etc. At this moment, the surplus cost that the contractor or subcontractor have put into the construction shall remain a burden to them. The question is to be raised whether the contractor or the subcontractor have any preferential right on the works executed or goods supplied to the construction without any return by payment from the employer.

Under Civil and Commercial Code regarding preferential right, lien on immovable properties for the work executed under the contract for hire of work is existed upon its official registration under Section 273, 287, and 1299. It is impracticable to the contractor or subcontractor to do so. Moreover, by the legal definition, the preferential right is to be exercised among all creditors in the order provided by law under Section 259. The action of enforcement is to be made by the court procedure. Despite of the goods provided into the construction site, the contract always provided that no removal of any machinery, equipment, material or goods from the site can be made by the contractor or subcontractor without employer’s consent despite those things have not been fixed into the construction. Thus, no preferential right is effective to the contractor or subcontractor on their work or good supplied under the contract. On the other hand, the employer is entitled under the Civil and Commercial Code to retain all those properties to enforce the contractor to continue performance of work under Section 251.

5) Direct payment from the third party

When the conflict between an employer and a contractor or a subcontract arises form delay payment, non-payment or refusal to pay, the owner of the site who is not enter into the contract as the employer may suffer loss and damage incurred from the construction delay. The question to be considered is
whether the owner is entitled to pay remuneration directly to the contractor or subcontractor for the employer. If there is no right or obligation provided under all related contracts, such action is interpreted as management of affairs without mandate under Section 395 and may be liable to the principal of that affair or the cost of management may not be recovered under Section 395.

2. Supply contract

1) Specific Contract for Sale

A contract for supply of goods for construction is applied by the law of Specific Contract regarding Contract for Sale where Section 453 provided that it is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it. The seller is obliged to deliver the goods sold to the buyer under Section 461 and the buyer is bound to take delivery of the property sold and to pay the price in accordance with the terms of the contract of sale under Section 468. The ownership of the property sold is transferred to the buyer from the moment when the contract for sale is entered into Section 458 but subject to another condition precedent or time condition under Section 459.

The law of sale provides rights and obligations on both parties regarding the nature of the action of sale including defect liability and liability on eviction. No specific provision of this law provides for the seller to enforce the buyer for delay payment, withholding payment or neglect to pay for the sale.

2) General Principle of Contract Laws

In case of delay payment, payment withholding or non-payment to the seller by the employer, the general principle of contract law provided in Civil and Commercial Code regarding “General Provisions” “Obligations” “Juristic Act” and “Contract” are to be applied to those cases in the same principle as aforementioned for construction contract.

Under Civil and Commercial Code regarding preferential right, lien on the property sold for the construction is existed under Section 270. However, as describe in the foregoing on construction contract, by the legal definition, the preferential right is to be exercised among all creditors in the order provided by law under Section 259. The action of enforcement is to be made by the court procedure.

3.2.3 Law on Dispute Resolution

In Thailand there are three forums for resolving disputes as follows:
1. Mediation

Mediation is a process for private dispute to find a settlement agreement between parties by a third person who mutually accepted and called a mediator. The parties to the dispute have freedom whether to agree on the settlement. The mediator has no authority by law to make a determination or decision on the dispute but will use his experience and effort to find fair solution acceptable by the parties. Mediation is acceptable for business dispute in several countries worldwide such as in USA. In Thailand, mediation is a formal process established in civil court of justice to provide a choice for the parties to settle the dispute by mutually agreement instead of continuing the court proceeding for the decision.

2. Arbitration

An arbitration is a procedure under the Arbitration Act A.D.2002, by which parties of a dispute mutually agreed in writing to submit the dispute to an arbitrator or arbitrators for determination Section 11. The parties may agree to settle any dispute by arbitration in any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract or not. Such arbitration agreement shall bind the parties. In case a party files a complaint on the dispute to the court regardless of the arbitration agreement, the other party may raise an objection to the court to dismiss the case and commerce arbitration proceeding as agreed.

An Arbitration shall be proceeded in the following manners:

(1) A party of the dispute (a) notifies the other party in writing to resolve the dispute in arbitration or to appoint an arbitration or to agree on the arbitration appointed by the first party; (b) notifies the dispute to the arbitral tribunal appointed (if any); or (c) submits the dispute to an arbitration institute as agreed Section 27.

(2) An arbitrator shall be impartial, independent and possess the qualifications prescribed in the arbitration agreement; or if the parties agree to submit the dispute to an institution established for the purpose of administrating arbitration, the arbitrator shall have the qualifications prescribed by the institute Section 19.

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60 The Arbitration Act, Section 15 “In any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract or not, the parties may agree to settle any dispute by arbitration, Such arbitration agreement shall bind the parties.”
(3) The arbitrator or arbitral tribunal may hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted solely on the basis of documents or other evidences Section 30.

(4) The arbitrator or arbitral tribunal shall decide the dispute in accordance with the governing law chosen by the parties or Thai law if no other specific law agreed Section 34. The award shall be made in writing and signed by the arbitrator or members of the arbitral tribunal Section 37.

(5) An arbitral award may be set aside by the competent court as request by a party if the proceedings do not in compliance with the stipulation Section 40.

(6) The enforcement of an arbitral award is to be taken action by the court Section 42 but the court may refuse its enforcement if the proceeding does not in compliance with the stipulation Section 43 or if the enforcement would be in contrary to public order or good moral. Section 44

In conclusion, the arbitration law does not provide time limitation for the proceeding. In fact, the arbitrations proceeded on construction contracts rather consume a long period of time for years with a lot of costs on arbitration administration fees for arbitration institute and arbitrator fees who are experts. In addition, the arbitration law does not provide interim measures and preliminaries order to protect a claimant from present loss and damage sustained such as from withholding payment by the employer.

3. Court

At present there are two categories of construction contracts for the dispute resolution in two different courts. The administrative contracts are in the competent of the Administrative Court under the Act on Establishment of Administrative Courts and Administrative Court Procedure, A.D.1999 and private contracts are in the competent of the Court of Justice under the law for the organization of court of justice and the Act on the Establishment of and Procedure for Intellectual Property and International Trade Court A.D.1996. A lot of procedures are provided by law to secure the most fairness decision. As a matter of fact, a long time consuming to resolve disputes in any court in particular regarding industrial construction contracts is generally known. This results that contractors or subcontractors whose payments are not received in a due time cannot be recovered for loss and damage within an appropriate time or too late for remedy.
3.3 Conclusion

Late payment and non-payment are inevitably impacts the contractor’s cash flow and result in consequence loss to subcontractors who are entrusted to complete several parts of the contract work. In Singapore, Building and Construction Industry Security of Payment Act was enacted and resolved that an act to facilitate payment to be paid for construction work done and establish a fast track adjudication to reduce loss for contractor and subcontract, both of administrative and private contracts. In addition, there is provided the provision to restrict the pay when paid clause to be unenforceable and no effect in construction work.

On the other hand, construction industry in Thailand is similar to other countries, but there is no provision is particularly provided legal right and obligation for administrative contract. Furthermore, the Civil and Commercial Code is mostly providing obligation on part of the contractors regarding the nature of general works and services which are necessary for work executed. It is not a specific law for industrial construction which have high value and huge responsibility with complicated method of construction under the contract.
Chapter 4

Analysis of Problems for Late Payment and Non-Payment

In this chapter, the researcher will analyze problems of late payment and non-payment in industrial construction contracts that effected to contractors and subcontracts under Thai law in comparison to the specific Singapore law regarding construction as described in the previous chapter. It also focuses on the major issues of dispute resolution and the law enforcement and the reason why Thailand should introduce the law regarding security of payment in construction industrial and what contexts the law should be.

4.1 Applicable Laws

Under Thai law, construction contracts both in public sector which are administrative contracts and in private sector is applied by the law regarding Hire of Work and other general provisions of Civil and Commercial Code. The law regarding Hire of Work had been established since A.D.1925 and intended to apply to general hire of work as even a small work and services provided in daily life. It provides only general rights and obligations of the party of the contract by their nature of works such as obligation to provide equipment and materials and how to use it, commencement of the work, delivery and acceptance of the work, remuneration to be paid. In case of delay payment or non-payment by the employer including default of or termination of the contract, the general principle of contract law provided in Civil and Commercial Code regarding “General Provisions” “Obligations” “Juristic Act” and “Contract” are to be applied. It also applied to all subcontracts in the same manner.

In fact, a construction contract in particular in construction industry is a lot more complicated than other general hire of works. In a contract for a medium or a large construction project, it comprises of several parts of conditions such as general conditions, particular conditions, specifications, construction measures, construction schedules, method of payment calculations, bill of quantities, drawings, etc. Even a state contract for construction that uses the form provided in the Declaration of the State Committee of Procurement Policy and Administration, it also attached similar conditions in details to be an integral part. Most of those conditions including payment conditions are not referred to in the law regarding Hire of Work and are left to be within the doctrine of freedom of the contract and are to be applied by general principle of law provided by
Civil and Commercial Code. It seems that the freedom of the contract cannot provide fair conditions in particular of payment terms and conditions to the contractors or subcontractors who have less bargaining power in the construction industry. While payment is solely the main obligation on part of the employer but actually most of contractors are unable to received full payment as agreed on the contract sum which lead to short of cash flow, delay of work, improper work and delay penalty being imposed upon as a problem loop that cannot be overcome for a long history both in public or administrative contracts and private contracts for construction.

To solve the problems of unfair contract terms in construction contracts but still abide by the doctrine of freedom of contract, several types of standard forms for construction are established in many countries and by international institutes such as JCT Standard Building Contract of United Kingdom, standard forms developed by the American Institute of Architects (AIA) and the American Society of Civil Engineers (ASCE) in USA, JICA Standard Form for public work and Engineering Advancement Association of Japan (ENNA) standard form for private construction in Japan, FIDIC Standard Contract of International Federation of Consulting Engineers, a well-known international standards organization for consulting, engineering and construction, etc. Those standard form have been encouraged to be used in construction industries of developed countries successfully. However, it cannot prevent unfair manner in payment entitled to employers under those standard conditions provided, i.e. right to delay payment, withhold payment, refuse to pay or even arbitrarily deduct payment. Finally, to stop the loop of payment problems, the law to secure payment in construction industries are established in several countries including in Singapore.

Singapore Building and Construction Industry Security of Payment Act 2004 (“SOP Act”) is applied to both public contracts for construction and private construction contracts to facilitate payments for work done by contractor and subcontractor and secure to receive payment. The employer cannot allege unreasonable issues to withhold or deducted any payments arbitrarily and unfairly. As a matter of fact, the contractor and subcontractor have less bargaining power and are unavoidable to maintain business relationship for future projects. SOP Act is able to maintain fairness through payment security provisions with the provision of “No contracting out” in Section 36 which stipulates that any terms and condition in an agreement related to construction being applied by the Act if exclude, modify, restrict or prejudice to the operation of the Act shall be void. In conclusion, upon SOP Act, the employer shall be enforced to comply with the act without limitation whether it is a public contract or private contract.
The researcher has been experienced with the Council of Engineers Thailand and The Consulting Engineers Association of Thailand to develop the standard construction contract to be acceptable by the parties in the same type as FIDIC and JCT, the private construction, but there is only a request for cooperation to use the standard construction contract form. No law is established to enforce the owner or employer to comply with that amended standard construction contract form. Even FIDIC Standard Contract which has been introduced into Thailand for several decades, until now it is not accepted by the employers in Thailand.

4.2 Late Payment and Non-Payment Conditions

The late payment and non-payment of the employer will affect huge impact to construction company. Some companies no longer are able to bear the burden of its financial difficulties then collapse and become liquidation and insolvency.

The construction contract is a contract which involves many other contracts in the project because it cannot complete the whole works in the project solely by itself. If the contractor does not receive a payment in due time, it will result in all supply chain or other related services and labors. Late payment and non-payment have caused problems during the work which may affect the project delay in completion within contract completion date and unable to handover the work. As a result of the contractor is in breach of the contract and the employer has the right to claim for penalty or liquidated damages under Civil and Commercial Code Section 380-381 at the rate specified in the contract until completion and handover of project. The delay bounces back to further more delay in payment, longer withholding, or finally to non-payment.

Although the terms of payment are important to support contractors and subcontractors to run a business, Thai law does not have specific construction laws but the Civil and Commercial Code regarding Obligations is to be applied. In a long-term construction contract, it always has conflicts between parties in particular regarding payment all along the course of the work. This will lead both parties to claim against each other for not being able to do their own obligation and resulting to dispute arising.

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4.2.1 Payment Claims

In Thai Law, a construction contract shall be applied by Hire of Work under Civil and Commercial Code where the contractor agreed to complete work and the employer agreed to make payment on accepted amount. It means that the contract is a reciprocal contract under Section 369, then either party have an obligation to follow the terms and conditions with the principle of freedom of contract for expressing and stipulating the contract conditions subject to requirement of good faith and public order or good moral. If the employer does not pay interim money when become due and payable, the contractor may issue a request for payment before the entitlement of termination contract. The request may be disputed and counterclaimed for the penalty and liquidated damages. There are two channels of dispute resolution in Thai Law, the first one is court of justice under the law of organization of the court of justice and the second one is arbitration under the Arbitration Act A.D.2002.

Singapore Law establishes the Security of Payment Act to apply to construction contract and supply contract including contract that has been terminated. During the period of construction, the contractor may serve a payment claim under Section 10 in respect of progress payment in whole or in part which has not been paid to the employer who is or may be liable to make payment under the contract, then the employer shall respond to the payment claim by a payment response with reason and information stating response amount to pay the claim amount in whole or in part or raising objection. If the claim has not been paid, the contractor has right to notify the employer in writing of his intention to apply for adjudication of the payment claim dispute. In addition, Section 9 “pay when paid” clause provides that payment to the subcontractor to be conditional upon the main contractor receiving payment under the main contract, shall be unenforceable and no effect. Thus, that clause has no effect to bar the subcontractor to raise the dispute for adjudication.

In comparison of Thai Law and Singapore Law, by Thai Law for construction contract it is difficulty for contractors and subcontracts to claim payment because there is no specific provision stipulated the entitlement of progress payment for the work done periodically during construction. The fact must be applied by the Civil and Commercial Code to object any withholding payment, but the construction contract is complicated in the method of construction related to sequence of payment. The existing law is insufficient to cover the details of construction and payment cycle to be paid in a specific period according to its nature of work. In the event that the parties are unable to mutually settle the issues of late payment or non-payment, no other option can be made except to
enter into arbitration or court of justice whether civil court or administrative court. The time and cost consuming in the dispute resolution both by arbitration and in court impacted more delay and difficulties to contractors and subcontractors to receive payment for recovery.

However, in Singapore the Security of Payment Act had been proposed to grant the right of payment claims for contractors and subcontractors, and establish the procedure for payment claims under Section 10 for late payment or non-payment. The employer must be paid in whole or in part to response the payment claim Section 11 before a party intends to make adjudication applications Section 13. Moreover, the act regulated pay when paid provision to be unenforceable and no effect, which is a major disadvantage to every tier of subcontractors or suppliers and results in cash flow difficulties in construction industry.

For example, the main contractor submits an application of interim payment claim in the amount of 1,000,000 Baht to the employer and has obligation to take a portion of the payment, 750,000 Baht paid to a subcontractor. If the employer failed to pay the main contractor, then there is no money to pay to the subcontractor to complete the work as agreed on time. Moreover, the subcontractor is a small business company with less capital and financial source. If the payment on progress of work is delay or no payment is made within 2 consecutive months, it will affect the cash flow and being unable to run the business further.

4.2.2 Suspension of Works

Generally, construction contract in Thailand is stipulate the suspension of works by the employer clause, mostly no clause provided the right to suspend work by the contractor. In the event of suspension of work upon the employer’s default, the contractor is entitled to the standby cost of staff and machinery including other facilities and utilities. Therefore, the contractor shall be notifying the cause of suspension of work which late payment and non-payment are one the reasons that interrupts the contractor to complete work.

On the contrary, Singapore Law, Security of Payment Act grants contractors and subcontractors, in the name of claimant, to suspend all construction work or supply of goods or services under Section 26 after the employer, in the name of respondent, failed to make payment for the adjudicated amount. Moreover, the contractor and subcontractor do not bear the cost during the suspension period. The act is provided that
the contractor shall resume work or supply within 3 days after receive the adjudicated amount.

Consequently, Thai Law cannot make fair contract terms and conditions for construction contract to grant the right of suspension of work for contractors and subcontractors including supplier within a reasonable time and cost. In addition, the contractors and subcontractors have less bargaining power to amend the construction contract to stipulate this clause and the employers normally unacceptable to waive some entitlement that no provision to enforceable. The Security of Payment Act is concluded that late payment and non-payment of the employer are necessary reason for suspension of work because they encounter cash flow shortage.

### 4.2.3 Adjudication of Payment Claims Dispute

There are two channels for dispute resolution in Thailand, litigation in court and arbitration. During the period of construction, solving thee in court is not an appropriate option because it affects the business relationship and takes a lot of time until the court decision with time and cost consuming. The contractor will not receive payment immediately from the lawsuit and cannot predict the outcome of the case. The construction contract has technical problems and complexity that cause disputes arising in all projects. It is more appropriate to dispute resolution by arbitration and will keep positive in business relationship. The principle of the arbitration is based on the mutual agreement of the parties to choose the arbitration for dispute resolution under Arbitration Act, 2002. In the event of neither party objects the arbitration and need to use the court of justice instead, the court prefers to refuse to accept the indictment and considers the parties to proceed with the dispute resolution by arbitration as agreed.

Furthermore, upon the arbitration determination is awarded, the court has the power to refuse not to enforce that determination if the enforcement of the determination is contrary to public order or good morals, or not. The dispute resolution on construction by arbitration however, consumes less time than bring into court with a lot more cost incurred but not within a short period. As a result, it is not favor to enter the arbitration proceeding.

In regard to the subcontract, Supreme Court Decision No. 3894/2559, the subcontractor filed a lawsuit to the Civil Court to enforce the contractor to make payment of 17,494,601.89 Baht. The Civil Court decided that the contractor must make payment in the amount of 11,012,060.81 Baht, but the Supreme Court dismissed the decision of the Court of First Instance of the Civil Court to dispose of the case for the contractor and
subcontractor to proceed with arbitration at first. Since the main construction contract between the employer and the contractor has an agreement that if there is a dispute arising the parties shall submit the said dispute to the arbitral tribunal for determination first, thus it is applied to the subcontractor in the same way as the contractor.

As a result, Singapore upon research and analysis of the problem from late payment and non-payment of the employer brought to enact the Security of Payment Act for the contractor and subcontractor to serve payment claim, if the owner or the employer fails to make payment, to mutually settle the dispute within 7 days before referring to the adjudication. Then, adjudicator shall be made determination on adjudicated amount to enforce the employer to pay and the contractor and subcontractor shall be entitled to suspend work if they do not receive any payment.

4.3 Conclusion

In conclusion, the construction contract is a long-terms contract and complexity in the field of construction. It needs an experienced professional to judge the problem of dispute including the particular law to be enacted for construction contract. Mostly, the disputes arise from issues of late payment and non-payment divided in various interim payment based on work done which is not fixed cost in each month that contract management and project management must be deliberate.

The Security of Payment Act is provided to reduce the risks of contractors and subcontractors while they encounter late payment or non-payment. They will be granted the procedure to claim and entitlement to receive payment quickly to carry out the completion of work efficiency.

Finally, Thailand should enact the Security of Payment Act in similar to other countries specifically as in Singapore that have thoroughly studied and researched that the contractors and subcontracts will be benefit from the procedure of adjudication to adjudicate the amount for fairness and faster than before the Security of Payment Act was enacted. The late payment and non-payment may occur multiple times while the dispute resolution should be fast and effective in particular construction contract.
Chapter 5

Conclusion and Recommendations

According to the studied and presented content in the previous chapters which demonstrate the problems of late payment and non-payment in construction contract and the Security of Payment Act to resolve disputes, the researcher found out that the Civil and Commercial Code is lacking specific legislation to applied to Thai construction contract at present. In this chapter, the researcher will conclude and propose the recommendation as follows;

5.1 Conclusion

Thai construction contracts including supply of goods and services or a contract for services in construction basically are applied by Civil and Commercial Code Section 587 which means to apply to all kinds of works being hired or services provided under the contract until accomplishment of such works or services. The works to be applied can even be a very small contract or a large contract of project construction contract. There is no a specific law provided for industrial construction which have high value and huge responsibility with complicated technology and complex works under the contracts. In addition, mostly the law provided the employer’s right to enforce the contractor to withhold payment in case of contractor’s delay in delivery or delivery of a defective work under Section 599 and to terminate the contract under Section 593, no specific provision of this law provides for the contractor to enforce the employer for late payment, withholding payment or non-payment.

There are many risks factors that the contractors and subcontractors encountered for their success in construction business such as high competition by under pricing for bidding project. They are taking risk on discontinuous income if they are unable to be awarded new project or be awarded under pricing projects with low profit margin. In case of late payment, withholding payment or non-payment to the contractor by the employer, the general principle of contract law provided in Civil and Commercial Code regarding “General Provisions” “Obligations” “Juristic Act” and “Contract” are to be applied to those cases. Notwithstanding, the law related to juristic acts and contract by themselves accept the doctrine of freedom of contract, but construction contracts in Thai construction industry which mostly drafted by the employers or their consultant have payment terms
and conditions that is tough for contractors to received payment regularly. Those contracts always provide several events entitled the employers to withhold payments or deduct payment or refuse to pay within the terms agreed to pay. Then, if a contractor does not receive progress payment within the due date and wishes to claim for such payment, other than the provision of Hire of work which provided that the remuneration is payable on taking delivery of the work under Section 602, the following General Laws and Contract Law are considered to be applied to construction contracts in seeking for justice in dispute resolution. There is no specific provision for payment on construction contract and several general provisions are to be applied to the dispute as to payment claim. The law has no concise meaning to be expected for the effect but to leave interpretation to the court or arbitration when applying to the facts. It is difficult to know the concise determination regarding “good faith”.

On the other hand, the Statute of the Republic of Singapore on Building and Construction Industry Security of Payment Act which was provided the entitlement of payment claim and specific details in particular of adjudication procedure. The act aims the approach to support contractors and subcontractors for better performance with fairness. Thus specific law has been established to apply to late payment or non-payment in construction contracts and/or related supply contracts to solve cash flow problem incurred in construction industry.

Moreover, the Security of Payment Act has provided similarly safeguard conditions to “pay when paid” and “no contracting out” clauses to prevent the general principle of law which permits contracts to be drafted in contrary to provisions provided by law if not conflict to public order or good morals and being enforceable. The freedom of contract leads to unfair contract termed drafted by the party that has more bargaining power to take advantage or allocate a lot more risk to the other party in particular as existing in construction industry. For the reason, to maintain fairness Section 9 provided that “pay when paid” which provided in the contract is unacceptable and being unenforceable and having no effect and Section 36 “no contracting out” which stipulates that any terms and condition in an agreement related to construction being applied by the Act if exclude, modify, restrict or prejudice to the operation of the Act shall be void.

In the researcher point of view, Thai construction contract is applied by Civil and Commercial Code, while it is lack of specific provision to provide contractor’s right to claim for late payment or withholding payment or non-payment. Consequently, if the contractor does not receive any progress payment become due and payable, and there is no provision to be entitled for payment claim other than the provision Hire of Work.
Then, the party is needed to enter the procedure of dispute resolution that there will be court or arbitration, but both channels are impacted more delay and difficulties to contractors and subcontractors to receive payment for remedies in time with cost consuming. So, Singapore has been enforced the Security of Payment Act to solve an impact from late payment and non-payment by granted the rights to make claim and entitled for adjudication procedure application. These measures are effective and benefit the contractor and subcontractor to receive payment faster.

Therefore, the existing of Security of Payment Act can facilitate payments for contractors and subcontractors in construction contract including supply of goods and services or a contract for services, by granting the right for payment claims, entitlement to make adjudication applications under a quick process, and enforcement procedure by suspension of work.

5.2 Recommendations

In construction industry, the owner and employer have the opportunity to late payment or non-payment to the contractors and subcontractors until release of contractual obligations. There is an impact the entire construction industry and lead to cost reduction and standard construction decrease, that the contractors will use its effort to execute work upon the cost reduction in labor force, below standard materials and workmanships and others. The consequence then leads to income insecurity of labors and subcontractors and the occurrences of labor shortage appear continuously. So, companies cash flow is very important to carry out the project work on time and success, they must be find the solution to force the employer for payment continuously. Then, many countries are inspired by United Kingdom Final Report that the purpose to be

As a result, the researcher concluded that the establishment of the Security of Payment Act in Thailand, is appropriate, for both of governmental contract and private contract according to the objective of Security of Payment in Singapore which was modelled substantially on the Building and Construction Industry Security of Payment Act of the New South Wales legislation under the same desire to improve payment behavior within the construction industry for sixteen years.

Thailand should be introducing the Security of Payment Act, the contract law still respects the doctrine of freedom of contract or liberty of contract subject to requirement of good faith and public interest or good moral, to establish the committee similar to authorized nominating body to judge the dispute in adjudication process that faster and
appropriate more than arbitration because focusing on payments in construction work in the meaning of the act. Moreover, the Security of Payment Act should be purpose in the same model structure that there are five important stages for the contractor and subcontractor to facilitate payment as follows:

1. apply to any construction work, or supplied any goods or services;
2. serve one or more payment claims in respect of progress payment before make adjudication application;
3. enter into the adjudication procedure;
4. effect of adjudication determinations; and
5. consequences of not paying adjudicated amount.

Finally, begin to observe and survey the result of implementation of the act, the contractor and subcontractor feedbacks on the understanding and beneficiary of the purpose of the act as facilitate payments for construction work done or related goods or services supplied including the dispute resolution by adjudication. However, the act must be proposing and amending from time to time, to be proper law for the practice of the country.
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