

Dealing with Late Payments - A Challenge for UAE Small Scale Subcontractors?

التعامل مع التأخر في السداد يمثل تحدياً للمقاولين من الباطن الصغار داخل الامارات العربية المتحدة؟

By

Abdulla Poomangalorakath Puthiya Purayil

Student ID - 2013222051

Project Report submitted in partial fulfilment of

MSc Construction Law and Dispute Resolution

Faculty of Business

Project Supervisor

Dr. Abba Kolo

November 2015

Abstract

The small scale subcontractors provide an extremely important service to the construction industry in UAE and they carry out more than 50% of the actual execution of the works at site in major projects as direct subcontractor to the main contractor or as a sub-subcontractor. It has been reported that the small scale subcontractors in UAE are severely affected by the late payment issues. Although several researches were conducted on the late payment issue faced by subcontractors in general, the researches with special focus to small scale subcontractors are very limited in numbers.

This research focused on identifying various challenges faced by small scale subcontractors in UAE with respect to the late payment issues, examining the legal and contractual aspects of the late payment issues under various jurisdictions with a particular focus to UAE law and to find out feasible solutions for the late payment issue. The methodologies adopted were questionnaire survey, literature review and face-to-face interviews.

The research reveals that dealing with late payment is a challenge for small scale subcontractors in UAE and foremost reason for the late payment is ‘main contractors wrongfully withholding due payments’. The research further shed light in to various provisions, concerning late payment to small scale subcontractors, available in the UAE law as well as other jurisdictions and found that UAE law is lacking several provisions which are available in other jurisdictions that protect small scale subcontractors.

To conclude, the late payment issue faced by the small scale subcontractors is an issue to be dealt with great concern as it has severe economic as well as social impacts. Further, it is recommended to adopt a quick and affordable statutory adjudication and a protection to subcontractors’ payment through the project escrow account in UAE as a solution to eliminate this issue.

نبذة مختصرة

يقدم المقاولين من الباطن الصغار خدمات مهمة للغاية لصناعة الانشاءات داخل دولة الامارات العربية المتحدة ويقومون بتنفيذ أكثر من 50% من التنفيذ الفعلي للأعمال بالمواقع في المشاريع الرئيسية كمقاول من الباطن مباشر للمقاول الرئيسي أو كمقاول من الباطن. ونحيط سيادتكم علمًا بهذا التقرير أن المقاولين من الباطن الصغار يتأثرون تأثرًا كبيرًا جراء تأخر عملية الدفع. فعلى الرغم من أن العديد من الأبحاث التي أجريت على مسألة تأخر الدفعات التي تواجه المقاول من الباطن إلا أن تركيز الأبحاث على المقاولين من الباطن الصغار كانت محدودة للغاية.

ويركز هذا البحث على التعرف على التحديات المختلفة التي تواجه المقاولين من الباطن الصغار بالامارات العربية المتحدة فيما يتعلق بمسألة تأخر الدفعات ودراسة الجوانب القانونية والتعاقدية لمسألة الدفعات وفقًا للسلطات القضائية المختلفة مع التركيز الخاص على قانون دولة الامارات العربية المتحدة لاييجاد حلول بسيطة لمسألة تأخر الدفعات. كما أن المنهجيات المعتمدة كانت لمرحلة الاستبيان والمراجعات الكتابية والمقابلات وجهًا لوجه.

ويظهر البحث أن التعامل مع الدفعات المتأخرة يمثل تحديًا للمقاولين من الباطن الصغار في الامارات العربية المتحدة ويرجع في المقام الأول السبب في تأخر الدفعات هو "خطأ المقاولين الرئيسيين في حجز الدفعات المستحقة". ويلقى البحث الضوء على شروط متنوعة تركز على تأخر الدفع للمقاولين الصغار من الباطن الموجودة بقانون دولة الامارات العربية المتحدة بالإضافة إلى عدم وجود قوانين رادعة بقانون دولة الامارات العربية المتحدة تعمل على حماية المقاولين الصغار من الباطن.

الخلاصة أن مسألة التأخر في سداد الدفعات التي تواجه المقاولين الصغار من الباطن تصدر للتعامل مع القلق الكبير الذي يحدث للمقاولين من الباطن كما أن لها أثر اقتصادي وتأثيرات اجتماعية كبيرة. كما نقترح أنه من المستحسن تأسيس سلطات قضائية عاجلة وسريعة وبمقابل معقول لحماية المقاولين من الباطن وذلك من خلال امكانية الدفع عبر حساب الضمان للمشروع بالامارات العربية المتحدة كحل من الممكن أن يقضي على تلك المسألة.

Acknowledgement

First, I would like to dedicate my sincere gratitude to my supervisor, **Dr Abba Ali Kolo**. Without his patient guidance, invaluable advice, and continuous support, this research would not have been finished on time. I would also like to extend my special thanks to **Professor Aymen Masadeh** for his tremendous support during the entire duration of this course.

The wide spread distribution of questionnaires would not have been possible without the support and assistance of many associations. I would also like to thank them for their efforts and continued concern for development in the construction industry.

Second, I wish to thank the over 32 participants who used their valuable time to complete the questionnaires. This research would not have been successful without their cooperation and interest. In addition, the special thanks must be given to the **Mr. Giju** and **Mr. Philippe** who accepted my face-to-face interviews.

Finally, I would like to expend my appreciation to all my family members and friends who have provided unlimited support over that period.

Contents

1. INTRODUCTION	7
1.1 Aim and Objectives	8
1.2 Hypothesis.....	9
1.3 Research Methodology	10
1.3.1Questionnaire Survey	11
1.3.2Literature Review	12
1.3.3Interviews	12
2. QUESTIONNAIRE SURVEY.....	13
2.1 An Overview of Questionnaire Survey	13
2.2 Survey Result Analysis & Discussion.....	13
2.3 Outcome of the Questionnaire Survey	28
3. LITERATURE REVIEW.....	29
3.1 An Overview of Subcontracting	29
3.2 Legal Aspects of Subcontracting	29
3.2.1 An overview of subcontracting under UAE Law.....	29
3.2.2The use of Pay When Paid Clauses in Contracts.....	30
3.2.3Claiming payments direly from the Employer	31
3.2.4Suspension of works in case of late payment.....	32
3.2.5Security for Payment	33
3.2.6Dispute Resolution	34
3.3 Outcome of the Literature Review	35
4. INTERVIEWS.....	36
4.1 An Overview of Interviews	36
4.2 Interview Questions & Analysis of Responses	36
4.3 Outcome of the Interviews	41
5. CONCLUSIONS & RECOMMENDATIONS.....	42
6. BIBLIOGRAPHY.....	44

7. APPENDICES	48
7.1 Appendix A1 – Questionnaire Survey Questions.....	48

1. INTRODUCTION

Subcontracting is a very common practice in the modern construction industry. It would be almost impossible for a single main contractor to carry out the whole of the works especially if the project is large sized and complex in nature.

Small Scale Subcontractors provide an extremely important service for the construction industry in UAE. The industry is heavily depended on the small scale subcontractors¹ and in many of the major projects more than 50% of the actual execution of the works at site is carried out by small scale subcontractors, either appointed directly by the main contractor or as a sub-subcontractor.

In recent years, the late payment issue has become a great concern for all parts of the construction industry. Parties involved in construction are now becoming increasingly concerned about the late payment issues and it's contractual as well as legal aspects. As a result, this issue has been well researched during the recent years including the late payment issues faced by the subcontractor.

However, recent researched conducted in similar topics have revealed that the payment issues faced by the small scale subcontractor is different from that of nominated subcontractors and large scale subcontractors². The reason identified is small scale subcontractors lack bargain powers compared to nominated subcontractors and large scale subcontractors.

Further, in an article titled 'Analysis: Late Payments'³ in the November 2013 edition of the Construction Week magazine, Semra Jalil commented that *"Grievances are often aired between parties in the supply chain, with the most common one being payment. These grievances seem to be aired more loudly at the lower order of the supply chain. The hierarchy of the order appears to be indirectly proportional to the level of risk*

¹ Archer Marker, " (Subcontracting in United Arab Emirates,) <<http://www.archermarks.com/construction-law/subcontracting-in-united-arab-emirates/>> accessed 10 November 2015

² Kowng-Leung Tang, Social Development in Asia (5th, Kluwer Academic Publishers, Dordrecht 2000)

³ Semra jalil, " (Analysis: Late payments,) <<http://alpha.constructionweekonline.com/article-24996-analysis-late-payments/>> accessed 28 October 2015

involved when it comes to economic frustration. In other words, the risk of a defaulted payment seems to increase as you progress down the chain”

Hence, it is obvious that being at the very lower order of the construction supply chain, the late payment issue affect the small scale subcontractors badly. Nevertheless, the topic of late payment issue faced by the small scale subcontractors in UAE has received only very less prior research attention as indicated by a limited number of articles available on this subject.

This research is attempting to bridge that gap that exists in this area of research by conducting an investigation in to the contractual and legal aspects of the late payment issues faced by small scale subcontractors in the UAE.

In addition, in most of the developed countries, the issues faced by the small scale subcontractors are dealt with great concerns by the law makers in preparing public policies as this issue directly affect the unemployment rate and have social as well as economic impacts⁴. As result, in many of the jurisdictions there are provisions in the laws that protect small scale subcontractors.⁵ In this research the author attempt to compare such provisions available in other jurisdictions with the provisions of the UAE law to recommend whether any change in legislation is required in UAE.

1.1 Aim and Objectives

Aim and objectives are the vital part of research and this has good influence in the research, the aim and objectives of the research as follows;

The aim of the research is:

- To investigate the issues faced by the UAE small scale subcontractors in respect of late payment issues and to suggest solutions to effectively overcome the issues identified.

⁴ Marc Lempérière 2012 “France strengthens its already strict laws concerning subcontracting” < <http://www.lexology.com/library/detail.aspx?g=62aeba10-2681-478f-abbb-706f7feea3c3>> 10 November 2015

⁵ Lloyd Biddell 2015 “Implementation of Project Bank Accounts across Highways England” < <http://www.secgrouop.org.uk/pdfs/2015/Implementation%20of%20Project%20Bank%20Accounts%20across%20Highways%20England.pdf>> Accessed on 20 August 2015

The objectives of the research in order to fulfil in pursuing the above aim are:

- Investigate the extent and causes of late payment issue faced by the small scale subcontractors in UAE
- Examine the standard payment terms followed by the main contractors in UAE with subcontractors who usually have lesser bargaining power than specialized or large-scale subcontractors
- Analyse various provisions, concerning the late payment issue, available in the UAE laws as well as laws other jurisdictions.
- Identify ways to effectively overcome the late payment issues faced by the small scale subcontractors

1.2 Hypothesis

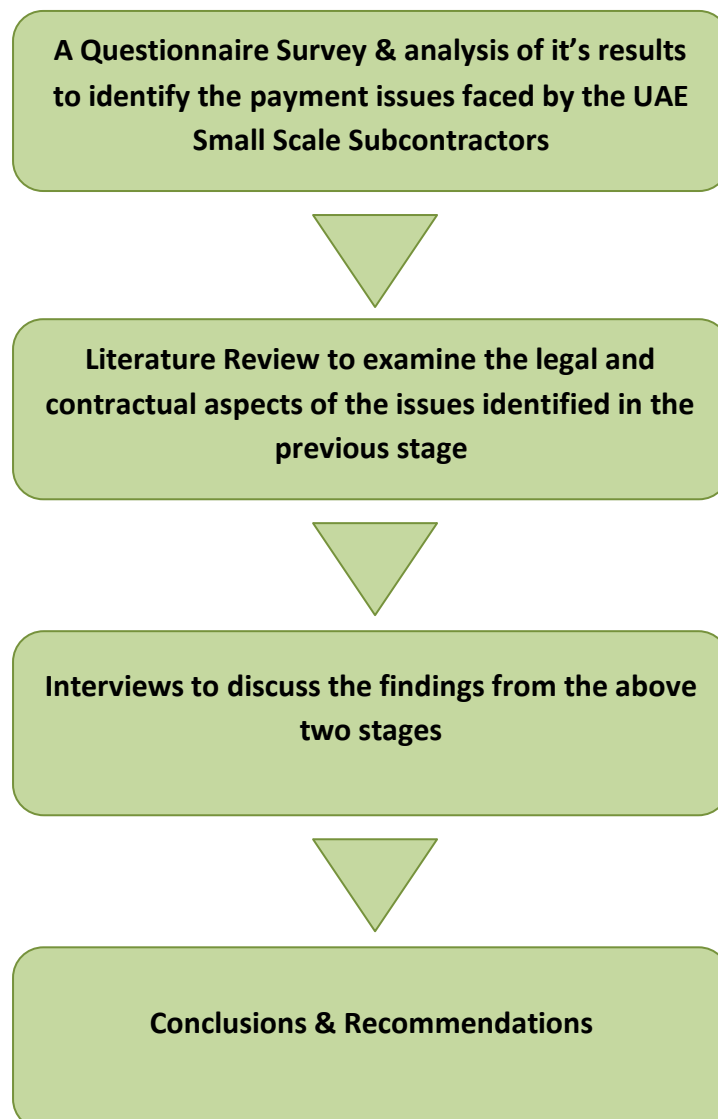
The hypothesis of the research is, ‘Is Dealing with Late Payments a Challenge for UAE Subcontractors?’

This is an investigation in to the contractual and legal aspects of the issues faced by small scale subcontractors in the UAE in respect of the late payments to establish whether it is a challenge to deal with the late payment issue. Moreover the research also examines the solutions to manage this challenge effectively.

1.3 Research Methodology

A research is a systematic investigation to find the answers for a problem. The analysis of the answers tends to gravitate around the notion of quantitative and qualitative research known as methodologies. This project had required a methodology that allows the use of multiple research techniques to gather data and analyse information. Multi data gathering techniques like document studies questionnaires and semi-structured interviews were employed. Therefore both secondary and primary methods of research were used.

In order to achieve the project objectives, the study was conducted in different stages as shown in the figure below so that the information acquired in each stage can be used as the basis for the next stage of the study.



This approach helped the author to focus on the actual problem as the main issues faced by the UAE subcontractors were identified in the initial stage itself through the questionnaire and further stages of the study were rightly focussed on analysing those issues.

After completion of each of the above stages the author thoroughly analysed and appraised the information received to ensure appropriateness to the research and to make sure that the study is progressing in the right direction so that all the objectives can be achieved

1.3.1 Questionnaire Survey

As was noted above, the Questionnaire Survey was part of one of the initial phases of the study. The objective of the Questionnaire Survey was to identify various issues faced by the subcontractors in UAE and also to obtain a view of the industry on how these issues can be effectively managed.

The survey questions are set out in Appendix 1. The targeted participants were mainly Project Managers and Quantity Surveyors working with small and medium size subcontractors in UAE. Essentially, participants of the survey were invited to answer questions about various issues faced by their company with respect to late payment issues. It also enquired about the various provisions in their contracts to deal with late payment and also their recommendation to overcome various issues.

The questionnaire prepared through surveymonkey.com and distributed through email. The researcher had sent emails to more than 60 construction professionals directly. In addition, the author requested the professionals working the main contractor to forward the survey link to their sub-contractors but the author had received back only 32 replies.

Participants of the survey identified themselves as falling within a range of project role types, and they were allowed to identify only one type. There were 32 responses to the question ‘How would you describe your own involvement in the project?’

The survey well achieved its objectives and it greatly helped the author to plan and conduct the literature review in an effective manner to achieve the overall objective of the project. The details of the literature review conducted are discussed below.

1.3.2 Literature Review

The objective of the literature review was to investigate the legal and contractual positions relating the late payment issue faced by the subcontractors in UAE. It gave a particular focus to the issues identified through the Questionnaire Survey.

All relevant subject matters are obtained by a search in university library and through the internet, reference books, past relevant dissertations, published Journals and newsletters.

Mahmoud Fathi Bader had previously submitted a thesis about ‘Impact of ‘back to back’ payment clause on the cash flow of subcontractor in the UAE’ at British University Dubai. The submitted thesis provided a good thought of different views from different angles about back-to back payment issue faced by subcontractors in UAE.

The literature review was mainly focusing on the study about subcontracting under UAE, legal provisions concerning the subcontractors’ late payment issue, legal and contractual options available to the subcontractors to deal with the payment issues, Pitfalls in the current legislation and industry practices etc.

The author summarised the outcome of the literature review and used it to develop questions for the interview which was the next phase of the study.

1.3.3 Interviews

As discussed above, the interviews were based on the outcome of the Questionnaire Survey and the Literature review. The interview questions were carefully drafted so as to obtain a deep insight into the problems and solution identified in the previous phases of the study.

The author conducted two face-to-face interviews. The interviewees were chosen in such a way that they come from different backgrounds and well experienced to provide valuable inputs. The interviewees were chosen on the basis that they had significant experience in relation to subcontracting in the UAE. The first interviewee is the General Manager of a small scale subcontracting firm and the second one is a Subcontracts Manager of one of the top ten main contractors in UAE.

The interviews greatly helped in achieving project objectives enabled as a follow-up to questionnaire, examine crucial problems in detail and a means of giving triangulation with other data sources.

2. QUESTIONNAIRE SURVEY

2.1 An Overview of Questionnaire Survey

In view of obtaining maximum response, a brief and specific questionnaire was devised. It contained very simple questions which can be easily understood and filled in. It was designed to be answered by Project Managers, Quantity Surveyors and other senior professional who are working with subcontracting firm in UAE. In this research, the targeted respondents were mainly professionals working with small and medium scale subcontractors.

The participants were asked to respond to the questionnaire only if they were dealing with drafting of contract or contract administration, otherwise requested to forward it to the concerned person in their circle. The importance of a covering letter was not neglected. As such, a covering letter explaining the purpose of this questionnaire, a note of thanks, the contact number and personal address was attached to each questionnaire. A copy the questionnaire is attached in Appendix A.

Out of the 32 responses received, 25 were from professionals working with small scale subcontractors 5 were from medium scale firms and 2 from large scale firms.

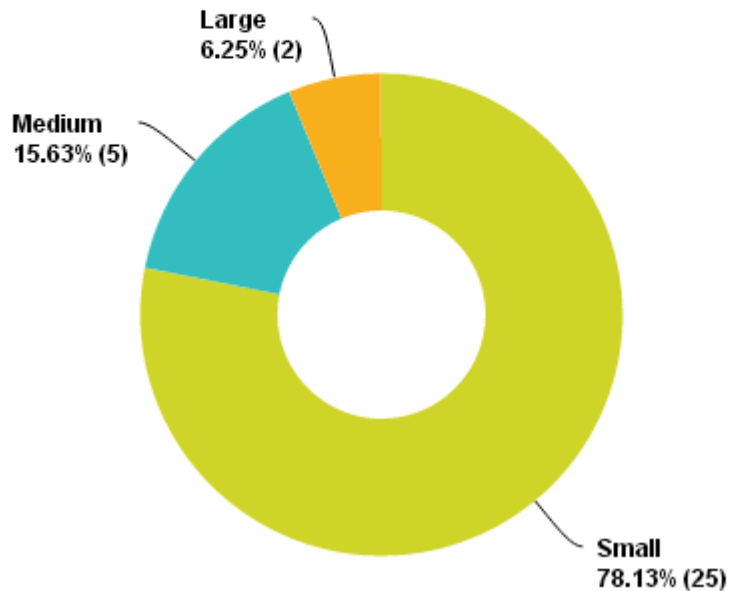
2.2 Survey Result Analysis & Discussion

Q1) Respondents' Type of Organisation

The participants were asked to describe their organisation based on the size. Options given were 'Small', 'Medium' and 'Large'. 78% of the respondents identified their organisation as 'Small', 15 % as 'Medium' and 6% as 'Large'. It is to be noted here that the questionnaire was targeting small & medium sized subcontractors and hence the distribution of the survey questionnaire also done accordingly. 32 responses were received, with the responses summarised in the chart below.

How would you describe your subcontract organisation?

Answered: 32 Skipped: 0



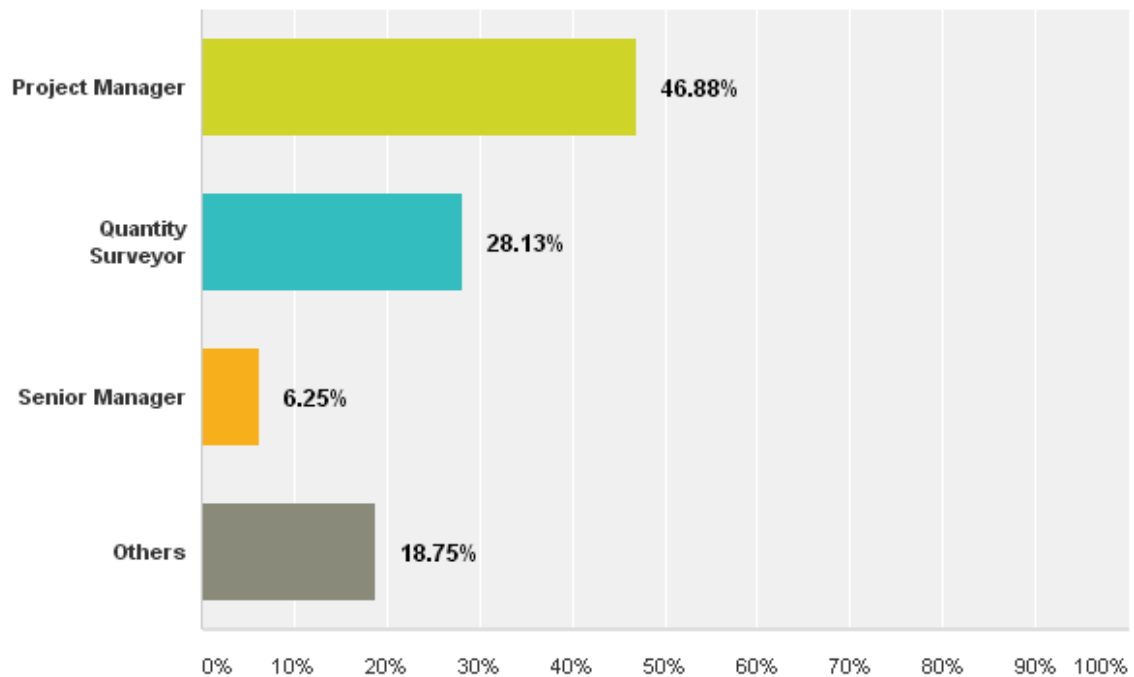
The above result shows the Survey was successful in achieving responses from the right target respondents intended for this Survey. Nevertheless it is to be noted the results of this survey may not be applicable for large sizes subcontractors.

Q2) Respondents' Position within the Organisation

Participants of the survey identified themselves as falling within a range of project role types, and they were asked to select a type from the three options – Project Manager, Quantity Surveyor & Senior Manager. There were 45 responses to the question 'How would you describe your own involvement in the project?'. Out of the 32 respondents, 47 % of them identified themselves as Project Managers, 28 % Quantity Surveyors, 6% as Senior Managers and 18% as other professionals. The chart given below summaries the responses received.

Your position within the organization?

Answered: 32 Skipped: 0



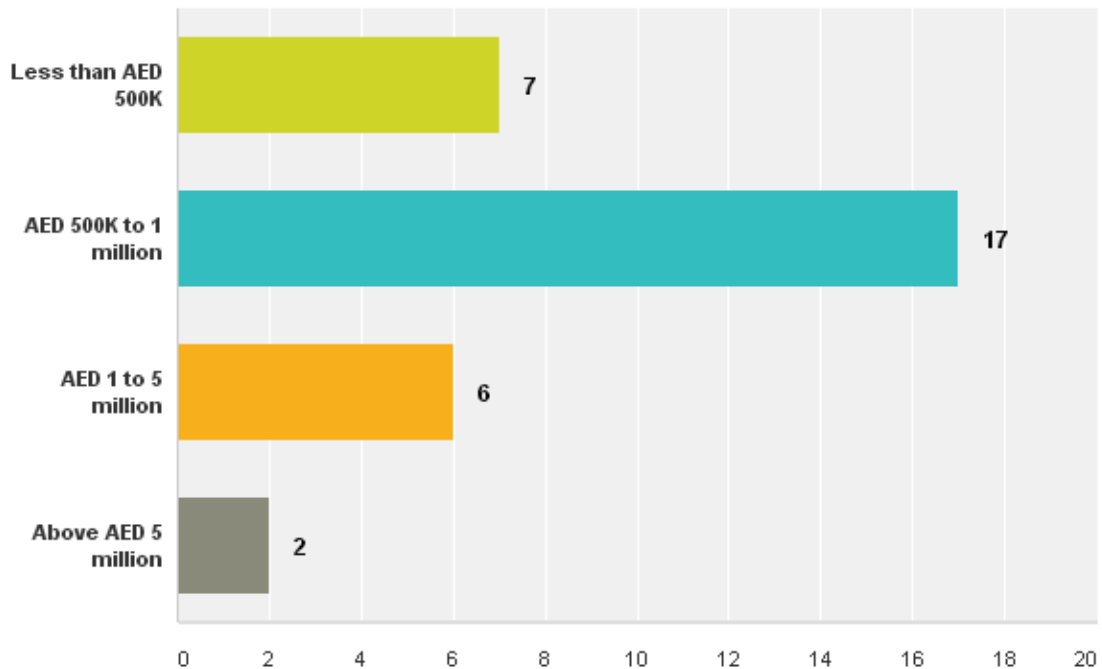
The above result shows the respondents were almost uniformly distributed in type of roles in the subcontract organisation those who usually deal with contract negotiation and administration. Hence the survey reflects the opinion of the entire industry rather than the professionals under a specific role.

Q3) Average Value of Subcontracts

The participants were asked to score the given range of values for the subcontracts undertaken by their organisation. Four range of values were given and the participants advised to score 1 for the highest encountered range and 4 for the least encountered. The 'AED 1 to 5 Million' scored highest with a score of 17 and the least scored was 'Above 5 Million' with a score of 2. The chart given below shows the score obtained for the different ranges.

Average value of subcontracts under taken by your company?

Answered: 32 Skipped: 0



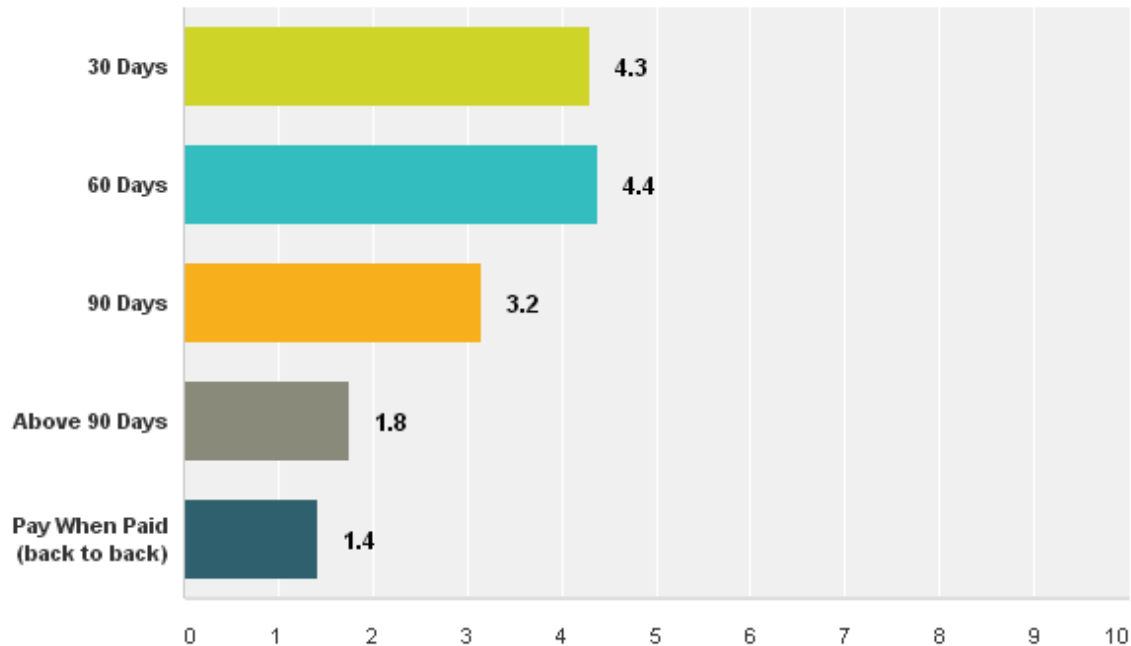
From the above result it is evident that value of subcontracts under taken by respondents' organisation are mostly less than AED 5 Million. Hence it is worth to mention here that the outcome of this survey may not be applicable for subcontracts with a value more than AED 5 Million.

Q4) Payment Terms Agreed in Subcontracts

The participants were asked to score the given payment period based on how they encounter it in their subcontracts. Five periods were given and the participants advised to score 1 for the highest encountered payment period and 5 for the least encountered. The highest scored range was '60 Days' with score of 4.5 and the least scored was 'Above 90 Days' with a score of 1.2. The score obtained for Pay When Paid is 2.5. The chart given below shows the score obtained for each payment period.

Payment terms agreed in your subcontracts?(Ranking 1 to 5 - 1 for highest occurrence & 5 for least occurrence)

Answered: 32 Skipped: 0



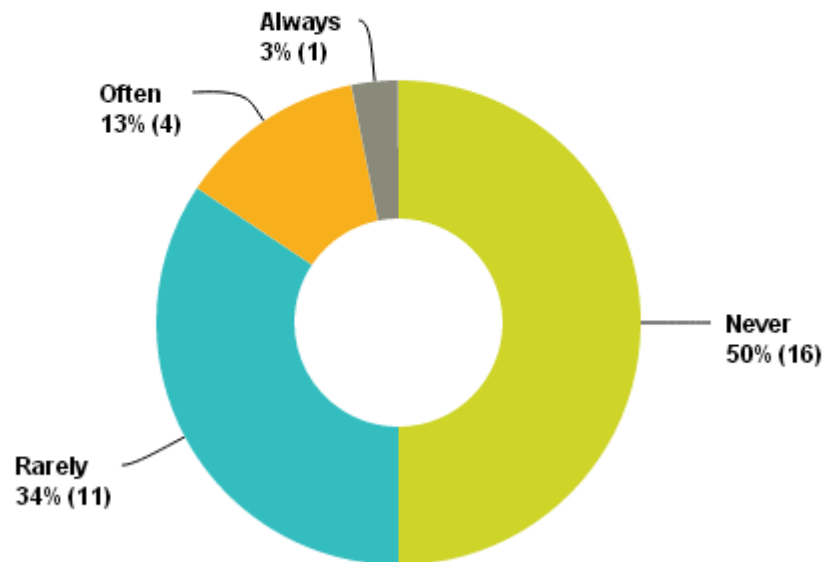
The above result demonstrates that although the Pay When Paid clauses are very common in UAE subcontracts they are not widely used in Small Scale Subcontracts. The most widely agreed payment period in Small Scale Subcontracts is 60 Days. However, based on the outcome of the previous research conducted by others in similar topics, the author believes that if Large Scale Subcontractors also were included in this survey then the outcome would have been entirely different.

Q5) Acceptance of Pay When Paid Payment Term?

The participants were asked how often they agree Pay When Paid payment term in their subcontracts. The given options to choose were ‘Never’, ‘Rarely’, ‘Often’ and ‘Always’. Most of the respondents (50%) confirmed that they ‘Never’ agree the Pay When Paid term in their subcontracts. Only 3% confirmed that they ‘Always’ agree and some confirmed that they ‘Never’ agree it. The chart given below shows the results

How often your company accepts Pay When Paid payment term?

Answered: 32 Skipped: 0



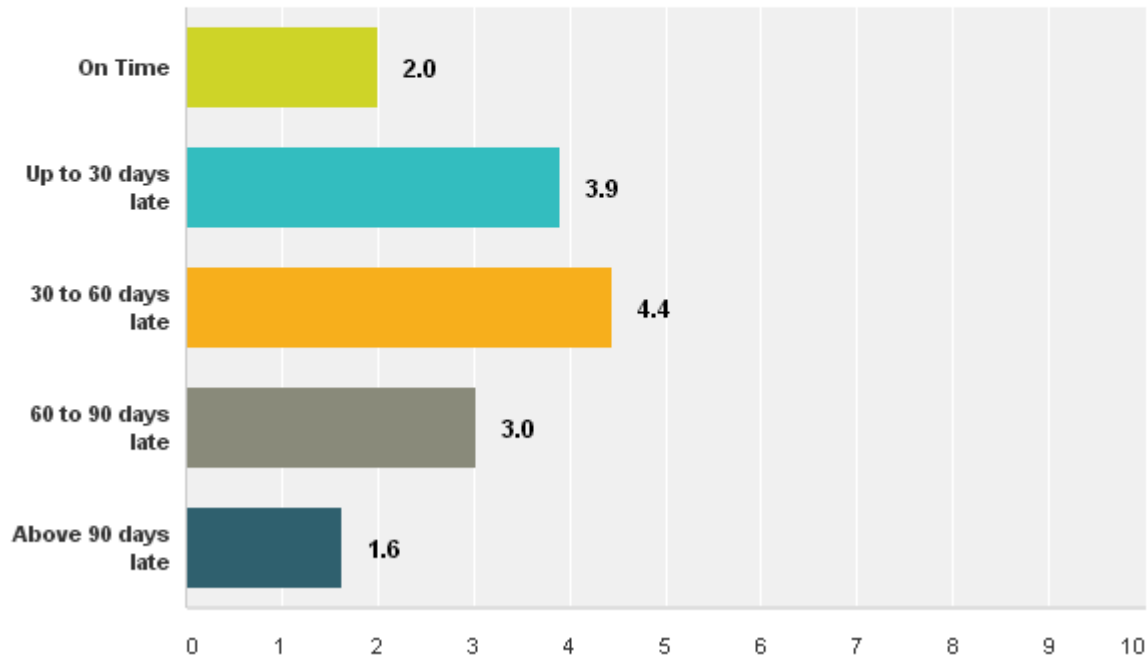
The above result demonstrates that the Pay When Paid payment term is not widely used in Small Scale Subcontracts in UAE. This result coincides with the outcome of the Q4 in regarding the payment terms agreed in subcontracts.

Q6) Average Delay in Payment from Main Contractor

The participants were asked a question about the extent of delay in payments they experience from their main contractors. Five options values were given and the participants were advised to score 1 for the highest encountered and 5 for the least encountered. The '30 to 60 Days Late' scored highest with a score of 4.4 and the 'up to 30 Days' range was next with a score of 3.9. 'Above 90 Days' got the least score.

**The average payment to your organisation
by the main contractor is?(Ranking 1 to 5 -
1 for highest occurrence & 5 for least
occurrence)**

Answered: 32 Skipped: 0



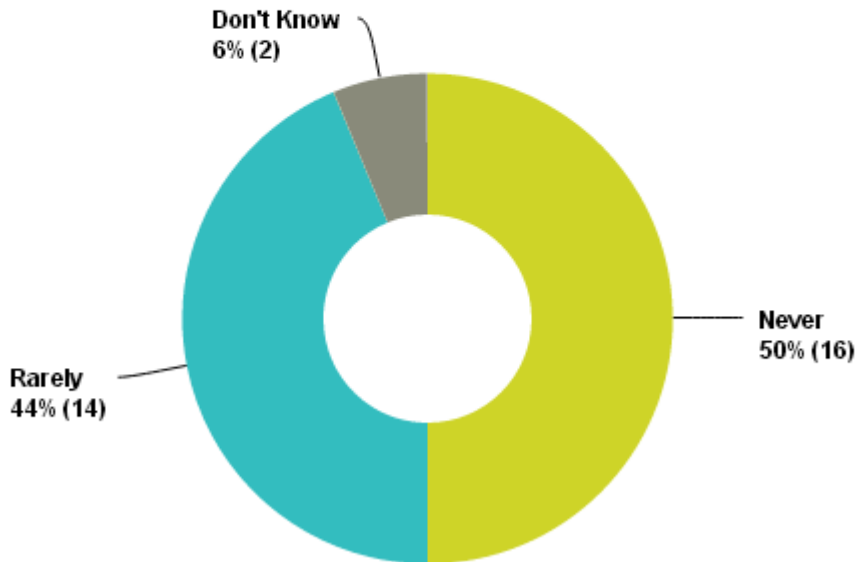
The above result is a clear demonstration of the late payment issue faced by the Small Scale Subcontractors in UAE. Most of the payments are late by 60 or more days and some of the payments are more than 90 days late. The rate of on-time payment is very low.

Q7) Provision for Suspension in Subcontracts

The participants were questioned about the availability of a provision in their subcontracts to suspend the works in case of late payments. There were a total of 32 respondents out of that 50% (16Nos) responded that they 'Never' have provision for the suspension. 44 % responded that they rarely had such a provision and 6% of them choose the option 'Don't Know'. The chart given below shows the details of responses received

Do your subcontracts usually have a provision to suspend the works in case of late payment?

Answered: 32 Skipped: 0



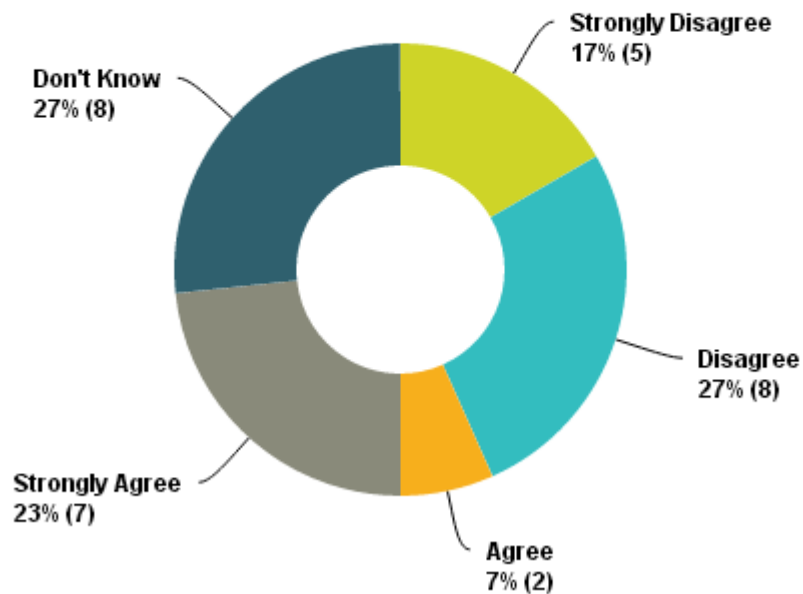
It is evident from the above result that although the provision to suspend the works in case of late payment is very common in main contracts, such provisions are rare in Small Scale Subcontracts. Many of the participants were not aware of such a provision and it shows that they are not very much concerned about it.

Q8) Can the Suspension be helpful to Subcontracts?

The participants were questioned their view on whether a provision for suspension in case of late payment can be of subcontractors help. The responses were varying. While 17% of the respondents 'Strongly Agree' that such provision will be useful, 23% of the respondents 'Strongly Disagree' to it. 27% of the respondents choose the option 'Don't Know'. The chart below shows the details about the responses received.

Can a provision for suspension in case of late payment be of subcontractors help?

Answered: 30 Skipped: 2



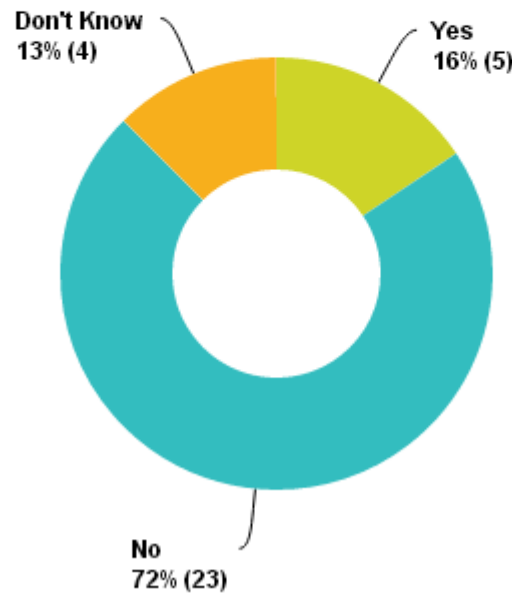
As the responses are varying, it is difficult to draw a conclusion on whether the suspension provision is useful or not. However, based on the analysis of the result, the author believes that a provision for suspension can be of small scale subcontractors' help in some cases but not in all cases.

Q9) Can Small Scale Subcontractors seek a Suspension Provision in Subcontracts?

Participants were asked to indicate their opinion on the possibility small scale subcontractors to negotiate with main contractor and to agree a provision in the subcontract to suspend the works in case of late payment. Total 32 responses received out of that 72% (23 Nos.) choose the option 'No' 16% (5 Nos.) choose the option 'Yes' and 13% (4 Nos.) choose the option 'Don't Know'. The chart given below shows the details of responses received

Do you believe small scale domestic subcontractors can seek for a provision in subcontract for direct payment from the Employer?

Answered: 32 Skipped: 0



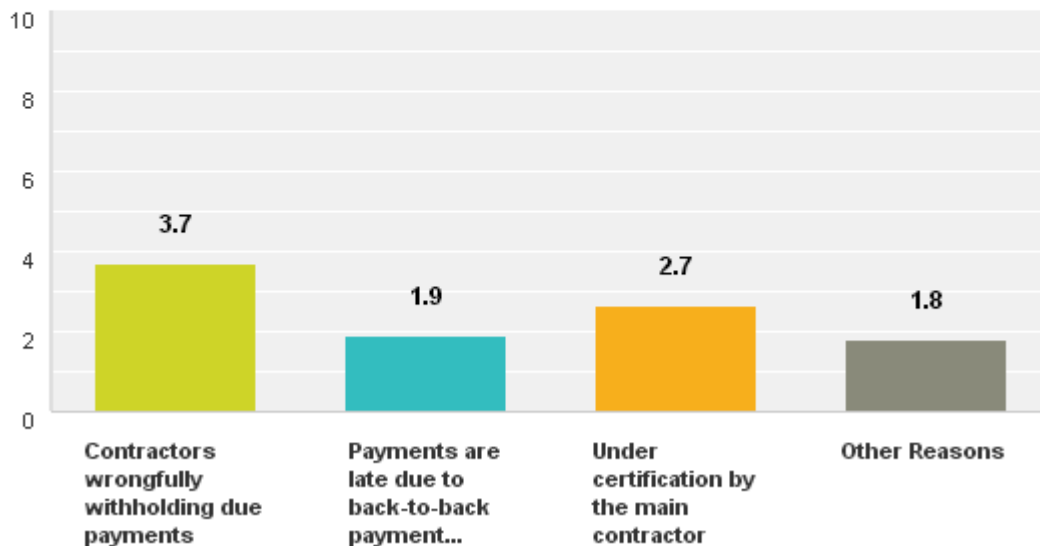
It is evident from the above results that most of the main contractors in UAE do not agree to include the provision for suspension in subcontracts.

Q10) Reasons for Late Payment

The participants of the survey were asked to score the given reasons for the late payment. Four options were given and advised to rate from 1 to 4 (1 for the highest affecting reason and 4 for the least affecting reason). The option 'Contractors Wrongfully Withholding Due Payments' scored highest with a score of 3.7 and the second was 'Under Certification by Main Contractor' with a score of 2.7. Other two options scored negligibly as shown the chart below.

How would you score the following in regards to the late payment issue faced by the small scale subcontractors in UAE?(1 for the highest affecting reason and 4 for the least affecting reason)

Answered: 32 Skipped: 0



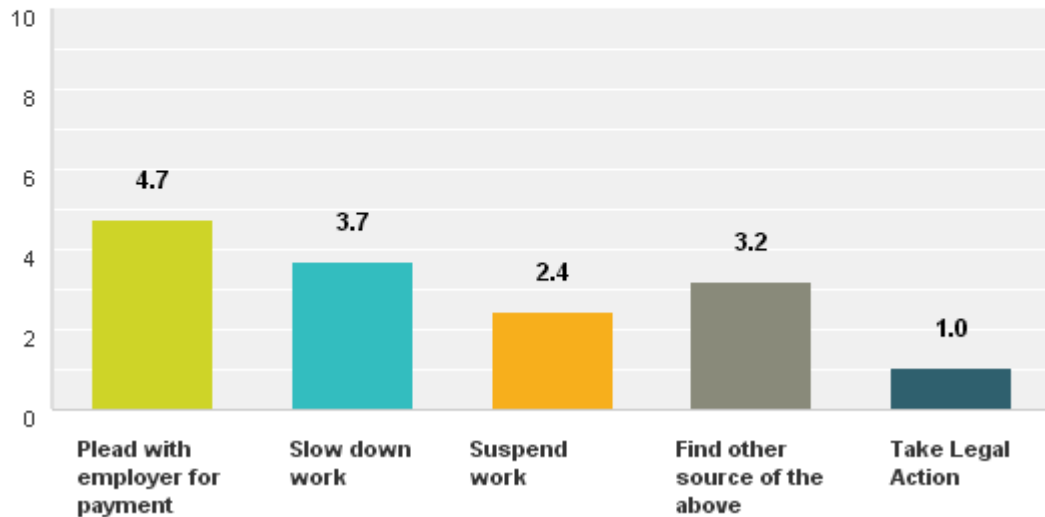
The result shows that majority of the small scale subcontractors in UAE believe that the major reason for the late payment issue is main contractors delaying the payments to improve their own cash flow.

Q11) Reaction to Late Payment

The participants of the survey were asked to score the given options on how their organisation responds to late payment. Four options were given and advised to rate from 1 to 5 (1 for first reaction & 5 for the last reaction). The highest scored option was 'Plead with employer for the payment' with a score of 4.7 and then comes 'slowdown works ate site' then comes 'Find other source of fund'. The option 'Take Legal Action' scored the least.

How would you score your organization's reaction to late payment?(Ranking 1 to 5 - 1 for first reaction & 5 for the last reaction)

Answered: 32 Skipped: 0

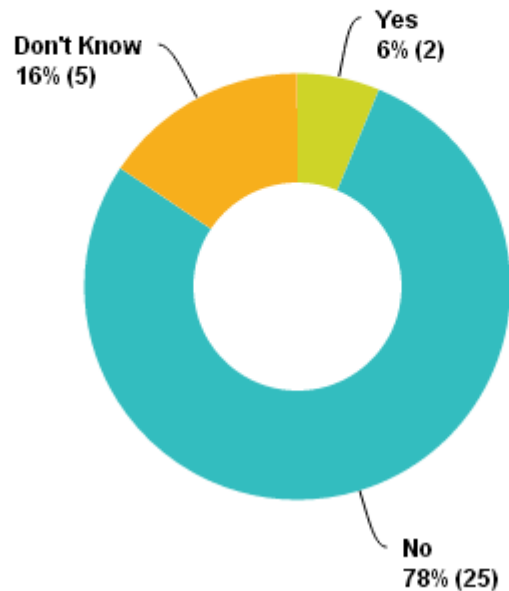


Q12) Is Contractual/ Legal Remedy Helpful to the Subcontractor?

The participants were asked 'Do you think Contractual/ Legal Remedy can solve late payment issue?' 78% of the respondents choose the option 'No' and 6% responded 'Yes' the balance 16% responded 'Don't Know'. The chart given below shows the details of responses received.

Do you think Contractual/ Legal Remedy can solve late payment issue?

Answered: 32 Skipped: 0



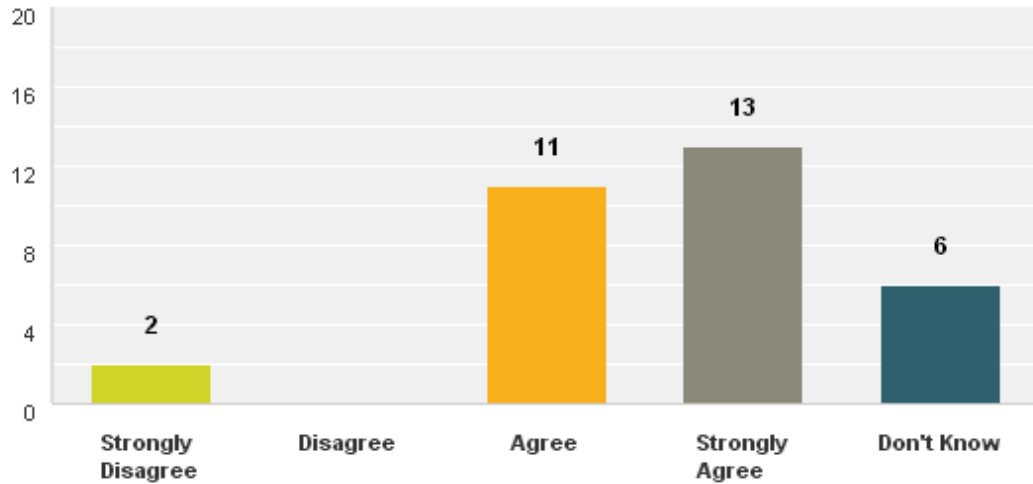
The overwhelming majority believes that the Contractual/ Legal Remedy will not be of helpful to small scale subcontractors. The author believes that this may be due to high cost and duration for such remedies especially considering the average value of subcontract orders undertaken by the small scale subcontractor. In addition to that the spoiling business relationship also may be one of the reasons.

Q13) Is there a requirement of change in Legislation?

Participants were asked about the requirement of change in legislation to protect subcontractors' payments and to deal with late payment issue effectively. Out of 32 respondents, most of them 'Strongly Agreed' that there is a requirement for change in legislation in UAE to protect subcontractors' payments. However, some of the respondents opted to choose the option 'Don't Know'. The chart given below shows the details of responses received.

Is there a requirement of change in legislation to deal with late payment issue?

Answered: 32 Skipped: 0



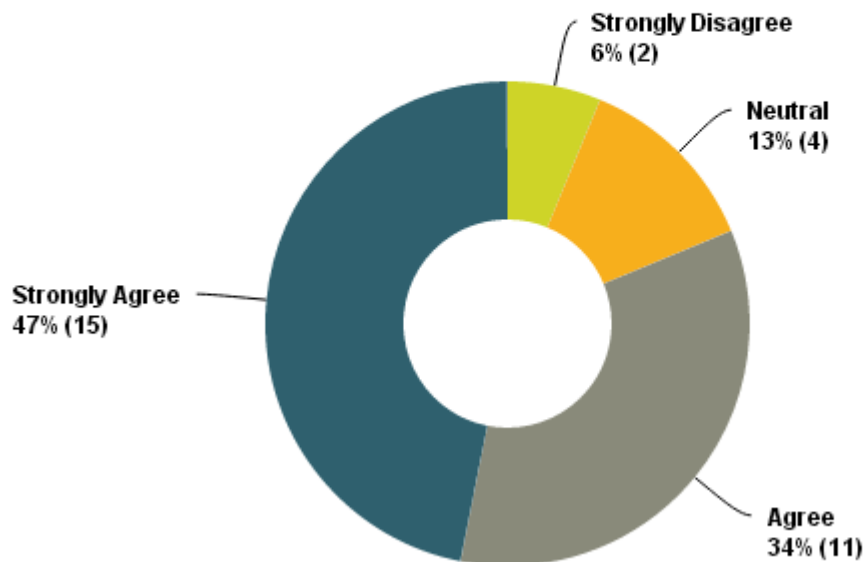
It is apparent from the above result that the subcontract industry in UAE strongly believes that the most apt solution to deal with the late payment issue is to introduce provisions in the laws to protect subcontractors' payment.

Q14) Is Dealing With Late Payment A Challenge For UAE Small Scale Subcontractors?

The participants were asked their view on whether dealing with late payment is a challenge for UAE small scale subcontractors. Out of 32 respondents, 47% of them 'Strongly Agreed' that it is a challenge and the balance 34% chose the option 'Agree'. Notably, none of the respondent had an opinion that it is not a challenge. The chart given below shows the details of responses received.

Dealing with Late Payment is a challenge for UAE small scale subcontractors?

Answered: 32 Skipped: 0



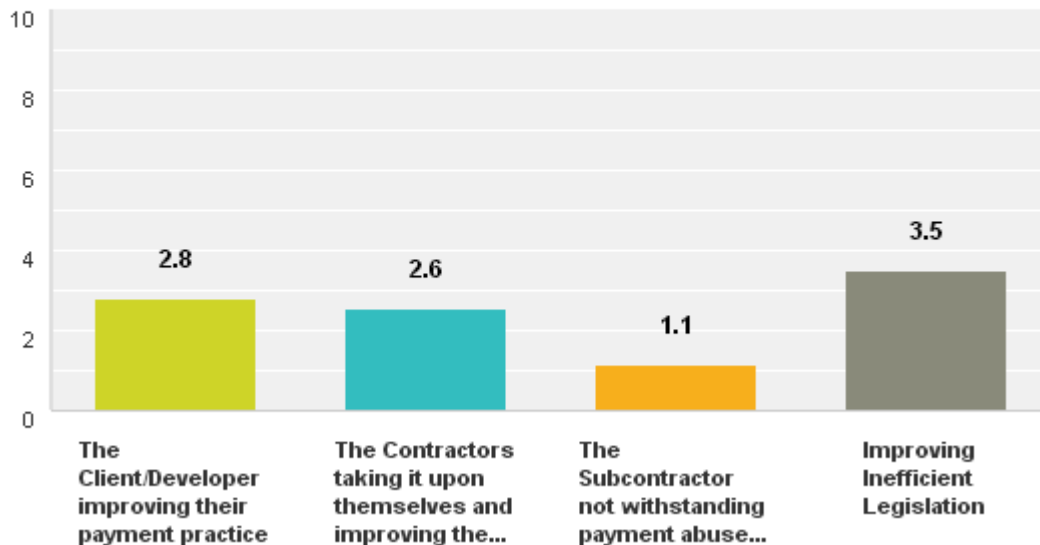
The above result clearly demonstrates that the dealing with late payment is a great challenge for small scale subcontractors in UAE.

Q15) Key Factors to Eliminate the Late Payment Issue?

The participants of the survey were asked to rate the given key factors to eliminate the late payment issue. Four points were given and advised to rate from 1 to 4 (1 for the most important factor and 4 for the least important factor). The highest scored factor was 'Improving Inefficient Legislation' with a score of 3.5 and the factor scored second was 'The Contractors taking it upon themselves and improving their own inefficient payment practice'. The factor scored least is 'The Subcontractor not withstanding payment abuse and eradicating the problem'. The chart given below shows the details of responses received.

The key to eliminating the problem of Late Payment can be achieved by?

Answered: 32 Skipped: 0



This result also affirms finding of a previous question that the subcontract industry in UAE strongly believes that the most important factor to resolve the late payment issue is to improve the law. All other factors come next to that.

2.3 Outcome of the Questionnaire Survey

The Questionnaire Survey was able to achieve a fair number of participants mainly those working Small Scale Subcontractors and dealing with contract negotiation and administration. The survey helped in identifying the details about the late payment issues faced by the Small Scale Subcontractors and it also collected the industry's opinion on the way forward to eliminate this issue.

The outcome of the survey clearly supports the hypothesis of this research and all the respondents either strongly agreed or agreed that late payment issue is a challenge for the small scale subcontractors in UAE. The prominent reason for the late payment issue identified by the survey is 'Main Contractors wrongfully withholding payment'. The key factor, identified by the survey respondents, for eliminating the late payment issue is 'improving the inefficient legislation'

3. LITERATURE REVIEW

The purpose of this literature review is to provide a wide platform of information and understanding on which to base the project research. It provides the bigger picture, into which the project can be placed, to give correct perspective and scale. It will allow the author to compare, and correctly put in context, the secondary information obtained during the literature search.

3.1 An Overview of Subcontracting

Subcontracting is a very common practice in the modern construction industry. It would almost impossible for a single Main Contractor to carry out the whole of the works especially if the project is large sized and complex in nature⁶.

In UAE, like most other countries, a significant portion of the main contractor's work is carried out by subcontractors. During the recent past, the fraction of work being carried out by the subcontractors has increased significantly.⁷ There are several reasons behind why main contractors are using subcontractors to carry out the works out of that two prominent reasons are one to reduce the overhead and the second is to improve the cash flow.

3.2 Legal Aspects of Subcontracting

3.2.1 An overview of subcontracting under UAE Law

The UAE law permit the main contractor to subcontract a portion or whole of the works⁸ to a third party without the requirement of obtaining permission from the employer, provided that the contract does not stipulate otherwise and the performance of the work does not depends on the competence of the contractor. It is stipulated under the Article 890(1) of the UAE Civil Transaction Code.⁹

⁶ Sachin Kerur, " (Successful Subcontracting,) <<http://www.cmguide.org/archives/3151>> accessed 10 November 2015

⁷ Ada Ivanova 2012 "Pros and Cons of Hiring Subcontractors" < <http://speckyboy.com/2013/01/17/pros-and-cons-of-hiring-subcontractors/>> Accessed on 20 August 2015

⁸ Archer Marker, " (Subcontracting in United Arab Emirates,) <<http://www.archermarks.com/construction-law/subcontracting-in-united-arab-emirates/>> accessed 10 November 2015

⁹ UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987 Article 890(1)

In accordance with the Article 890 (2) of the UAE Civil Transaction Code, the main contractor shall be liable to the Employer for the whole of work even if the main contractor had appointed a subcontractor to carry out the whole of the works or a portion of it.

The Article 891 of the Civil Code stipulates that: ‘The second contractor may not make any claim against the employer for anything due to him from the first contractor unless he has made an assignment of it to him as against the employer.’¹⁰

3.2.2 The use of Pay When Paid Clauses in Contracts

The Pay-When-Paid is a contractual mechanism usually used in subcontracts that makes the payment under the subcontract conditional on the main contractor receiving the payment under the main contract from the employer. The main contractors use this provision to transfer the risk of late payment to the subcontractor and such provisions were very widely used across the world. However, subsequently some the jurisdictions found this provision as an unfair and made it illegal. The use and validity of Pay-When-Paid clauses under various jurisdictions are discussed below.

In UAE, especially after the recent economic recessions, most of the main contractors warrant the Pay-When-Paid provision in the subcontracts. Although in the Case No. 281/1995¹¹ the Dubai Cassation Court upheld the decision ordering the main contractor to pay the subcontractor as he has completed the works, later decisions of the court were contrary to this. For example, in the cases Dubai Ct of Cass. Case No. 240/2006, Dubai Ct of Cass. Case No. 267/2007 and Dubai Ct of Cass. Case No. 83/2009 the cassation court upheld lower court decision that the main contractor does not have to pay the subcontractor until he receive the payment from the employer even if the subcontractor has completed the works. In these cases the court considered the Pay-When-Paid as condition precedent and decided that subcontractor cannot make the claim unless the condition is met.

¹⁰ Ahmed Ibrahim 2015 “Subcontracting under UAE Law” < <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law>> accessed 5 November 2015

¹¹ Richard Price, Emaasm Al Tamimi United Arab Emirates Court Of Cassation Judgements: 1998-2003 (1st, Brill, Boston 2005)

Whereas, under UK law as per the Section 113 of the Housing Grants, Construction and Regeneration Act 1996 the conditional clauses are illegal. The section 113 stipulates “*A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent*”

It is evident from the above discussion that although Pay-When-Paid clauses illegal under English Law, they are perfectly valid under UAE law and enforceable in UAE courts. Although Pay-When-Paid clauses are very common in UAE, the Questionnaire Survey conducted shows the use of Pay-When-Paid in clauses is very rare in case of small scale subcontracts. Nevertheless, as Pay-When-Paid clauses are valid in UAE, the author believe that the small scale subcontractor should completely stay away from the Pay-When-Paid clauses as it’s a risk that most of the small scale subcontractors are not capable to handle.

3.2.3 Claiming Payments Directly From The Employer

As per the UAE Civil Code the subcontractor does not have the right to claim a payment directly from the employer unless the parties have agreed otherwise in the contract. The Article 891 of the Civil Code stipulates that: ‘The second contractor may not make any claim against the employer for anything due to him from the first contractor unless he has made an assignment of it to him as against the employer.’

However, the above is not the case in some other jurisdictions. For example, under the French Law a subcontractor is entitled to claim a payment directly from the Employer if the main contractor failed to pay. This entitlement is provided under a law introduced in 1975 and later supplemented in 1986 with an intention to improve the efficiency of the protection provided to the subcontractor,

According to Article 12, first recital, of the 1975 Law:

“where the Main Contractor fails to pay the Subcontractor within one month after formal notification, the Subcontractor may request payment of all amounts due under the Subcontract directly from the Employer.”

Article 13 of the 1975 law provides that:

“the obligations of the Employer are limited to the amount he still owes to the Main Contractor at the date of receipt of the copy of the formal notification [whereby the Subcontractor requests payment from the Main Contractor].”

Nevertheless, based on his own experience and as commented by the interviewees (described in the Interviews section of this report), the author believes that a provision that provide an entitlement to subcontractors to claim directly from the employers in the event of late payment, is not recommended in UAE as this may complicate the contractual relationship and may lead to increased number of disputes. It is also worth to mention here that literature review conducted demonstrate that such provisions are very rare in other jurisdictions. This in itself is a support for the author’s view on this.

3.2.4 Suspension of works in case of late payment

It is a well agreed fact that suspension is a great tool for the contractors to use against late payment. As such, most of the standard form contracts such as FIDIC, JCT NEC etc. include provisions that allows the contractor to suspend the works in case of late payment. The suspension provision is very common in subcontracts also. However the Questionnaire Survey conducted demonstrates that the suspension provision is very rare in small scale subcontracts. Therefore, it is worthwhile to review the provisions concerning the suspension that shall be implied by law. The provision concerning the suspension under various jurisdictions are discussed below.

The Article 247 of the UAE Civil Code stipulate that a party can refuse to carry out his obligations under the contract if the other party in the contract is not performing his obligation. For example, in a construction subcontract if the main contractor is not making any payment then the subcontractor can refuse to continue with the carrying out of works. This provision in the Civil Code allow the subcontractor to suspend the works in case of late payment even in the absence of the explicit contractual provision. However, experts have warned about the risk of solely relying on this provision to suspend the works and advised the subcontractors to obtain legal advice before doing so. There are several factors which need to be taken into consideration for determining whether the subcontractor can rely on the suspension right provided in the Article 247,

this includes a proper notification of the main contractor, the subcontractor have performed his primary obligations under the subcontract etc.

The common law does not provide for a right that allows the subcontractor to suspend the performance of the works if the main contractor failed to pay, however, there are statutory provisions in many of the common law countries based on which the contractor may suspend the carrying out works in case of the late payment. For example, as per the Housing Grants Construction and Regeneration Act 1996 as amended in 2011, subcontractors have the right to suspend the carrying out of the works when a required payment of a notified sum has not been made. The subcontractor may either suspend a part of the work or the whole of the works

The above discussion demonstrates that even in the absence of explicit contractual provision the small scale subcontractor have the right to suspend the carrying out of works in the event of late payments. However they should be very careful in exercising it otherwise it may result in a breach of contract. Therefore, the author believes that it is advisable for the small scale subcontractor to negotiate and include a provision for suspension in case of late payment. Although the inclusion of such may be difficult as per the outcome of the Questionnaire Survey, based on the literature review conducted, the author strongly believes that inclusion of such a provision can be of great use to small scale subcontractors to deal with the late payment.

3.2.5 Security for Payment

It is not uncommon that some of the jurisdictions provide for security to subcontractors payment. For example, pursuant to Article 14 of the 1975 Law of the French Law, in order to have validity for the subcontract, the main contractor must provide a bank guarantee to the Subcontractor for the total amounts payable to the subcontractor under the subcontract. Instead of that the main contractor may delegate this obligation to the Employer. If a bank guarantee pursuant to Article 14 is not issued, then the subcontractor may request to cancel the subcontract within 5 years from the formation of the subcontract.

However, during the literature review the author did not come across any provision under the UAE law which is similar to the aforementioned provision under French Law.

Further, based on his own experiences in the UAE construction industry and as commented by the interviewees, the author believes that it may not be feasible to adopt such a system in UAE.

Nevertheless, it is worth to discuss here about the Project Bank Account system proposed by UK Government Construction Board Fair Payment User Group for implementing the government project which is aimed at providing security for payments to the supply chain. As per the research conducted by the User Group the Project Bank Account proved effective in reducing the disputes and improving the overall efficiency. In addition, The Real Estate Regulatory Authority in Dubai has introduced a mandatory Trust Account System aimed at protecting the real-estate investors. In addition to protecting the real estate investors, the Trust Account system also provides a security to the main contractors involved in the project. This has been widely appreciated by the contractors in the UAE.

The author believes that considering the positive impact given by the Trust Account system, such protection should be extended to the parties involved in the lower order of the supply chain such as small scale subcontractor. This can be helpful in providing a security for small scale subcontractors at least in the real estate projects. It is to be noted that a major chunk of the UAE construction comes under the real estate development. It may not be easy to extend the Trust Account to the small scale subcontractors, however if implemented it will definitely help in improving the wellness of the UAE construction industry.

3.2.6 Dispute Resolution

The dispute resolution mechanism is an important aspect of every construction contract. It plays a vital role in dealing with the late payment issue. The dispute resolution mechanisms available to small scale subcontractors in UAE as well as other jurisdictions and their effectiveness in dealing with the late payment issue are discussed below.

It is very well understood that the only dispute resolution mechanism other than litigation readily enforceable under UAE law is Arbitration. Due to several benefits of the alternative dispute resolution, parties usually chose it as the dispute resolution mechanism in construction contracts. As such, Arbitration is the most common dispute resolution mechanism in the most of the construction contracts regardless of the value of the

contract. Accordingly, if small scale subcontractors in UAE wish to escalate late payment issue through the contractual provision then the only option available to them is Arbitration as other methods such as adjudication and mediation are not readily enforceable as a court judgement in UAE. Although the Arbitration is considered a cheaper and faster compared litigation in many cases, it may not be feasible for the late payment issue faced by the small scale subcontractors where the value of dispute will be comparatively less and it requires a very quick and enforceable decision. The Arbitration is not feasible for disputes with less value and it will take a minimum of six months for a resolution. As such, the author believes that the dispute resolution available to small scale subcontractors in UAE are not effective in dealing with the late payment issue.

Whereas, in UK after the introduction of the Housing Grants, Construction and Regeneration Act 1996 the small scale subcontractors have an option to avail adjudication. The adjudication provision is mandatory in all construction contracts as per the Act and the adjudicator shall render his decision within 28 days. Although the decision is not final, it is binding on all the parties until the dispute is finally settled through arbitration or litigation. This very quick and inexpensive dispute resolution is highly helpful for the contractors and subcontractors in maintaining their cash flow and researches conducted on this topic also shows the same. As inspired by the fruitfulness of this provision under the Construction and Regeneration Act 1996, many of the other countries such as Australia, Singapore, and Malaysia etc. also have adopted such a system.

The above discussion demonstrates the importance of the requirement of a very quick and inexpensive dispute resolution mechanism in the construction contracts. The author believes that considering the effectiveness of the aforementioned statutory adjudication and the positive impact brought to the respective industry, the lawmakers in the UAE also should be inspired to adopt a similar system in UAE.

3.3 Outcome of the Literature Review

The literature review shed light in to various provisions, concerning late payment to small scale subcontractors, available in the UAE law as well as other jurisdictions. It has been found that some of other jurisdictions provide protection to small scale subcontractors

through provisions such as bank guarantee for payment, quick resolution of disputes by adjudication and even a right to claim directly from the employer.

However, the UAE law does not provide any of the mechanisms discussed above. The research further analysed the feasibility and practicability of the aforementioned provisions and came to a conclusion that the ‘bank guarantee’ and ‘right to claim directly from employer’ may not be feasible in UAE. However, a quick and affordable statutory adjudication and a protection to subcontractors’ payment through the project escrow account are highly recommended as solutions to eliminate this issue.

4. INTERVIEWS

4.1 An Overview of Interviews

In order to have an in-depth investigation on the late payment issues faced by the small scale subcontractors in UAE, apart from conducting questionnaire survey, the author conducted two face-face interviews. The first interviewee was Mr Giju who is the General Manager of one of the small scale subcontractors in UAE and the second interviewee Mr Philippe is working as Subcontract Manager with one of the top 10 Main Contractors in UAE.

The interview consisted of 8 questions and questions were designed in line with the aims and objectives of this search. The questions as well as the responses from the interviewees are discussed below.

4.2 Interview Questions & Analysis of Responses

Q1) Why Late Payment is a Challenge for UAE Small Scale Subcontractors?

Mr. Giju commented that the late payment is a concern for all of the construction firms regardless of their size however it becomes more critical for the small scale subcontractors due to reasons such as they are the one of the last links of the supply chain and they have less bargaining power compared to large scale or nominated subcontractors etc. Moreover, the small scale subcontractors have to deal with the wage payment.

According to Mr. Phillip, the dealing with late payment becomes a challenge for the small scale subcontractor as they do not have any other option than plead with the main

contractor. Most of the main contractors in UAE use one sided contracts in which the terms are in favour to them. In addition, any action such as suspension or slowdown by the small scale subcontractor is also may not impact the main contractor's progress as there will be several other subcontractors in the site who do such works. In addition the legal protections they have really don't help them as they are costly and lengthy. Hence the small scale subcontractors consider it as a last resort.

Form the above discussion, the author believe that the late payment issue is a challenge for the small scale subcontractors because they have less bargain power in the pre and post contract stage and legal/contractual remedy available to them are not efficient to deal with the issue.

Q2) What are The Main Causes of the Late Payments?

According to Mr, Giju's experience, the main reason is main contractors wrongfully withholding due payment there may be several reasons for them to do so but it is not permitted. He also mentioned that the back to back payment mechanism also contributes to an extent but for small scale subcontractors the effect of back-to-back payment term is not significant. He believes that even for the subcontractor who do not agreed the back-to-back, the main contractor delay the payment if they haven't received the payment from the Developer. In addition to that, regardless of the payment due date, the main contractors always give priority to the creditors those who have given some security such as post dated cheque or specialist subcontractors whose works are very critical for them to achieve the target completion date.

Mr.Phillip also had a view similar to the above. He also mentioned that after the 2008's financial crisis; it has become a usual practice for most of the stakeholders in construction to delay payments to creditors with a intention keep a healthy cash flow. Unfortunately this practice is badly effecting the small scale subcontractor as they are last link the chain and their payments are mainly wages to employees, which cannot be delayed.

Based on the above two discussions, the author conclude that the main reason for the late payment issue is Main Contractors wrongfully withholding the due payments and it is happening as there're is no security for the small subcontractors' payments and their response to late payment cannot significantly impact the Main Contractor's progress

Q3) Is Pay-When-Paid Clause Affecting Small Scale Subcontractors?

Mr. Giju commented that the Pay-When-Paid is very common in UAE and most of the main contractors are very adamant on including this in their subcontract agreements but usually it is not applicable for small scale subcontract. Most of the small scale subcontractors usually do not agree to the Pay-When-Paid clause and the Main Contractor do not insist also. He acknowledged that his company very rarely agree to such payment terms. However he also pointed out that even if the contract does not stipulate the Pay-When-Paid, in several instances the actual payment in effect become Pay-when Paid.

According to Mr Phillips's experience, ideally the 'Pay-When-Paid' clause should not significantly affect small scale subcontractors as most for the small scale subcontract in UAE are signed without this provision. He told that their company have two types of subcontract form one Minor and Major. Minor form is usually used for small scale subcontracts and the payment terms in it is '60 Days from the certification of Invoice' but the Major form has the 'Pay-When-Paid' clause and their company usually do not negotiate it.

The above discussions demonstrate that the 'Pay-When-Paid' clause is not very common for small scale subcontracts in UAE however it is a practice for the Main Contractors to withhold the payment if they do not received the payment from the Developers, even in the absence of such clause. It is worth to mention here that this result coincides with the outcome of the Questionnaire Survey.

Q4) Can The Suspension Provision Be Of Small Scale Subcontractors Help?

According to Mr Giju a provision for suspension in the contract is a great to tool to deal with the late payment. However, he believes that the suspension may not be useful to small scale subcontractors in all cases. The main contractors shall speed up the payment process only if the suspension affects their progress work but it will not be the case often. Usually there will be several subcontractors in a site who carry out similar type of works such as plastering, block work, tiling etc. If one of the subcontractors suspends the work it is not going to affect the main contractor significantly. However it is recommend that the subcontractors should seek to include a suspension provision in their subcontracts if possible.

Mr. Philippe believes that the suspension provision in the subcontracts can be of great help to the small scale subcontractors in case of late payment. However, he noted that most of the Main Contractors in UAE, including his organisation, do not agree to include such a provision in the subcontract. He believes suspending the work will force the Main Contractor to expedite the payment

It is evident from the above that the views of the interviewees on the suspension is slightly different from each other where one believes that it will be of great help but at the same time the other believes it may not be always. However both recommend subcontractors to include the provision in the subcontract.

Q5) What Are Consequences Of Late Payment?

Giju commented that cash flow is the blood for every construction related business whether it is small or big. The main consequence of late payment faced by the small scale subcontractors is the cash flow problem. Unlike large subcontractors the small scale subcontractors are not prepared to handle it and it leads to insolvency in many cases and result in closure of the business. This will not only have a negative impact to the overall economy and also affect the migrant workers of the company. There are several incidents in which the owner of the business left the country due to insolvency and migrant workers left here with unpaid wages and uncertainty about the future.

Philippe also express almost same view of Giju. He believes the biggest threat is the insolvency and the consequences suppliers and employees of the company have to face. He expressed an opinion that it is not only an economic issue but has social impact also due to non payment of wages

The above discussion demonstrates the main consequence of the late payment issue is that it leads to insolvency of the business and in turn may even cause for the closure. It not only badly affects the economy but has some social consequences also due to non payment of wages.

Q6) Can The Subcontractor Rely On Contractual/Legal Remedy?

Mr Giju replayed subcontractors can rely on the Contractual/Legal remedies however a question arises as whether such actions can effectively resolve the issue. While facing the late payment issue the subcontractors will be looking for receiving the due payment as quickly as possible to avoid insolvency. Giju doubt whether contractual or the legal remedies can achieve this. He believe that ultimately they will get paid at some point but that will not help them to avoid the insolvency. According to him what is required a quick solution.

Mr Philippe also believes that the remedies available in most of the subcontracts in UAE are not capable to effectively resolve this issue due to the time taken by such remedies to have a resolution. He also commented that in addition to the time taken the cost is also an issue. In most cases of the small scale subcontracts, the value of dispute will not be enough to make such contractual or legal actions feasible.

The above shows that both of the interviewees believe that the contractual/legal remedies available in the subcontracts are not capable to resolve the issue effectively due to their cost and time taken.

Q7) As per the Majority of the respondents participated in the Questionnaire Survey, the Key factor in eliminating the late payment issue is Change In Legislation – what is your view on this?

According to Giju, there are several factors to be dealt with in order to eliminate the payment issue. However he agrees that the Change in Legislation is an important aspect because unless there is a legal supporting, implementation of any solution will be highly difficult. He believes that the biggest challenge faced by the small scale subcontractor is the only option available to them in case of late payment is to plead with the Main Contractor as the current remedy Arbitration/Litigation is not effective to deal this issue. According to him it should be changed and there should be a provision in the law that enable the small scale subcontractor to get paid within a reasonable time.

Mr Philippe also agreed that change in legislation is an important aspect and the contractual/legal remedy should be capable to enable the small scale subcontractors to get paid within a reasonable period. In addition to that he also commented that there should be some sort of security for the subcontractors' payments. One example for the security

he given is the Escrow Payment system introduced by the RERA for the payment to main contractors. He believes it is great initiative and it should be extended to the subcontractors also.

It is evident from the above that both the interviewees concur with the outcome of the Questionnaire Survey that change legislation is the key to resolve the late payment issue faced by small scale subcontractors. The author also believes the payment security system proposed by Mr Philippe is an excellent solution as it will help in avoiding this disputes rather than resolving it quickly.

Q8) In some other countries, subcontractors have the right to claim directly from the Employer and also get a bank guarantee for their payments – what is your view on adopting those systems in UAE ?

Mr. Giju commented that a right to claim directly from the employer is beneficial to subcontractors but he believes most of the UAE employers and contractors would not be in favour of this and it may complicate the matter and increase number of disputes. Hence it is not practical in UAE. However he believes that a guarantee for subcontractors' payment is an effective remedy to this issue.

Mr Philippe also had the same view of Giju on providing a right to claim directly from employer. Whereas, he believes, providing bank guarantee for each subcontractor's payment will a burden on the main contractor and it may not be feasible also. Instead, he recommends including subcontractors also in the mandatory escrow payment system for payment to main contractors in traduced by RERA.

It is evident from that above that both the interviewees believe that a right to claim directly from employer is not practical. Although both of them supports providing security for subcontractors' payments, one believes bank guarantee is not feasible and instead the security should be through escrow payment.

4.3 Outcome of the Interviews

The interviews were a follow-up and review of the outcome of the Questionnaire Survey. It covered most of the key aspects of the Questionnaire Survey results in order to analysis

it further. The inputs from the interviewees on the various questions helped the author to proceed further in the research.

The responses from the interviewees support the hypothesis of the interview and demonstrate that late payment is a challenge for the UAE small scale subcontractors. The main issue faced by the small scale subcontractors is the wrongful withholding of due payments by the main contractors and the back-to-back payment terms do not affect them significantly. The reasons for this include the facts that the small scale subcontractors have less bargain power, no security for their payments and the contractual/legal provisions are not efficient to deal with this issue. Both the interviewees recommend change in legislation and providing a security to subcontractor's payment as solutions to eliminate this issue.

5. CONCLUSIONS & RECOMMENDATIONS

The study investigated the challenges faced by the UAE small scale subcontractors in respect of late payment issues and it has identified the standard payment terms followed by the main contractors in UAE with small-scale subcontractors, various reasons for the late payment issue, legal aspects of late payment issue under UAE law and other jurisdictions. The study has also analysed potential solution to effectively overcome the late payment issue.

The methodologies adopted were questionnaire survey, literature review and face-to-face interviews. As stated earlier, the survey was mainly targeted professionals working with small scale subcontractors in UAE. A total of 32 construction professionals participated in the Questionnaire Survey and contributed in to the survey and provided their expert judgments. The author conducted two face-to-face interviews, one with the General Manager of a small scale subcontractor and other with a Subcontract Manager working with one of the prominent main contractor in UAE.

The outcomes of the Questionnaire Survey reveal that vast majority of the professionals in the industry support the hypothesis of this research and believe that dealing with late payment is a challenge for small scale subcontractors in UAE. The foremost reason or scenario for the late payment is 'main contractors wrongfully withholding due payments'

then comes ‘under certification by main contractors’ and ‘delay due to back-to-back payment terms’. The research shows that unlike large scale subcontractors, the small scale subcontractors in UAE are not significantly affected by the Pay-When-Paid contractual provision and most of the small scale subcontractors agree to Pay-When-Paid mechanism very rarely only. Nevertheless, their payments are delayed.

The research further shed light in to various provisions, concerning late payment to small scale subcontractors, available in the UAE law as well as other jurisdictions. It has been found that some of other jurisdiction provide protection to small scale subcontractors through provisions such as bank guarantee for payment, quick resolution of disputes by adjudication and even a right to claim directly from the employer. However the UAE law does not provide any of the aforementioned mechanisms. The research further analysed the feasibility and practicability of the aforementioned provisions and came to a conclusion that the ‘bank guarantee’ and ‘right to claim directly from employer’ may not be feasible in UAE. However, a quick and affordable statutory adjudication and a protection to subcontractors’ payment through the project escrow account are highly recommended as solutions to eliminate this issue.

To conclude, the research reveals that dealing with late payment is a great challenge for small scale subcontractors in UAE and foremost reason for the late payment is ‘main contractors wrongfully withholding due payments’. UAE law lacks several provisions available in other jurisdictions that protect small scale subcontractors against late payment issues. The author believes that late payment is an issue which should be dealt with great importance as it has economical as well as social impacts. Further, the adoption of a quick and affordable statutory adjudication in UAE law and providing protection to subcontractors’ payment through the project escrow account are recommended as solutions to eliminate this issue.

6. BIBLIOGRAPHY

Text Books

1. Uff Jhon, Construction Law (10th, Thomson Reuters (Legal) Limited, London 2009) 461
2. Smith J. Nigel, Tony Merna, Paul Jobling, MANAGING RISK IN CONSTRUCTION PROJECTS (2nd, Blackwell Publishing, Victoria 2006)
3. Bueno Júlio César, The Projects and Construction Review (1st, Law Business Research Ltd, London 2011)
4. Hackett M, Robinson I, & Statham G, The Aqua Group Guide to Procurement, Tendering and Contract Administration (Blackwell, Oxford 2007)
5. Murdoch John, Construction contracts law and management (4th, Taylor & Francis, Oxon 2008)
6. Clough, R H., Sears, G A., Sears, S. K., (2005). Construction Contracting Seventh Edition A Practical Guide to Company Management. Hoboken, NJ: John Wiley & Sons, Inc
7. Jaeger Volkmar Axel, FIDIC-A Guide for Practitioners (1st, Springer, Berlin 2010)
8. Kowng-Leung Tang, Social Development in Asia (5th, Kluwer Academic Publishers, Dordrecht 2000)
9. Richard Price, Emaasm Al Tamimi United Arab Emirates Court Of Cassation Judgements: 1998-2003 (1st, Brill, Boston 2005)

Online Articles

1. Archer Marker, " (Subcontracting in United Arab Emirates,)
<<http://www.archermarks.com/construction-law/subcontracting-in-united-arab-emirates/>>
accessed 8 November 2015

2. Semra jalil, " (Analysis: Late payments,) <<http://alpha.constructionweekonline.com/article-24996-analysis-late-payments/>> accessed 10 October 2015
3. Bader M, 'Impact of 'back to back' payment clause on the cash flow of subcontractor in the UAE' (2013) accessed 8 November 2015
4. Sachin Kerur, " (Successful Subcontracting,) <<http://www.cmguide.org/archives/3151>> accessed 10 November 2015
5. Building and Construction Industry (Security of Payment) 2009. Available at: <<http://www.legislation.act.gov.au/a/2009-50/current/pdf/2009-50.pdf> > Accessed 20 October 2015
6. MARTIN PRESTON, 'Key issues of UAE construction law' (gulfconstructiononline.com 2013) <http://www.gulfconstructiononline.com/news/14334_Key-issues-of-UAE-construction-law.html> accessed 28 October 2015
7. Samer Sheikh, " (Importance of contractor progress payment terms,) <<http://www.cmguide.org/archives/2364>> accessed 5 November 2015
8. David Dale (Construction disputes and the economic crisis) <<http://www.cmguide.org/archives/1398>> accessed 5 November 2015
9. Samer Sheikh (How subcontractors can get paid) <<http://www.cmguide.org/archives/2217>> accessed 10 November 2015
10. Clyde & Co 2009 „The Works- Construction Bulletin“ <www.clydeco.co.uk/attachments/.../The%20Works_Issue%202_July2009.pdf> accessed on 28 August 2015
11. Out Law 2011 “The Construction Act and its amendment – adjudication” < <http://www.out-law.com/en/topics/projects--construction/adjudication/the-construction-act-and-its-amendment--adjudication/>> accessed on 30 August 2015
12. Kanishka Singh 2015 “Pay-when-Paid Clauses in the UAE: Is there a way around for a Subcontractor?” < [http://www.tamimi.com/en/magazine/law-update/section-11/april-8/pay-](http://www.tamimi.com/en/magazine/law-update/section-11/april-8/pay-when-paid-clauses-in-the-uae)

when-paid-clauses-in-the-uae-is-there-a-way-around-for-a-subcontractor.html> accessed 5 November 2015

13. Ahmed Ibrahim 2015 “Subcontracting under UAE Law” <
<http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law>> accessed 5 November 2015
14. Marc Lempérière 2012 “France strengthens its already strict laws concerning subcontracting” <
<http://www.lexology.com/library/detail.aspx?g=62aeba10-2681-478f-abbb-706f7feea3c3>>
10 November 2015
15. Ada Ivanova 2012 “Pros and Cons of Hiring Subcontractors” <
<http://speckyboy.com/2013/01/17/pros-and-cons-of-hiring-subcontractors/>> Accessed on 20 August 2015
16. Eric Teo 2010 “Bridging the contractual gap between an employer and a sub-contractor” <
<http://www.mondaq.com/x/105304/Building+Construction/Bridging+the+contractual+gap+between+an+employer+and+a+subcontractor>> Accessed on 20 August 2015
17. “Suspending works for non-payment: What's changed?” <
<http://www.building.co.uk/suspending-works-for-non-payment-whats-changed/?/5028840.article>> Accessed on 20 August 2015
18. Paul Taylor “The ins and outs of 'suspension of the works' under construction contracts” <
<http://www.constructionweekonline.com/article-986-the-ins-and-outs-of-suspension-of-the-works-under-construction-contracts/>> Accessed on 20 August 2015
19. Lloyd Biddell 2015 “Implementation of Project Bank Accounts across Highways England” <
<http://www.secgroup.org.uk/pdfs/2015/Implementation%20of%20Project%20Bank%20Accounts%20across%20Highways%20England.pdf>> Accessed on 20 August 2015
20. Mohammed Kawasmi, David Bowman & Mohammed Kamran Tahir 2013 “BUILD IT AND THEY WILL COME” <
<http://www.tamimi.com/en/magazine/law-update/section-5/february-4/build-it-and-they-will-come-part-1.html>> Accessed on 20 August 2015
21. Nicolos Gould “Adjudication in The Middle East” <
<http://www.cmguide.org/archives/3673>>
Accessed on 10 November 2015

Case Laws

1. Dubai Court of Cassation - Case No. 281/ 1995
2. Dubai Court of Cassation - Case No. 240/2006
3. Dubai Court of Cassation - Case No. 267/2007
4. Dubai Court of Cassation - Case No. 83/2009

Statutes

1. UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987 (“Civil Code”)
2. Housing Grants, Construction and Regeneration Act 1996 (UK)

7. APPENDICES

7.1 Appendix A1 – Questionnaire Survey Questions

Dealing with Late Payments - A Challenge for UAE Small Scale Subcontractors?											
<p>* 1. How would you describe your subcontract organisation?</p> <p><input type="radio"/> Small</p> <p><input type="radio"/> Medium</p> <p><input type="radio"/> Large</p>											
<p>* 2. Your position within the organization?</p> <p><input type="radio"/> Project Manager</p> <p><input type="radio"/> Quantity Surveyor</p> <p><input type="radio"/> Senior Manager</p> <p><input type="radio"/> Others</p>											
<p>* 3. Average value of subcontracts under taken by your company?</p> <p><input type="radio"/> Less than AED 500K</p> <p><input type="radio"/> AED 500K to 1 million</p> <p><input type="radio"/> AED 1 to 5 million</p> <p><input type="radio"/> Above AED 5 million</p>											
<p>4. Payment terms agreed in your subcontracts?</p> <p>(Ranking 1 to 5 - 1 for highest occurrence & 5 for least occurrence)</p> <table border="1"><tbody><tr><td><div><div></div><div></div><div></div></div></td><td><div><div></div><div></div><div></div></div> 30 Days</td></tr><tr><td><div><div></div><div></div><div></div></div></td><td><div><div></div><div></div><div></div></div> 60 Days</td></tr><tr><td><div><div></div><div></div><div></div></div></td><td><div><div></div><div></div><div></div></div> 90 Days</td></tr><tr><td><div><div></div><div></div><div></div></div></td><td><div><div></div><div></div><div></div></div> Above 90 Days</td></tr><tr><td><div><div></div><div></div><div></div></div></td><td><div><div></div><div></div><div></div></div> Pay When Paid (back to back)</td></tr></tbody></table>		<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 30 Days	<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 60 Days	<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 90 Days	<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> Above 90 Days	<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> Pay When Paid (back to back)
<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 30 Days										
<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 60 Days										
<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> 90 Days										
<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> Above 90 Days										
<div><div></div><div></div><div></div></div>	<div><div></div><div></div><div></div></div> Pay When Paid (back to back)										

* 5. How often your company accepts Pay When Paid payment term?

- ☐ Never
- ☐ Rarely
- ☐ Often
- ☐ Always

* 6. The average payment to your organisation by the main contractor is?

(Ranking 1 to 5 - 1 for highest occurrence & 5 for least occurrence)

Ranking	1	2	3	4	5	On Time
Ranking	1	2	3	4	5	Up to 30 days late
Ranking	1	2	3	4	5	30 to 60 days late
Ranking	1	2	3	4	5	60 to 90 days late
Ranking	1	2	3	4	5	Above 90 days late

* 7. Do your subcontracts usually have a provision to suspend the works in case of late payment?

- ☐ Never
- ☐ Rarely
- ☐ Often
- ☐ Don't Know

* 8. Can a provision for suspension in case of late payment be of subcontractors help?

- ☐ Strongly Disagree
- ☐ Disagree
- ☐ Agree
- ☐ Strongly Agree
- ☐ Don't Know

* 9. Do you believe small scale domestic subcontractors can seek for a provision in subcontract for direct payment from the Employer?

- ☐ Yes
- ☐ No
- ☐ Don't Know

10. How would you score the following in regards to the late payment issue faced by the small scale subcontractors in UAE?

(1 for the highest affecting reason and 4 for the least affecting reason)

<input type="text"/>	Contractors wrongfully withholding due payments
<input type="text"/>	Payments are late due to back-to-back payment provision in the subcontract
<input type="text"/>	Under certification by the main contractor
<input type="text"/>	Other Reasons

11. How would you score your organization's reaction to late payment?

(Ranking 1 to 5 - 1 for first reaction & 5 for the last reaction)

<input type="text"/>	Plead with employer for payment
<input type="text"/>	Slow down work
<input type="text"/>	Suspend work
<input type="text"/>	Find other source of the above
<input type="text"/>	Take Legal Action

12. Do you think Contractual/ Legal Remedy can solve late payment issue?

- ☐ Yes
- ☐ No
- ☐ Don't Know

13. Is there a requirement of change in legislation to deal with late payment issue?

- ☐ Strongly Disagree
- ☐ Disagree
- ☐ Agree
- ☐ Strongly Agree
- ☐ Don't Know

<div> <div></div> <div></div> <div></div> </div>	<div> <div></div> <div></div> <div></div> </div>	The Client/Developer improving their payment practice
<div> <div></div> <div></div> <div></div> </div>	<div> <div></div> <div></div> <div></div> </div>	The Contractors taking it upon themselves and improving their own inefficient payment practice
<div> <div></div> <div></div> <div></div> </div>	<div> <div></div> <div></div> <div></div> </div>	The Subcontractor not withstanding payment abuse and eradicating the problem
<div> <div></div> <div></div> <div></div> </div>	<div> <div></div> <div></div> <div></div> </div>	Improving Inefficient Legislation

☐ Strongly Disagree

☐ Disagree

☐ Neutral

☐ Agree

☐ Strongly Agree