

Security of Payment Regimes in the United Kingdom, New South Wales (Australia), New Zealand and Singapore: A Comparative Analysis

Munaaaim, M.E.C.¹

Centre of Construction Law and Dispute Resolution, The Old Watch House, Strand Campus, King's College London, Strand, London, United Kingdom and
Faculty of Built Environment, University of Malaya, Kuala Lumpur, Malaysia
(email: muhammad.che_munaaaim@kcl.ac.uk)

Abstract

Several developed countries have adopted security of payment legislation. The term 'security of payment' refers to the legislative intervention that provides rights to payment and adjudication. The United Kingdom introduced this legislation first followed by the New South Wales state in Australia. These two are arguably the leading models of this legislation. The trend has been followed in New Zealand, other states and territories of Australia (Victoria, Queensland, Northern Territory and Western Australia), the Isle of Man and Singapore. Except for New Zealand (which is a hybrid of the UK and NSW Acts), the regime in each jurisdiction closely follows either the UK or the NSW model. A few other countries are also contemplating to introduce similar legislation. The paper reports the initial findings conducted via a literature review and legal research methods. This paper attempts to examine the profiles of the security of payment regimes in the UK, New South Wales in Australia, New Zealand and Singapore to highlight the available leading models that a particular jurisdiction can adopt. Further this paper will highlight some of the difficulties concerning the operation of these regimes so that other legislators may consider them when drafting their own legislation. There are two types of regime that are currently in place which are adjudication independent of payment and adjudication related to payment. The ambit of the regimes is different, covering certain types of contract and excluding some others. The scope and application of payment and adjudication machineries are essentially different from one jurisdiction to another. Similarly, enforcement options are also dissimilar. Despite their differences all these regimes fundamentally have similar objectives i.e. to facilitate payment and improve cash flow within the construction industry. The New Zealand and Singapore Acts have arguably improved some of the questionable features of the UK and NSW Acts. Furthermore, the Singapore Act has included some distinctive features that are unique to its

¹ This paper is a part of the writer's PhD study undertaken in the Centre of Construction Law and Dispute Resolution at King's College London. The supervisors of the PhD study are Professor Phillip Capper and Mr. Nicholas Gould. The writer gratefully acknowledges the valuable comments given by the supervisors and Professor Philip Britton during the course of the PhD study that led to the publication of this paper. Views and errors are, of course, the writer's own. The writer also gratefully acknowledges the sponsorships of the PhD study provided by the Ministry of Higher Education of Malaysia and University of Malaya.

construction industry. Legislators in other jurisdictions contemplating to introduce similar legislation can benefit from the rich and recent precedents set in these regimes.

Keywords: adjudication, cash flow, contracts, disputes, payment.

1. Introduction

The introduction of security of payment legislation for the construction industry in certain Commonwealth jurisdictions has appeared to address the issue of prompt payments in their respective industries. ‘Security of payment’ is the phrase sometimes used, notably in the titles of legislation, as in New South Wales and Victoria in Australia, and Singapore. It refers to ‘the entitlement of contractors, consultants or suppliers in the contractual chain to receive payment due under the terms of their contract from the party higher in the chain’.² It provides new statutory rights to payment (added on top of existing contractual rights); together with a mechanism for determining some or all of the rights of parties to construction contracts via adjudication, a quick and effective quasi-judicial method of statutory dispute resolution. Linked to adjudication are enforcement options, if the decision of an adjudicator is not respected. Throughout this paper, for the sake of consistency, the term ‘security of payment regime’ will be used to describe these two central pillars of this legislative intervention: rights to payment and adjudication mechanisms by which these rights may be asserted, determined and enforced.

Security of payment legislation thus aims to overcome at least some of the myriad problems of payment which are prevalent in the construction industry. The United Kingdom was the leader in this revolutionary development towards cash flow improvements in the construction industry by passing the Housing Grants, Construction and Regeneration Act (the UK Act) in 1996³. This was later followed by New South Wales in Australia three years later, when the Building and Construction Industry Security of Payment Act⁴ (the NSW Act) was enacted. The operation of the UK and NSW regimes is somewhat different despite their fundamentally similar objectives. The key difference is that the scope of the UK Act is considerably wider than that of the NSW Act, allowing all types of disputes to be subject to adjudication, whilst the NSW Act only allows disputes related to progress payments to be taken to adjudication. Arguably, these two are the leading models with regard to the operation of security of payment regimes in the Commonwealth's jurisdictions.

Since then, the trend of having industry-based legislation to improve payment practices has been followed in New Zealand⁵, other states and territories of Australia (Victoria⁶, Queensland⁷, Northern Territory⁸ and Western Australia⁹), the Isle of Man¹⁰ and Singapore¹¹. Except for New Zealand, the

² Uher, T. E., & Brand, M. C. (2007). A Comparative Analysis of the Operation of 'Compulsory Rapid Adjudication' in New South Wales and New Zealand. *Construction Management and Economics*, 25 (7), 765-775, p. 766.

³ Actually under Part II of the Housing Grants, Construction and Regeneration Act 1996. Amendments have been made to Part II of this Act and have been included as Part 8 of the Local Democracy, Economic Development and Construction Act 2009. At present, this part however has not come into force. Throughout this paper reference will be made to the Part II of the Housing Grants, Construction and Regeneration Act 1996.

⁴ This Act was amended in 2002. Accordingly throughout this paper reference will be made to the NSW Act as amended.

⁵ Construction Contracts Act 2002, New Zealand.

⁶ Building and Construction Industry Security of Payment Act 2002 amended in 2006, Victoria, Australia.

⁷ Building and Construction Industry Payments Act 2004, Queensland, Australia.

⁸ Construction Contracts (Security of Payment Act) 2004, Northern Territory, Australia.

⁹ Construction Contracts Act 2004, Western Australia, Australia.

regime in each of these jurisdictions closely follows either the UK or the NSW model. New Zealand's Construction Contracts Act 2002 (the NZ Act) is a hybrid, following the UK's approach to adjudication but the NSW's approach to payment. Singapore introduced its Building and Construction Industry Security of Payment Act 2004¹² (the SG Act) and incorporated some distinctive features that are unique to its construction industry. The paper reports the initial findings of a PhD study conducted via a literature review and legal research methods. The aim of the PhD research is to develop a framework for an effective security of payment regime in Malaysia. The aim is supported by the following objectives:

1. To examine the profiles of the payment security regimes in the UK, New South Wales, New Zealand and Singapore;
2. To identify the lessons learned from the operation of the payment security regimes in the UK, New South Wales, New Zealand and Singapore;
3. To identify influential factors that policymakers should consider when drafting payment security legislation in Malaysia; and
4. To identify the key elements of an effective payment security regime in Malaysia.

This paper attempts to examine the profiles of the security of payment regimes in the UK, New South Wales in Australia, New Zealand and Singapore. Examining these profiles will be beneficial in terms of highlighting the approaches these jurisdictions took when drafting their legislation. This exercise will highlight the available leading models that a particular jurisdiction can adopt. Further this paper will also highlight some of the difficulties concerning the operation of these regimes so that other legislators may consider them when drafting their own legislation. The reason for choosing the United Kingdom is obvious: statutory adjudication was introduced first there. Since the UK Act has the longest history, a significant body of case law has been developed to illustrate its operation. As for New Zealand, the adjudication regime operating in this country is regarded by some as an improved version of the UK regime.¹³ The NSW Act is also chosen as a case study because the security of payment regime in operation in this state is regarded as the main alternative version to the UK regime, with different coverage and procedures, but with a fundamentally similar objective. Moreover, the fact that the NSW Act has been in force longest in Australia also means that there is useful case law about its function. Singapore is chosen as a case study due to the uniqueness of some of the features provided under its statute.

¹⁰ Construction Contracts Act 2004, The Isle of Man.

¹¹ Building and Construction Industry Security of Payment Act 2004, Singapore (the SG Act).

¹² The SG Act came into force on April 1, 2005.

¹³ Wallace, I. D. (2002). HGCRA: A New Zealand Version. *International Construction Law Review*, 130-134, p. 130.

2. Operation of security of payment legislation

A close scrutiny of the operation of all four statutes considered in this case study reveals that there are two operative mechanisms being used in those jurisdictions, which are as follows:

- a. Parallel contractual and statutory scheme for both payment and adjudication provisions (the UK model)
- b. Parallel contractual and statutory scheme for payment provisions and a purely statutory scheme for adjudication provisions (the NSW, NZ and SG models)

2.1 The UK model

The UK Act is unique as it tolerates the establishment of contractual regimes for both adjudication and payment as alternatives to the statutory regime. It introduces minimum parameters with regard to adjudication and payment machineries. Section 108 of the UK Act describes all the requirements that must be included in construction contracts to allow resolution of disputes via adjudication whilst sections 109-113 impose requirements regarding payment provisions to be incorporated into construction contracts. These requirements are minimal and the parties involved can agree to more stringent requirements provided they do not contradict the compliance provisions. Failure on the part of a construction contract to comply with the requirements imposed by the Act will result in the deployment of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the English Scheme) which has the impact as implied terms of the contract. However, the effect of deploying this default scheme varies according to the non-compliance of payment provisions or adjudication provisions. If a payment provision in a contract fails to comply with the requirements imposed by the UK Act, it will be substituted with the relevant payment provision of the English Scheme. This is because the deployment of a default provision is on a 'section to section basis' which means that if a particular section of a contract does not conform with UK Act requirements, the relevant provision of the English Scheme will apply. By contrast, non-compliance of a particular adjudication provision in a construction contract will cause all adjudication provisions to be repealed and replaced with the full set of English Scheme adjudication provisions.¹⁴

2.2 The NSW, NZ and SG model

The rest of the jurisdictions considered in this case study differ from the UK Act with respect to the operation of their regimes. The establishment of a contractual regime as an alternative to a statutory regime is only permitted in the context of payment provisions. Thus, the adjudication regime imposed by the respective legislation is purely statutory. Furthermore, since the whole legislative framework for both payment and adjudication is virtually provided in the primary legislation, there is no default scheme that will operate in the event of non-compliance of these provisions. Similar to the UK Act, the NSW, NZ and SG Acts impose mandatory requirements in construction contracts regarding payment and adjudication provisions. In the event of non-compliance, default provisions are

¹⁴ *John Mowlem & Co plc v Hydra-Tight Ltd* (2000) CILL 1650.

embedded in the main body of the primary legislation. The inclusion of adjudication provisions in construction contracts is mandatory and must strictly follow the prescribed requirements of the statutes. The deployment of default payment provisions in NSW and NZ is similar to the UK when a contract fails to comply with the payment provisions imposed by the legislation. However, the situation is different in Singapore, as the deployment of a default statutory regime is only impinged upon the contractual terms if they are silent on payment terms or if the contract so provides the terms of which are considered to be unfair or not in tandem with the intention of the SG Act.¹⁵ Some standard forms of contracts in Singapore have been amended to take into consideration the requirements imposed by the SG Act whilst others remain unchanged. This would likely give rise to legal issues in adjudication or in the courts as to whether a particular payment term is in line with the intention of the SG Act.

3. Scope of application of security of payment legislation

A detailed examination of the security of payment legislation in the selected jurisdictions shows that there are two regimes in operation which are as follows:

- a) Adjudication Independent of Payment (the UK and NZ Acts)
- b) Adjudication Related to Payment (the NSW and SG Acts)

3.1 Adjudication independent of payment

The UK and NZ Acts provide that any dispute can be referred to adjudication without limitation to progress payment disputes. A dispute, as long as it arises under a contract, can be adjudicated at any time. In the UK, the fact that adjudication is made available to all types of disputes has caused considerable debate among academics and practitioners alike about the effectiveness of such a system. One view is that since all types of disputes can be adjudicated, this would open the floodgates to include professional negligence disputes. The consultants' quality of services will now be subject to 'rough and ready' adjudication. Arguably, professional negligence claims are unfit for time-bound adjudication. The element of 'rough and ready justice' offered by adjudication may not be suitable in this class of disputes, as 'fine justice' offered by litigation or arbitration could be more desirable in order to truly reflect the rights and obligations of both parties in this complex area of law. On the other hand, if professional negligence claims are subject to adjudication, this in turn will compel professionals to be more prudent in exercising their duties. This could result in improved quality of services that will benefit projects and end users. New Zealand, despite offering all types of disputes to be adjudicated under its Act, somewhat excludes these professional negligence disputes from the constituency of adjudication. This is achieved by expressly excluding professional services contracts from the operation of the NZ Act.

¹⁵ Teo, P. J. (2008). Adjudication: Singapore Perspective. *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 224-230.

3.2 Adjudication related to payment

The NSW and SG Acts allow only disputes over progress payments to be referred to adjudication. Progress payments in the NSW Act are defined to include final payments.¹⁶ In Singapore, notwithstanding the absence of express provisions regarding the inclusion of final payments, it could be construed from the wording of the SG Act that progress payments are also deemed to include final payments.¹⁷ The application of the NSW and SG Acts could be seen as limited, but there has been an instance in NSW where a dispute over prolongation claims was considered to be a progress payment dispute and thus covered by the Act.¹⁸ It is reasonable to suggest that disputes regarding defects, liquidated damages, variation order, and loss and expense could all be within the ambit of the NSW and SG Acts so long as they are related to progress payments. A close scrutiny of the NSW and SG Acts show that their application, albeit not as wide as the UK and NZ Acts, attempts to resolve common disputes encountered in the day-to-day running of a project.

4. Ambit of security of payment legislation

4.1 Definitions of constructions contracts

The definitions of construction contracts are important, as the determination of whether a contract is covered by security of payment legislation is contingent upon successful qualification under these definitions. An examination of legislation provided in these selected jurisdictions shows that there are three ways of defining contracts that are subject to the application of the legislation which are as follows:

- 1) Contracts for construction operation/work
- 2) Contracts for the supply of services
- 3) Contracts for the supply of goods

Contracts for construction operations/work

The definitions of construction operations/work covered by the operation of the statutes considered in this case study are described in an almost similar fashion.¹⁹ However, different terminologies are used to describe the types of operations/work covered by the Acts. The UK Act uses the term ‘construction operations’, whilst the NSW, NZ and SG Acts use ‘construction work’ to refer to the types of activities covered by them. Furthermore, the list of exclusions associated with the definitions of construction operations and work differ between the statutes. The UK Act features an elaborate list of operations/work that is not covered by it. First, the exclusion relates to activities associated with the

¹⁶ See the definitions of ‘Progress Payment’ under Section 4 of the NSW Act.

¹⁷ ‘Progress Payment’ is defined under Section 2 of the SG Act to include a payment that is based on an event or a date. Since a final payment is triggered after the issuance of a Final Completion Certificate, it satisfies the definition of ‘Progress Payment’ provided under Section 2 of the SG Act.

¹⁸ *Walter Construction Group Ltd v. CPL (Surry Hills) Pty Ltd* (2003)[2002] NSWSC 266.

¹⁹ Section 105 of the UK Act, Section 5 of the NSW Act, Section 6 of the NZ Act and Section 3 of the SG Act.

extraction of oil and natural gas.²⁰ The UK Act further excludes activities of mineral extraction from its ambit.²¹ The third exclusion is known in the industry as the ‘process plant exception’ clause²². This clause refers to process plant operations which are not covered by the Act, namely, the assembly, installation or demolition of the plant, machinery and associated steelwork that provide support or access to a site whose primary activity is related to ‘nuclear processing, power generation, or water or effluent treatment; or the production, transmission, processing or bulk storage (other than warehousing of chemicals, pharmaceuticals, oil, gas, steel or food and drink’.²³ This process plant exception clause has resulted in a satellite of unwarranted litigation²⁴ regarding whether a particular operation is included or excluded from the operation of the UK Act.

Essentially, examination of the definitions of construction operations/work in the selected jurisdictions pointed to four categories of construction operations/work that are subject to the application of adjudication and payment legislation. They are as follows:

- 1) Building work
- 2) Civil and infrastructure engineering work
- 3) Operations forming part of the work
- 4) Cleaning, painting and decorating work

Contracts for the supply of services

An extensive analysis of the security of payment regimes in the selected jurisdictions show that contracts for the supply of services are placed into two categories: namely contracts for supply of labour and contracts for supply of professional consulting services. Amongst four jurisdictions considered for this case study, only the NZ Act excludes these contracts. The rest of the jurisdictions considered for this case study provide contracts for supply of labour to be governed by the provisions of the legislation.²⁵ It is unclear why the NZ Act excludes contracts for supply of labour from its ambit but the better view is that these contracts were not intended to be part of its constituency. As for professional consulting services contracts it could be assumed that its exclusion was the result of extensive lobbying by professional bodies not to be covered by the NZ Act. Further analysis of the scope of professional consulting services contracts provided in the UK, NSW and SG reveals that, notwithstanding the drafting styles, there are essentially three types of contracts covered by adjudication and payment legislation. However, there is a careful qualification that these contracts should relate to construction operation/work. The contracts are as follows:

²⁰ Section 105(2)(a) of the UK Act.

²¹ Section 105(5)(b) of the UK Act.

²² Section 105(c) of the UK Act.

²³ Section 105(c) of the UK Act.

²⁴ See, for example, *Palmer Ltd v ABB Power Construction Ltd* [1999] BLR 426, *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] BLR 124, *ABB Zantingh Ltd v Zedal Building Services Ltd* 2001 BLR 66, *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* [2001] 77 ConLR 20 and *Conor Engineering Limited v Les Constructions Industrielles de la mediterranee SA* [2004] All ER (D) 75 (Apr).

²⁵ Section 104(c) of the UK Act, Section 6(1)(b)(i) of the NSW Act and Section 3(1)(d) of the SG Act.

- 1) Contracts for architectural, engineering and surveying services
- 2) Contracts for project management services
- 3) Contracts for specialist advisory services

Contracts for the supply of goods

The UK Act expressly excludes contracts for the pure supply of goods²⁶. The exclusion of these contracts from the ambit of the UK Act was a total departure from the Latham Report. The Report highlighted that cash-flow problems are confronted not only by contractors, but also by suppliers. However, the drafters of the UK Act chose not to include these contracts by expressly prohibiting contracts for manufacture and delivery to site of components, materials, plants and equipment to be covered by the Act unless the contracts also provide for their installation²⁷. The NZ Act²⁸ also excludes supply of goods contracts; however, the NSW²⁹ and SG Acts³⁰ include these contracts. The reason for exclusion could be due to the fact that suppliers are not typically considered as vulnerable parties, notwithstanding the fact that they are normally placed at the bottom of the payment chain. The NSW and SG Acts on the other hand, provide protection to suppliers of materials, components, plants and equipment.³¹ A potential area of peculiarity is likely to arise if supply contracts are not covered by the legislation. Consider a situation in which a contractor is liable for liquidated damages as a result of a supplier's late delivery of material. The contractor in this situation will not be able to recover his loss swiftly against the supplier if adjudication is not made available to him under a contract. Another area that could also give rise to absurdity is contracts of supply of prefabrication components. If a manufacturer is delayed in supplying materials, the contractor will be in danger of receiving an adjudication notice for such delay by the employer. The manufacturer's delay, however, will not be referred to adjudication as a result of the exemption provided by the legislation. It is true that there is nothing to prevent the parties from inserting a contractual adjudication provision in their contract, but without legislative support there will be difficulties with regard to the enforcement of an adjudication decision.

The SG Act as well as its predecessor i.e. the NSW Act provides refuge to suppliers of goods. In these two jurisdictions the definitions of goods are broad and comprise of 'materials and components' to form any part of any building, structure or work', as well as 'plant and materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work'.³² However, the SG Act defines supply of goods contracts as including contracts under which 'one party undertakes 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'.³³ The first part of the definition

²⁶ Section 105(2)(d) of the UK Act.

²⁷ Section 105(2)(d) of the UK Act.

²⁸ Section 6(1)(f)(iv) of the NZ Act, however, states that prefabrication components, whether carried out on- or off-site, is construction work and thus covered by the Act.

²⁹ Section 6 of the NSW Act.

³⁰ Section 2 of the SG Act.

³¹ Section 6 of the NSW Act and Section 2 of the SG Act.

³² Section 4 of the NSW Act and Section 2 of the SG Act.

³³ Paragraph (a) of the definition of 'supply contract' in Section 2 of the SG Act.

covers the normal supply of goods contracts entered into by contractors and suppliers. The second part of the definition effectively covers supply of goods contracts between employers, owners or developers, and suppliers.

4.2 Contracts in writing

An investigation into the operation of the security of payment legislation in the UK, NSW in Australia, NZ and SG shows that there are two approaches in defining what constitutes a contract in writing and thus subject to payment and adjudication provisions. The approaches are as follows:

- a) Contracts that are in writing or evidenced in writing (the UK and SG models)
- b) Contracts that are in writing or oral (the NSW and NZ models)

The UK and SG model

The UK Act, by virtue of Section 107, provides that the provisions of the Act apply only to construction contracts that are in writing.³⁴ The definition of writing as provided by the Act is wide and beyond what one would expect as the common form of writing.³⁵ Notwithstanding the fact that the SG Act is closely modelled after the NSW Act, the definitions of what constitutes an agreement in writing as stipulated in its Section 4 (3) bear close similarity to the UK Act. The drafting of Section 107 of the UK Act is not without controversy. The problems posed by the current drafting have called for the section to be under judicial scrutiny, as the courts have been asked several times to interpret the true intention of the UK Act intended by Parliament with regard to the requirement of a contract to be in writing. On the one hand, we find the judgment of Ward LJ in an appeal case of *RJT Consulting Engineers v. DM Engineering*³⁶, where an enforcement of the adjudicator's decisions was refused on the ground that all of the express terms were not made in writing. On the other hand, in the same case we find Auld LJ's statement that, despite allowing the appeal, disagrees as to the requirement of what constitutes a contract that is evidenced in writing to confine to material terms that are of relevant to the dispute in question. The first proposition has been given judicial support in the cases of *Debeck Ductworth Installations Ltd v. T & E Engineering Ltd*³⁷ and *Trustees of the Stratfield Saye Estate v. AHL Construction Ltd*³⁸, whilst *Bronlow Ltd. v. Dem-Master Demolition Ltd*³⁹ followed the latter.

There are further difficulties concerning the above propositions made by both learned judges. The principle introduced by Ward LJ requiring that all the terms be in writing for a contract to be within the ambit of the Act could cause difficulties in a situation where a contract is varied by an oral agreement. This was in fact experienced in the case of *Carillion Construction v. Devonport Royal*

³⁴ Section 107(1) of the UK Act.

³⁵ Dancaster, C., & Riches, J. (2004). *Construction Adjudication*. London: Blackwell Publishing.

³⁶ [2002] BLR 217.

³⁷ [2002] EWHC BM250063 (TCC).

³⁸ [2004] EWHC 3286 (TCC).

³⁹ [2004] ScotSC A904/03.

*Dockyard*⁴⁰, which leaves further scope of argument among academics and practitioners alike. The fact that a construction contract that is within the provisions of the UK Act with regard to payment, suspension and adjudication ceases to be subject to the Act if the contract is varied orally poses peculiarities in the operation of the Act.⁴¹ The substantive rights and obligations of the parties will be significantly altered when an oral variation to the written contract is made. For example, the employer who was initially required to issue a withholding notice under a written contract is no longer under that obligation if the contract is varied orally. By way of contrast, the contractor could be in repudiatory breach against the employer if suspension of work is resorted to by the former following an oral variation to the written contract.

The principle introduced by Auld LJ requiring that all the material terms be made in writing for the Act to be operative is also not without difficulty. It should be noted that adjudication is not the only outcome of the contract being caught by the application of the Act. Payment and suspension regulations are also part of the package if a contract is subject to the Act. This could cause further difficulties in the sense that in determining whether a contract is subject to the coverage of the Act, a reference will be made to a dispute that might not have crystallised.⁴² For the sake of clarity and certainty as to which types of contracts are within the purview of the Act, the blanket inclusion of all contracts, either written or oral, as provided by the NSW and NZ Acts seems sensible to achieve the desired objectives. Arguably, the interpretations of Section 107(2)(c) by both learned judges has narrowed the application of adjudication, which could be inconsistent with the intentions of the UK Act. However, the fact that the restriction imposed by the strict interpretation of that particular section to contracts that have greater certainty as to contract terms seems to coincide with the short time frame and the summary nature of the UK's adjudication regime.

Taking into consideration the particular difficulties inherent in Section 107, specifically regarding what constitutes an agreement in writing, proposals have been made to amend Part 2 of the UK Act. A proposal has been made to abolish Section 107, allowable under the Local Democracy, Economic Development and Construction Act 2009. Effectively, the abolishment of this section opens the possibility for oral contracts to be governed by the new legislation. The inclusion of oral contracts in the new UK's payment and adjudication legislation seems to be consistent with similar legislation in New South Wales and New Zealand. Strangely, however, the Bill requires construction contracts to include written adjudication provisions. In essence, this means that a construction contract can be oral, but must also have written adjudication provisions. The fact that a default scheme for adjudication provisions will be deployed in cases where a contract does not conform to the New UK Act makes the requirement of written adjudication provision redundant. Under the New UK Act, if an oral contract does not include express adjudication provisions, it is still subject to the legislation. Nonetheless, this triggers the default adjudication provisions provided by the English Scheme. Consequently, the required inclusion of adjudication provisions even in oral contracts seems not to serve the obvious benefit to the operation of the legislation.

⁴⁰ [2005] EWHC 778 (TCC).

⁴¹ Constable, A. (2006). Construction Industry Payment and Adjudication Legislation: The Choice That Lies Ahead for Malaysia. *International Construction Law Review*, 78-88. p 82.

⁴² *Ibid.*

The NSW and NZ model

Section 7(1) of the NSW Act provides that the Act applies to any construction contract, whether written or oral, or partly written and partly oral. Similarly, the NZ Act applies to every construction contract that is written or oral, or partly written and partly oral.⁴³ Essentially, the application of the payment and adjudication machineries in these jurisdictions is considerably wider than those in the UK and SG Acts. Small subcontractors who either carry out construction projects or supply labour for projects are also prone to cash flow problems. Being the last party on the contractual payment ladder makes them most vulnerable to payment problems. One disruption higher up on the payment ladder could have a disastrous effect on the financial position of subcontractors and the effect of nonpayment could result in insolvency. The inclusion of oral contracts within the ambit of the security of payment legislation could provide them with statutory protection.

5. Payment: scope and application

A detailed analysis of the payment provisions provided under the chosen statutes reveals that there are two types of payment mechanisms introduced by the security of payment legislation, which are as follows:

- a) Prescriptive payment mechanism
- b) Non-prescriptive payment mechanism

5.1 Prescriptive payment mechanism

Except for the UK Act, the rest of the statutes chosen for this case study provide a rule-based prescriptive payment mechanism. This mechanism introduces the concept of payment claim and payment schedule/response⁴⁴, which is currently non-existent in the context of the UK Act, to ensure compliance by parties in the contract. The claimant who has carried out construction work or supplied goods and services in relation to construction operation/work under a contract is entitled to make a payment claim under the NSW and SG Acts. Conversely, under the NZ Act, only parties who have carried out construction work are entitled to make such a claim. The definition of 'claimant' differs between the NSW and SG statutes. The NSW Act defines 'claimant' as 'a person by whom a payment claim is served'⁴⁵, whilst the SG Act makes more explicit expression of the definition of 'claimant', which means 'a person who is or claims to be entitled to a progress payment'.⁴⁶ The NZ, on the other hand, does not use the term 'claimant', but instead uses the term 'payee', which is defined as a 'party

⁴³ Section 9 of the of the Construction Contracts Act 2002, New Zealand.

⁴⁴ The NSW and NZ Acts use the term 'payment schedule' whereas the SG Act uses the term 'payment response'.

⁴⁵ Section 4 of the NSW Act.

⁴⁶ Section 2 of the SG Act.

to a construction contract who is entitled to a progress payment'.⁴⁷ This definition is synonymous with the definition of 'claimant' provided under the SG Act.

5.2 Prescriptive payment mechanism

The UK Act prescribes minimum parameters that construction contracts must comply with in regard to payment provisions. The Act stipulates that contract parties may agree upon a payment scheme, such as payment by instalments, stage payments or other periodic payments.⁴⁸ In order to be regulated by the payment mechanism afforded by the UK Act, the duration of the work specified in the contract or agreed between parties must be less than 45 days.⁴⁹ If a contract meets that requirement, an 'adequate mechanism' to determine what payments are due and when they are due should be provided in the contract.⁵⁰ Further, the mechanism should also specify the final date of payment with respect to any amount that becomes due.⁵¹ There is, however, no express definition of 'adequate mechanism' in the Act. The practical view is that a comprehensive method of establishing the quantum of payments will likely comply with the requirement of the Act. Consequently, the certification process prescribed by most standard forms of contract could fall within this definition. The fact that contract parties are at liberty to agree upon the mechanism of determining what is due and when it is due, as well as the final date of payment in relation to what is due, means that the freedom of contract between the contracting parties is preserved.

5.3 Prohibition of conditional payment mechanism

To further protect the financial interest of vulnerable parties, security of payment legislation provides a mechanism to prohibit the use of conditional payment provisions in construction contracts. The degree of protection offered by the legislation is, however, varied between one jurisdiction and another. The UK's legislative drive seems to have banned the use of what the industry refers to as the 'pay-when-paid' clause.⁵² The 'pay-when-paid' clause is a provision that defers the payment obligation on the part of the contractor to the subcontractor to a later date, until the former is paid by the employer. This provision, however, does not extinguish payment obligation completely. The obligation to make such a payment still exists, but has been deferred to a later date. The UK Act, however, permits the use of the conditional payment provision in situations where an employer who is supposed to make payment to the contractor is insolvent⁵³. This provision is known in the industry parlance as the 'pay-if-paid' clause. The effective use of this clause could extinguish the main contractor's payment obligation to the subcontractor completely. For example, in the event of the employer's insolvency, a main contractor is relieved from paying his subcontractor for the same work

⁴⁷ Section 19 of the NZ Act.

⁴⁸ Section 109(1) of the UK Act.

⁴⁹ *Ibid.*

⁵⁰ Section 110(1)(a) of the UK Act.

⁵¹ Section 110(1)(b) of the UK Act.

⁵² Section 113(1) of the UK Act.

⁵³ *Ibid.*

if such a clause is in existence. The exemption provided under the UK Act is consistent with the *pari passu* rule (with equal step, equally without preference) which stemmed from English Law.

In recent years, innovations have been orchestrated by the drafters of the standard forms to circumvent the requirement imposed by the UK Act with respect to the prohibition of conditional payment provisions. One of the most notable innovations was the ingenious inclusion of ‘pay-when-certified’ clauses in various UK standard forms of contract. These clauses have the effect of deferring the main contractor’s payment obligation to the subcontractor until payment for the same work is certified by the contract administrator in the main contract. Furthermore, since the UK gives a *carte blanche* to parties who agree to the timing of payment, a party with a considerable bargaining position may impose unfairly long payment periods on the other to ease the former’s cash flow. This delay in payments is possible due to the unenforceability of the conditional payment provisions.

Other statutes considered for this case study also prohibit the use of conditional payment provisions in contracts. The ambit of prohibition offered by these statutes is, however, considerably wider than the one provided under the UK statute. For example, these statutes effectively render the use of ‘pay-if-paid’ clauses ineffective.⁵⁴ A provision that places liability on a main contractor to pay his subcontractor, contingent on the former being paid by the employer, is referred to as a ‘pay-if-paid’ clause. This clause is to be contrasted with the ‘pay-when-paid’ clause, which defers the due date of payment but does not relinquish the main contractor’s payment obligation to the subcontractor in a situation where the latter is not being paid for the same work. The NSW and SG Acts, however, do not make any reference to the ‘pay-if-paid’ clause in their legislation. Reference is only made to ‘pay-when-paid’ provisions. The definitions of the ‘pay-when-paid’ provision, as provided under the NSW and SG statutes, are, however, broad enough to cover a provision that places liability on the contractor to make payment to the subcontractor, so long as the latter receives payment from the employer. Despite unclear drafting, the NSW and SG Acts have also effectively outlawed the effect of ‘pay-if-paid’ clauses in a contract. Conversely, the NZ Act clarifies that a payment conditional provision that is commonly referred to in the construction industry as the ‘pay-when-paid’ or ‘pay-if-paid’ clause is unenforceable.⁵⁵

In regard to the effect of conditional payment provisions, the NSW Act provides that they shall have no effect in relation to payments under a contract. In contrast, the NZ and SG Acts provide clear consequences of the inclusion of conditional payment provisions by not merely rendering them ineffective, but also unenforceable. The NZ Act states that ‘a conditional payment provision of a construction contract has no legal effect’ and is thus unenforceable⁵⁶. Similarly, the SG Act stipulates that a conditional payment provision is unenforceable and has no effect in relation to payments made under a contract.⁵⁷ The intended consequence of the use of the conditional payment provision is made explicit under the security of payment legislation in these jurisdictions, which offer certainty and clarity as to the operation of the legislation. In this regard, the approach taken by the legislators in

⁵⁴ Section 12(2)(a) of the NSW Act, Section 13(2)(a) of the NZ Act and Section 9(2)(a) of the SG Act.

⁵⁵ Section 13(2)(c) of the NZ Act.

⁵⁶ Section 13(1)(a) of the NZ Act.

⁵⁷ Section 9(1) of the SG Act.

New Zealand and Singapore with respect to the prohibition of the use of conditional payment provisions is desirable for adoption. The use of a ‘pay-when-paid’ provision, which effectively defers a payment due date for the subcontractor to the date that the contractor is paid, is also banned in New South Wales, New Zealand, and Singapore jurisdictions.⁵⁸ Furthermore, the NSW and SG Acts also disallow a provision that makes the liability or the due date for payment contingent on the operation of any other contract.⁵⁹ In anticipation of future efforts to circumvent the operation of the payment security legislation in regard to the nullity of the prohibition of conditional payment provisions, the legislators in New Zealand and Singapore introduced a ‘catch all’ clause to cover a full range of possibilities on the form that the provisions may take. These ‘catch all’ clauses, which are currently absent in the context of the UK and NSW Acts, could be the answer in ensuring that the policy of the security of payment legislation in prohibiting conditional payment provisions from being tolerated by ‘innovative’ contractual devices.

6. Adjudication: scope and application

Comparative analyses of the adjudication regimes in the selected jurisdictions indicate that a two-step approach is used to implement the adjudication process in all jurisdictions. The first step requires the claimant to issue a notice specifying his intention to refer the dispute to adjudication.⁶⁰ The UK and NZ Acts provide the unfettered right to adjudication; the NSW and SG Acts do not. Reference to adjudication in the UK and New Zealand can be made by any parties in contract, at any time and with virtually any types of disputes.⁶¹ Upon the appointment of an adjudicator, formal reference to adjudication is then made by the claimant.⁶² Conversely, the NSW and SG adjudication regimes limit adjudication to disputes about progress payments. Such adjudication can only be initiated when a dispute about progress payment crystallises.

6.1 Should the legislation allow for dispute settlement period?

The SG Act uniquely includes a provision that allows both parties in a dispute to clarify for each other any matters relating to payment claim. The dispute settlement period begins on the expiry of the date when the payment response is due to be issued and expires on the seventh day following the due date of the payment response. Reference to adjudication can be made upon the expiry of the dispute settlement period. The fact that this settlement period promotes an early exchange of information between the disputing parties could also increase the prospect of settlement, should the matter proceed to adjudication.⁶³ The existence of a dispute settlement provision in security of payment legislation is not without controversy. Such an existence delays the delivery of an adjudicator’s decision and could ultimately worsen the vulnerable party’s cash flow. The right to refer a dispute to adjudication should

⁵⁸ Section 12(2)(b) of the NSW Act, Section 13(2)(b) of the NZ Act and Section 9(2)(b) of the SG Act.

⁵⁹ Section 12(2)(c) of the NSW Act and Section 9(2)(c) of the SG Act.

⁶⁰ Section 108(2)(a) of the UK Act, Section 17(2)(a) of the NSW Act, Section 28(1) of the NZ Act and Section 13(1) of the SG Act.

⁶¹ Section 108 of the UK Act and Section 28 of the NZ Act.

⁶² Paragraph 7 of the English Scheme and Section 37 of the NZ Act.

⁶³ [Teo, P. J.], *op. cit.*, p. 227.

not be delayed by any preceding activities. In the UK, there have been instances where judges held that the existence of a mandatory preceding activity (e.g., mediation) before adjudication can commence is enforceable, as it obviates a party's right to rapid adjudication. The unenforceability results in the deployment of the adjudication provisions of the English Scheme to substitute not only the offending provision, but also the entire adjudication provision in the contract.

6.2 Should the legislation allow for review of decision?

The SG Act uniquely features a provision that allows respondents who are dissatisfied with the outcome of adjudication to apply for the review of the adjudicator's determination.⁶⁴ The review of the adjudicator's determination is carried out by a new adjudicator or a panel of adjudicators and should be applied for within seven days after the determination has been made.⁶⁵ However, the right of review is limited and is only available when the adjudicated amount is in excess of \$100,000 greater than the response amount.⁶⁶ Furthermore, parties seeking a review are required to pay the adjudicated amount in full in the first instance before a review can be applied.⁶⁷ This requirement works in line with the principal objective of the Act to facilitate cash flow improvements. Moreover, this review mechanism is a novel innovation orchestrated by Singapore's legislators to provide an opportunity for dissatisfied parties to have their case reviewed without having to experience expensive and protracted litigation and arbitration. With this mechanism in place, dissatisfied parties' degree of acceptance could increase should the adjudicator or the review panel reach the same conclusion.

6.3 Jurisdiction of the adjudicator

The issue of the jurisdiction of the adjudicator is of paramount importance. This is because an adjudicator's decision will not be enforceable if such a jurisdiction has been exceeded. Parties disputing the adjudicator's decision would normally argue that the adjudicator has exceeded his jurisdiction to resist payment. The UK Act does not outline the jurisdiction of the adjudicator nor does it allow the adjudicator to determine his own jurisdiction. It is submitted that, apart from not breaching the principles of natural justice⁶⁸, the decision of the adjudicator will only be enforceable if the adjudicator does not exceed the jurisdiction, i.e., there is a dispute that arises under a construction contract, as defined by the Act.⁶⁹ Thus, the jurisdiction of the adjudicator includes disputes of any magnitude and complexity as long as they arise under a construction contract as defined by the UK Act.

However, the UK Act does not give the adjudicator the power to determine his own jurisdiction. This has resulted in an increasing number of cases challenging adjudicators' jurisdictions and refusals by

⁶⁴ Section 18(2) of the SG Act.

⁶⁵ Section 18(2) of the SG Act.

⁶⁶ Regulation 10(1) of the BCISP Regulations.

⁶⁷ Section 18(3) of the SG Act.

⁶⁸ *Glencot Development & Design v. Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207.

⁶⁹ *Halki Shipping Corporation v. Sopex Oils Ltd* [1998] 1 WLR 726, *Sindall Ltd v. Solland and Others* (15 June 2001), *Beck Peppiatt Ltd v. Norwest Holst Construction Ltd* [2003] BLR 316 and *Orange EBS Ltd v. ABB Ltd* [2003] BLR 323.

the courts to enforce decisions due to a lack of jurisdiction. This could defeat the UK Act's policy objectives of expediting payment and improving cash flow. To avoid this, the Technology and Construction Solicitors Association (TeCSA) has included in its Adjudication Rules a provision giving adjudicators the power to determine their own jurisdiction. It is believed that the number of cases concerning adjudicators' jurisdiction brought before the courts would decrease significantly and the policy objectives of the Act would be met. However, such a change would require the industry to be confident about extending adjudicators' powers. Before that can happen, any industry concerns about the quality of adjudicators must be addressed. Accordingly, the current training for adjudicators should be reviewed.

The NSW Act outlines the jurisdictions of the adjudicator to determine the amount of progress payment, the due date for payment, the rate of interest on the unpaid portion of the progress payment and the apportionment of adjudication fees⁷⁰. These are similarly outlined in the SG Act.⁷¹ The jurisdictions of the adjudicators in NSW and SG are thus considerably narrower than those in the UK. This is understandable since the scope of the application of NSW and SG's adjudication regime is confined to disputes relating to progress payments. The NZ Act gives adjudicators much broader powers than the NSW and SG Acts. Adjudicators in NZ have the ability to determine the liability of any party of a construction contract regarding payments, whether they be progress or other payments. They also have the ability to question disputes about the rights and obligations of the parties under the contract.⁷² Furthermore, the NZ Act provides that an adjudicator's jurisdiction can extend to other matters as long as there is written agreement of the parties involved.⁷³ The NZ Act also permits adjudicators to consolidate two or more pending adjudications into one adjudication with the written consent of all the parties involved.⁷⁴

7. Enforcement mechanism

Legislators wishing to establish security of payment legislation must also decide what remedies should be included in the event of non-compliance regarding payment terms and adjudication decisions by respondents. These remedies are needed to ensure that the overriding objective of the legislation, which is to expedite payment and improve cash flow, is not compromised.

7.1 Suspension of work or supply

Pursuant to the payers' or respondents' non-conformance with the payment terms, all the statutes give payees or claimants the statutory right to suspend their obligations under the contract. The security of payment legislation has fundamentally altered the common law position with regard to suspension of performance. A payee or claimant is vested with express power to suspend the work or supply depending on jurisdictions if payment terms have been breached by the payer or respondent. To

⁷⁰ Section 22(1) of the NSW Act.

⁷¹ Section 17(2) of the SG Act.

⁷² Sections 38, 48, 49(1)(c) and 50(1)(c) of the NZ Act.

⁷³ Section 38(2) of the NZ Act.

⁷⁴ Section 40 of the NZ Act.

safeguard the payer or claimant's interests with respect to unwarranted suspension of construction work or supply of goods or services, a number of safety measures have been put in place by legislators. For example in the UK, such a right can only be exercised when a sum due under the contract is not paid in full by the final date of payment⁷⁵, when a withholding notice has not been issued by the payer⁷⁶ and when an effective notice of intention to suspend performance has been issued by the payee.⁷⁷ With respect to the NSW and NZ Acts, a claimant or payee may only invoke the right of suspension by issuing a notice of intention to suspend performance⁷⁸ if one of the conditions provided by the legislation is met. These conditions are as follows:

- a) If no payment schedule is issued, failure on the part of the payer or respondent to pay the claimed amount either in whole or in part when payment is due⁷⁹;
- b) If a payment schedule is issued, failure on the part of the payer or respondent to pay the scheduled amount either in whole or in part when payment is due⁸⁰; or
- c) Failure on the part of the payer or respondent to pay the adjudicated amount⁸¹.

The SG Act, on the other hand, only gives the suspension right to the claimant/payee during the post-adjudication period.⁸² If no payment is made by the payer or respondent by the prescribed period⁸³ after a notice of intention has been issued, which varies from one jurisdiction to another, a payee or claimant may suspend the work or supply of services⁸⁴ or goods.⁸⁵

The UK, NSW, NZ and SG Acts unanimously exclude the period of lawful suspension from the calculation of the completion period.⁸⁶ However, these statutes differ with respect to the recovery of loss and expenses incurred pursuant to the suspension of work or supplies. The UK Act is silent on this matter and consequently the recovery of losses and expenses following suspension is contingent on the terms of the contract. On the other hand, the NSW and SG Acts provides monetary relief to cover losses and expenses arising from the suspension.⁸⁷ The NZ Act provides an express provision prohibiting the payee who has suspended the work to claim any costs incurred as a consequence of the suspension.⁸⁸ The NSW, NZ and SG Acts further provide an express provision relieving the claimant

⁷⁵ Section 112(1) of the UK Act.

⁷⁶ *Ibid.*

⁷⁷ Section 112(2) of the UK Act.

⁷⁸ Sections 15(2)(b) and 16(2)(b) of the NSW Act and Section 72(1)(b) of the NZ Act.

⁷⁹ Sections 15(1)(a) and (b) of the NSW Act and Section 72(1)(a)(i) of the NZ Act.

⁸⁰ Sections 16(1)(a) – (d) of the NSW Act and Section 72(1)(a)(ii) of the NZ Act.

⁸¹ Section 24(1)(b) of the NSW Act and Section 59(2)(b) of the NZ Act.

⁸² Section 23(1)(b) of the SG Act.

⁸³ Seven days after the issue of notice of intention to suspend performance under the UK Act, two business days after the issue of notice of intention to suspend performance under the NSW Act, five working days after the issue of notice of intention to suspend performance under the NZ Act and seven days after the issue of notice of intention to suspend performance under the SG Act.

⁸⁴ Only in the UK and New South Wales, Australia.

⁸⁵ Only in New South Wales, Australia.

⁸⁶ Section 112(4) of the UK Act, Section of the NSW Act, Section 72(2)(c) of the NZ Act and Section 26(7) of the SG Act.

⁸⁷ Section 27(2A) of the NSW Act and Section 26(3) of the SG Act.

⁸⁸ Section 72(2)(c) of the NZ Act.

or the payee who invoked the right of suspension from claims of loss and damage by the respondent or payer and any third party.⁸⁹ No corresponding provision is provided under the UK Act. The mechanism allowing loss or additional expenditures incurred by the payee or claimant during the period of suspension to be recovered from the payer or respondent as provided under the NSW and SG statutes seems preferable. This mechanism affords statutory protection to the payee or claimant who incurs loss and expense as a consequence of the suspension. This allows certain recovery of losses or expenses by the payee or claimant, as such a recovery is not made contingent on the terms of the contract.

7.2 Statutory debt enforced through court judgment

Unique to the NSW, NZ and SG Acts is an express provision allowing a claimant or payee to recover the unpaid amount from the respondent or payer, whether it be a progress payment⁹⁰ or adjudicated amount⁹¹ as a statutory debt that may be recovered in a court of competent jurisdiction. The right to sue for the unpaid amount as a debt due to the payee or claimant in the UK, albeit in the absence of any explicit provision in the UK Act, exists under common law. However, if certainty and clarity are the objectives of legislators hoping to introduce security of payment legislation, the approach taken by NSW, NZ and SG legislators to include an express provision allowing payment debt to be recovered as statutory debt is preferable.

7.3 Lien

A lien is the right to take and hold or sell the property of a debtor as security for a debt until payment is made. This mechanism is used extensively in the US and Canada and is known as a mechanic's lien. Under the NSW legislation, apart from seeking a summary judgement in the event where the unpaid portion becomes a statutory debt, the claimant is given the right to place a lien on unpaid and unfixed goods he supplied.⁹² Goods are defined in this jurisdiction as including not only materials and components to form part of the work but also as 'plants or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work'.⁹³ A claimant's right to place a lien on goods in the event the respondent has breached the payment terms is thus far unique to the NSW regime. It provides an alternative remedy, apart from suspension of work and adjudication, which may be commercially practical in certain situations. However, the right of lien vested by the NSW statute is limited and does not extend to a third party who is an owner of the unfixed plant or equipment.⁹⁴ The right of lien may be exercised by the claimant on the due date stated in the contract (if there is no stipulation in the contract, the right of lien may be exercised ten business days after a payment claim is made)⁹⁵. The SG Act also provides a provision for a right of lien, but such a right

⁸⁹ Section 27(30) of the NSW Act and Section 72(2)(b) of the NZ Act.

⁹⁰ Sections 15(2)(a)(i) and 16(2)(a)(i) of the NSW Acts and Section 24(2)(a) of the NZ Act.

⁹¹ Section 25(1) of the NSW Act, Section 73(3) of the NZ Act and Section 23(2) of the SG Act.

⁹² Section 11(3) of the NSW Act.

⁹³ Section 6(1)(a)(ii) of the NSW Act.

⁹⁴ Section 11(5) of the NSW Act.

⁹⁵ Section 11(1)(b) of the NSW Act.

may only be exercised in a situation where a respondent has failed to pay the adjudicated amount.⁹⁶ The procedures for exercising the right of lien on goods supplied which are unfixed and unpaid for are similar to those in the NSW Act. This is understandable since the SG Act is largely modelled on the NSW Act.

7.4 Charging order

The NZ Act provides a novel remedy to the right to issue a charging order⁹⁷ over a construction site, which is an alien concept in other jurisdictions. ‘Charging order’ refers to placing a charge on the debtor’s property.⁹⁸ The NZ Act is the only legislation considered for this case study that confers such an additional right on the claimant in the event of the respondent’s failure to pay the adjudicated amount. The fact that the NZ Act permits a claimant to include an owner of the land in the adjudication opens the possibility for the claimant to apply for a charging order. The claimant may serve the owner a notice of adjudication if he seeks a determination of owner’s liability and approval for the charging order.⁹⁹ However, the involvement of the owner in the adjudication proceeding between the claimant and the respondent is only permitted if it can be proved that the respondent is an owner’s associate, as defined by the Act. The definitions of ‘associate’ are many and include spouse, child, parent, partner and trustees of the respondent and a person or company who owns 20% of the controlling interest in the respondent company.

If it is determined that the owner is jointly and severally liable with his associate’s respondent to pay the claimant, the adjudicator must approve the issuing of a charging order over a construction site.¹⁰⁰ The charging order will then be immediately issued by the Registrar of the District Court upon entry of judgment against the owner.¹⁰¹ The owner, however, is allowed to apply to the District Court to review the adjudicator’s determination.¹⁰² Notwithstanding the fact that this right can only be exercised in limited situations (for example, the respondent must be an associate of the owner), the effect of this clause should not be underestimated. If this right is lawfully invoked, it could force the owner to either pay the respondent’s debt directly to the claimant to avoid the site being subject to sale as a result of the charge or it could compels the respondent to pay the debt.

7.5 Direct payment from the principal

Unique to the SG Act is the existence of a provision allowing the principal of the respondent to directly pay the claimant any outstanding adjudicated amount¹⁰³. Invoking this provision is up to the discretion of the principal and may be done in order to protect the principal’s interests. This right is invoked by issuing notice that direct payment shall be made by the principal to the claimant, a copy of

⁹⁶ Section 25 of the SG Act.

⁹⁷ Sections 49 and 50 of the NZ Act.

⁹⁸ [Uher, T. E., & Brand, M. C.], *op. cit.*, p. 767.

⁹⁹ Section 28(1)(b) of the NZ Act.

¹⁰⁰ Sections 50(1),(2) of the NZ Act.

¹⁰¹ Section 76 of the NZ Act.

¹⁰² Section 52 of the NZ Act.

¹⁰³ Section 24 of the SG Act.

which is sent to the respondent.¹⁰⁴ The respondent is afforded two days after the receipt of such notice to present evidence that payment has in fact already been made, failing which the principal is entitled to pay the claimant directly.¹⁰⁵ Such a direct payment constitutes a reduction of the payment to the respondent that the principal owes or may in future owe to the respondent in connection with relevant construction work or the supply of goods and services.¹⁰⁶ Alternatively, it may be recovered by the principal as a debt owed by the respondent.¹⁰⁷ This unique right, which is currently not found in other security of payment legislation, may provide an alternative route by which a claimant may recover the adjudicated amount. It might be desirable to invoke this right, although it is purely discretionary on the part of the principal, in situations where the smooth running of the construction project is the principal's main concern.

8. Conclusion

This paper has reported the findings from initial literature review and legal research methods conducted for the purposes of examining the profiles of the security of payment regimes in the United Kingdom, New South Wales in Australia, New Zealand and Singapore. This exercise has highlighted what are the available leading models that may be adopted in a particular jurisdiction. Difficulties concerning the operation of these regimes have also been presented. Other legislators should give a great deal of attention to these and consider them when drafting their own legislation. From this study it was discovered that there are two types of regime that are currently in place which are adjudication independent of payment and adjudication related to payment. The ambit of the regimes is different, covering certain types of contract and excluding some others. For example the UK Act excludes supply of goods contracts from its constituency whereas the NSW and SG Acts include them. The scope and application of payment and adjudication machineries are essentially different from one jurisdiction to another. For example the UK Act imposes a non-prescriptive payment mechanism whereas the NSW, NZ and SG Acts provide a prescriptive payment mechanism. Similarly, enforcement options are also dissimilar. For example the UK Act only provides a right to suspend the work or supply (apart from the right to refer a dispute to adjudication) in the event of non-conformance of payment terms. The NSW Act and NZ Acts, on the other hand, on top of those two rights, afford a right to lien and a right to charging order respectively. However, notwithstanding their differences all these regimes fundamentally have similar objectives i.e. to facilitate payment and improve cash flow within the construction industry. The New Zealand and Singapore Acts being enacted later, have arguably improved some of the questionable features of the UK and NSW Acts. Furthermore, the Singapore Act has included some distinctive features that are unique to its construction industry. The provision of requiring the parties to attempt to resolve their dispute within the dispute settlement period is currently non-existence in the rest of the jurisdictions. Legislators in other jurisdictions contemplating to introduce similar legislation can benefit from the rich and recent precedents set in these regimes.

¹⁰⁴ Section 24(2)(a) of the SG Act.

¹⁰⁵ Sections 24(2)(b),(c) of the SG Act.

¹⁰⁶ Section 24(4)(a) of the SG Act.

¹⁰⁷ Section 24(4)(b) of the SG Act.

References

- Constable, A. (2006). Construction Industry Payment and Adjudication Legislation: The Choice That Lies Ahead for Malaysia. *International Construction Law Review* , 78-88.
- Dancaster, C., & Riches, J. (2004). *Construction Adjudication*. London: Blackwell Publishing.
- Teo, P. J. (2008). Adjudication: Singapore Perspective. *Journal of Professional Issues in Engineering Education and Practice* , 134 (2), 224-230.
- Uher, T. E., & Brand, M. C. (2007). A Comparative Analysis of the Operation of 'Compulsory Rapid Adjudication' in New South Wales and New Zealand. *Construction Management and Economics* , 25 (7), 765-775, p. 766.
- Kennedy-Grant, T. (2008). Adjudication: The New Zealand Position. *Construction Law Journal* , 24 (5), 382-409.

Appendix 'A' – Comparative Analysis of the Operation of the Security of Payment Regimes in the United Kingdom, New South Wales in Australia, New Zealand and Singapore

Item	UK Act	NSW Act	NZ Act	SG Act
Scope of Application of Security of Payment Legislation				
1. Adjudication independent of payment	√		√	
2. Adjudication related to payment		√		√
Ambit of Security of Payment Legislation				
<u>Definitions of Construction Contracts</u>				
1. Contracts for construction operations/work	√	√	√	√
2. Contracts for the supply of services	√	√		√
i. Contracts for supply of labour	√	√		√
ii. Contracts for supply of professional consulting services	√	√		√
a) Contracts for architectural, engineering and surveying services	√	√		√
b) Contracts for project management services (management contracts included)	√			√
c) Contracts for specialist advisory services	√	√		√
3. Contracts for supply of goods		√		√
i. Contracts for supply of goods between the contractor and the supplier		√		√
ii. Contracts for supply of goods with the developer and the supplier				√
4. Excluded contracts				
i. Residential occupier contracts	√	√		√
a) Contracts under which one party intends to occupy or reside	√	√		
b) Contracts that do not require the approval of Building Authority				√
c) Residential occupier contracts included (only right to adjudication available)			√	
ii. Private Finance Initiative (PFI), finance and development agreements	√	√	√	√
a) PFI/PPP agreements	√	√		
b) Finance agreements	√	√	√	√
c) Development agreements	√			
iii. Employment contracts	√	√	√	√

iv. Construction contracts outside jurisdiction	√	√	√	√
<u>Definitions of Construction Operations</u>				
1. Building operations/work	√	√	√	√
2. Civil and infrastructure engineering operations/work	√	√	√	√
3. Operations forming part of the works	√	√	√	√
4. Cleaning, painting and decorating	√	√	√	√
5. Excluded construction operations				
i. Extraction of oil and natural gas	√	√	√	
ii. Extraction of mineral	√	√	√	
iii. Process plant exception clause	√			
a) Plant and machinery	√			
b) Structural steelwork that provides access and support to the plant	√			

Appendix 'A' – Comparative Analysis of the Operation of the Security of Payment Regimes in the United Kingdom, New South Wales in Australia, New Zealand and Singapore (Cont'd)

Item	UK Act	NSW Act	NZ Act	SG Act
Ambit of Security of Payment Legislation (Cont'd)				
<u>Definitions of contracts in writing</u>				
1. Contracts that are in writing or evidenced in writing	√			√
2. Contracts that are oral and in writing		√	√	
Payment: Scope and Application				
<u>Payment mechanism</u>				
1. Prescriptive payment mechanism		√	√	√
2. Non-prescriptive payment mechanism	√			
<u>Prohibition of conditional payment mechanism</u>				
1. Pay when paid clauses	√	√	√	√
2. Pay if paid clauses		√	√	√
3. Other innovative conditional payment mechanisms (e.g. pay when certified clauses)			√	
Adjudication: Scope and Application				
<u>Dispute Type</u>				
1. All types	√		√	
2. Progress payments related		√		√
<u>Nomination of the adjudicator</u>				
1. Agreement between parties	√		√	
2. Nominating Body/Authority chosen by agreement between parties	√		√	
3. Any Adjudication Nominating Bodies/Authorities	√	√	√	√
<u>Duties of the adjudicator</u>				
1. Act independently, impartially and in a timely manner	√	√	√	√
2. Avoid incurring unnecessary expenses	√	√	√	√

3. Comply with the principles of natural justice	√	√	√
4. Disclose any conflict of interest to the parties in adjudication		√	
5. Resign from the adjudication proceeding if a conflict of interest is present		√	

Powers of the adjudicator

1. Open up, revise, review and revise any decision made or certificate	√		√	
2. Award interest	√	√	√	√
3. Request the parties to supply the necessary documents	√	√	√	√
4. Decide on the choice of language for adjudication	√		√	
5. Meet and question the parties and their representatives	√	√	√	√
6. Carry out site visits and inspections	√	√	√	√
7. Carry out tests or experiments	√		√	
8. Appoint expert witnesses and advisors	√		√	
9. Issue directions concerning the timetable of adjudication and deadlines	√	√	√	√
10. Issue directions relating to the conduct of the adjudication	√		√	√
11. Award the cost of adjudication		√	√	√

Appendix ‘A’ – Comparative Analysis of the Operation of the Security of Payment Regimes in the United Kingdom, New South Wales in Australia, New Zealand and Singapore (Cont’d)

Item	UK Act	NSW Act	NZ Act	SG Act
Adjudication: Scope and Application (Cont’d)				
<u>Powers of the adjudicator (Cont’d)</u>				
12. Conduct the adjudication in a manner seen fit			√	√
13. Correct the decisions		√	√	√
14. Approve the charging			√	
<u>Determination of the adjudicator’s jurisdiction</u>				
1. Allowed				
2. Not allowed				
<u>Consolidation of one or two pending adjudications into one adjudication</u>				
1. Allowed			√	
2. Not allowed	√	√		√
<u>Dispute settlement period prior to adjudication</u>				
1. Provided				√
2. Not provided	√	√	√	
<u>Review of decision</u>				
1. Provided				√
2. Not provided	√	√	√	
Enforcement Options				
<u>Suspension of work or supply</u>				
1. Loss and expense non-claimable	√			
2. Loss and expense claimable		√	√	√
<u>Statutory Debt Enforced Through Court Judgment</u>				
1. Express provision		√	√	√
2. No express provision	√			

<u>Lien</u>				
1. Provided		√		√
2. Not provided	√		√	
<u>Charging order</u>				
1. Provided			√	
2. Not provided	√	√		√
<u>Direct payment from the principal</u>				
1. Provided				√
2. Not provided	√	√	√	
