

# Vietnam legal corridor for protection of payment to contractor

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## Abstract:

According to the General Statistic Office of Vietnam, the construction industry has continued to grow relatively in 2020 with a value-add of 6.76% despite of impact of the COVID-19 pandemic. The Vietnam construction market incorporates almost small and medium enterprises and has had lots of payment disputes related to lawsuit. This study aims not only to examine the definition of payment to contractor in investment construction operations but also to outline existed legal corridor promulgated to secure the contractor's payment. Using the systematic analyzing method of previous researches, some types of Vietnam legal documents and other countries to determine what the payment to contractor is and how it is safeguarded by legal corridor in Vietnam. As a result, under Vietnam legal documents, although the regulations on protection of payment to contractor have been mentioned, they are not enough legal deterrence to restrict the payment terms and conditions breaches in the construction contract.

**Keywords:** Payment; payment risk; protection; principal; contractor.

## 1. Introduction

In Vietnam, payment has been included in project implementation, which is the most important stage among 3 steps of construction investment and has belonged to payment terms and conditions in the construction contract (CC) [1][2]. Payment is the principal cost and seems to be the contractor's main income. In case of occurring payment terms and conditions breaches, the contractor is affected heavily in paying fixed costs, including employees, suppliers, labors, and it resulted in low productivity, delayed delivery, credibility reduction, business opportunity loss [3].

During the performance of a CC, the consequence of non-payment on time, partial payment, or even non-payment, which impact negatively business efficiency of various parties in the contract, becomes more and more common in Vietnam [4]–[6]. According to the Vietnam Mediation center's statistic at the conference "Efficient dispute resolution for EPC contract disputes (Unclog the stagnation in projects of significance in Vietnam)" in 2019, there were 5

commercial meditations involving construction dispute with a total dispute value at 934.5 billion VND (approximately 40,3 million dollars) [7] and many disputes in construction related to three previous mentioned cases. To prove these statements, the case of the CC dispute between Tai Loc Company and Corporation 36 is cited as an example [8], and recently there is a dramatic dispute in construction between FLC Group and Hoa Binh Construction Group [9], and many others.

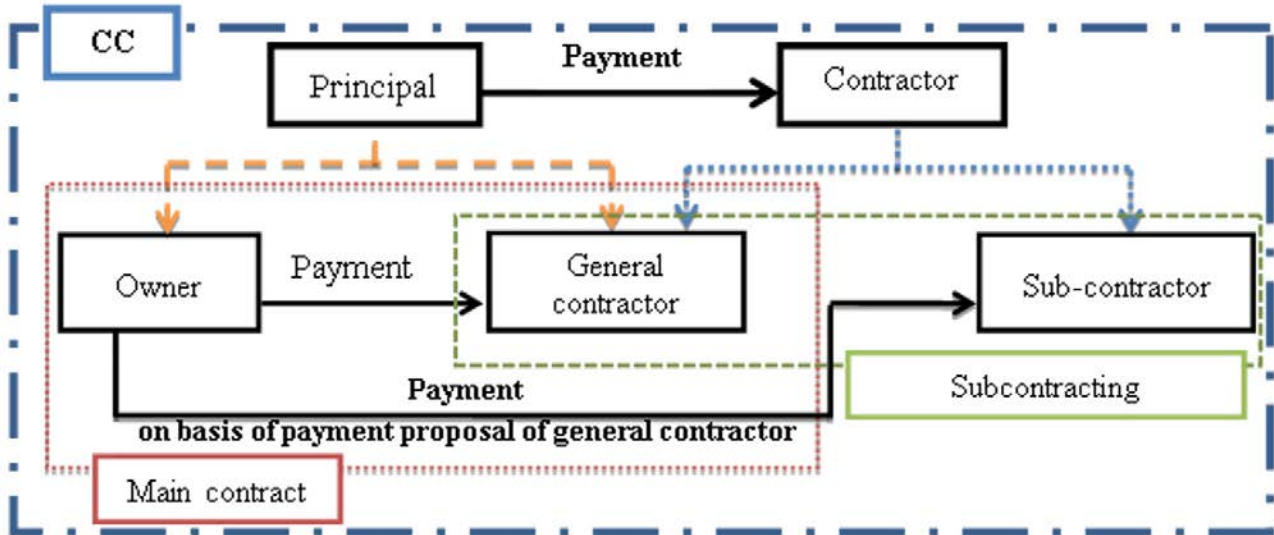
Therefore, the Vietnamese Government has created a sufficient and favorable legal corridor in accordance with the existing conditions in construction to secure contractor payment and promote economic development.

## 2. Payment to contractor awareness

Based on Vietnam Decree No. 37/2015/ND-CP detailed regulations on construction contract [10]–[11], a CC has been defined as a civil contract established in the form of a written agreement between a principal and a contractor for execution of a part or all of the works in

construction investment activities. By this time, the principal is either an owner/his representative or a general contractor; and the contractor is a general contractor in case of the principal is an owner or is a sub-contractor if the principal is a general contractor. Thus, the payment to

contractor can be understood as an amount of money, which the principal should pay to contractor indicated under terms and conditions of the contractual agreement and illustrated by the below figure.



**Figure 1.** The payment structure in the construction contract.

According to figure 1, it can be seen that whether a construction contract is a main contract or a subcontracting, the contractor will be paid for completed works by the owner unless the parties have had other arrangements. It could help the sub-contractor avoid payment risks made by a general contractor. A refusing to pay the performed works makes the contractor face up to the payment risk [12], as a result, it directly impacts on the slow progress of work which affecting the overall progress of the whole project, inferior project quality, project cost rising and indirectly on their corporation financial statement. Leading to Vietnam legal system should concern about documents, which contain the Points, Clauses, or Articles for security the payment to contractor and should be amended and supplemented regularly.

### 3. Vietnam legal corridor for security of contractor's payment

From now on, the highest legal documents, related to the payment protection to the contractor, are Construction Law No. 50 and Law No. 62/2020/QH14 Amending and

Supplementing some articles of the Construction Law No. 50. Under Construction law, there are some other existing legal documents, such as: Decree No. 37/2015/ND-CP detailed regulations on construction contract and Decree No. 50/2021/ND-CP Amending and Supplementing some articles of Decree No. 37/2015/ND-CP, Decree No. 10/2021 on the management of construction investment costs [13], Decree No. 139/2017/ND-CP on penalties for administrative violations against regulations on investment and construction; extraction, processing, and trading of minerals used in construction, production and trading of building materials; management of infrastructural constructions; real estate business, housing development, management and operation of apartment buildings and office buildings [14] and Decree No. 21/2020/ND-CP Amending and supplementing some articles of Decree No. 139/2017/ND-CP [15], Circular No. 01/2015/TT-BKHDT detailing the preparation of requests for expression of interest, bidding documents, dossiers of requirements for consultancy service [16][17], and others.

During the time of contract performance, the contractor has the right to request the principal payment for the value of completed volumes under terms and conditions of the contractual agreement and the owner obligates to pay to general contractor, or directly to the sub-contractor if existing a subcontracting agreement and on the basis of payment proposal of the general contractor unless the parties have had other arrangements (Point c of Clause 1 of Article 113 and Point đ of Clause 2 Article 112 of Construction law No. 50/2014/QH13, Clause 3 of Article 47 of Decree No. 37/2015/ND-CP, Clause 3 of Article 9 of Circular No. 09/2016/TT-BXD [18]). These promulgated rights and obligations have ensured both general construction contractor and construction subcontractors are paid on time for the works they carry out under contractual agreement. The value for each installment, which is subtracted a payment in advance and warranty cost as agreed upon in the contract, will be paid to contractor, unless parties have had other arrangements (Article 144 of Construction law No. 50/2014/QH13 and Clause 3 of Article 19 of Decree No. 37/2015/ND-CP).

For preventing the payment risk to the contractor, some articles have indicated in legal documents in detail:

Firstly, according to Point d of Clause 1 of Article 7 of Bidding Law No. 43/2013-QH13 [19][20], the owner is not allowed to issue the bidding documents without allocated capital resources and even the principal is not permitted to sign a CC without assurance of adequate funds for payment under terms and conditions of the contractual agreement before signing the CC, except urgent construction works (Point b of Clause 2 of Article 138 of Construction Law No. 50/2014/QH13, Clause 2 of Article 17 of Decree No. 37/ND-CP). That is the reason why the definition of payment guarantee has been mentioned in Clause 1 of Article 17 of Decree No. 37/ND-CP and construed as proof of the principal's capability to execute his payment

obligations or guarantee of obligatory repayment by the other party to the contractor under terms and conditions of the contractual agreement, for instance: approved capital allocation plan, bank or credit institution guarantee, credit agreement or loan agreement with the financial institution. In addition, the promulgation of guarantee provisions being mentioned from Article 338 to 343 of Civil Code No. 91/2015-QH13 [21][22] helps protect the contractor's payment upon construction contract.

Secondly, for protecting the payment to contractor, the principal has been forbidden from partial payment or non-payment on time to the contractor according to terms and conditions of the contractual agreement (Clause 11, Article 19, Decree No. 37/NĐ-CP). Moreover, according to Clause 3, Article 34, Decree No. 10/2021/NĐ-CP, the agency paying the investment capitals and the owner have also prohibited from setting illegal regulations on construction investment capital payment. Additionally, the payment timing is within 14 working days since the date, which the principal had received a complete and valid payment request dossier under terms and conditions of the contractual agreement and it is specified as follows (Clause 10 of Article 19 of Decree No. 37/NĐ-CP):

a) Within a 7 working day period since receiving a complete and valid payment request dossier being prepared by the contractor, the principal must complete procedures and give the payment proposal to either the bank or the state treasury serving payment;

b) Within a 7 working day period since receiving a complete and valid payment proposal dossier being prepared by the principal, the bank or the state treasury serving payment must transfer the full value of each installment to the contractor;

c) The payment timing of a CC in projects, which use ODA capital and loan capital from foreign credit institutions, is performed under terms and conditions of the contractual

agreement being written on the basis of the international treaties as well as the payment processing in accordance with legal provisions.

Thirdly, the principal must indemnify the contractor when having the contractor's compensation request for damage in case of the principal's non-payment on time and partial payment under terms and conditions of the contractual agreement (Point k of Clause 2 of Article 112 and Point đ of Clause 1 of Article 113 of Construction Law No. 50/2014/QH13, Point d of Clause 4 of Article 146 of Construction Law No. 50/2014/QH13, Point c of Clause 1 of Article 28 of Decree No. 37/2015/NĐ-CP). The principal has paid up late payment interests corresponding to late payment periods at interest rates being announced by the bank, where the contractor has created the payment account and late payment interests are accumulated since payment expiration until being paid (Clause 2 of Article 43 of Decree No. 37/2015/ND-CP and Clause 2 of Article 6 of Chapter VI of Part 5 of Circular No. 01/2015/TT-BKHDT).

Fourthly, according to Point c of Clause 2 of Article 18 of Decree No. 139/2017/ND-CP, a fine ranging from 80 million VND to 100 million VND imposed on entities that violate terms and conditions of the contractual agreement on payment times, payment period, point of payment, payment expiration unless the parties have had other arrangements.

Finally, the contractor rights to suspend his CC performance and to extend the period of contractual performance in case of occurring payment terms and conditions breaches, such as within 28 days after payment expiration, the principal has not fully paid the contractor, or there is no payment guarantee on upcoming volumes unless parties have had other arrangements (Point b of Clause 1 of Article 145 of Construction Law No. 50/2014/QH13 and Point b of Clause 2 of Article 40 of Decree No. 37/2015/NĐ-CP, respectively). In addition, the contractor has a right to terminate a CC if the

principal still does not pay the contractor within 56 following days since receiving a complete and valid payment request dossier unless the parties have had other arrangements (Point b, Clause 1, and Point c of Clause 3 of Article 145 of Construction law No. 50/2014/QH13 and Point c, Clause 8, Article 41 Decree No. 37/2015/NĐ-CP).

Furthermore, upon Article 44 of Decree No. 37/2015/NĐ-CP, within 56 following days after the payment expiration, if the principal still breaches the payment terms and conditions, the contractor immediately sends a written complaint form about these breakings to the principal and requests for his payment obligation and within 28 days since receiving the contractor's complaints, the principal must respond to contractor's complaints. Over this period, the principal is defaulted to approve the contractor's complaints without any comments. When disputes have arisen, contractual parties will negotiate for disputes settlement by themselves and their disputes will be settled through mediation, commercial arbitration, or court under legal regulations without agreement (Point 8, Clause 8, Article 146 of Construction law No. 50/2014/QH13). Payment disputes are being resolved by mediation and within 28 days since receiving the mediation settlement, the contractor will notify the tribunal if he opposes this resolution and these disputes will then be carried out based on the procedure of either the commercial arbitration or the court (Article 45 of Decree No. 37/2015/NĐ-CP).

#### **4. Conclusions and recommendations**

Based on the above information, Vietnam legal corridor for the security of contractor's payment seems to be nearly complete but a late payment or a reduced payment, or a no payment at all is going on and the causes of those existences might be an owner's insolvency, a deficiency of thorough and detailed preparation for both contract draft and negotiation before signing a construction contract, non-identifying payment

risk indicators during contract performance, and a lack of solutions to the potential for payment risk. The absence of the control mechanisms for checking the existence of capital resources, which have been mentioned in the approved capital allocation plan would lead to the financial capability that the contractor will be paid untimely or partially if the project appraisal is approved. The implementation of many projects at the same time may cause the owner to get financial risks and to lose his solvency because of price escalation of materials, labor, equipment, etc. Besides, a fine ranging for violations on the terms and conditions of a contract is not enough threat to prevent the principal from his breakdown of contractual agreement. All the legal regulations have been followed by parties of a contract if they have realistic sanctions to make parties obey the terms and conditions in the construction contract. In New Hampshire, if contractors and suppliers do not get paid on performed works, they can file a mechanics lien to secure payment [23]. The New Hampshire mechanic's lien law set forth by statute in RSA Chapter 447 is a legal tool that provides the unpaid party with a security interest in someone's property. To qualify for a mechanics lien, the contractor must have performed work for or provided materials in the amount of 15 dollars pursuant to a direct contractual relationship with the owner, the general contractor, or a first-tier subcontractor of the general contractor within the last 120 days for which contractor has not been paid in full. Hence, the Viet Nam government should consider similar regulations on the security for payment to a contractor.

With the payment guarantee, the beneficiary (the contractor) still has not been paid a certain amount of money by the guarantor (bank) or others in case the guaranteed (the principal fails to perform any payment obligations) because of its shortcoming. The guarantor invokes unreasonable and unclear terms and conditions, which have been intentionally set in the payment

guarantee, to refuse adequately his guarantee obligation and put the beneficiary at risk [24]–[26]. Unfortunately, the common short of the legal department in Vietnam contractor's corporate structure has caused him too much trouble for drafting and/or negotiating of contract or contract terms and conditions, which provide critical security for contractor's payment while most contractors have never read the terms and conditions before signing the construction contract [27]–[32].

The contractor cannot avoid any payment risk without a thorough preparation of what issues happens in writing a draft and which skills adapt to negotiate, the contractor should structure a legal department properly to meet the needs of his business, especially, on the payment protection purposes.

## References

- [1] Quốc hội; “Luật xây dựng số 50/2014/QH13”. Hà Nội: Quốc hội khóa 13; ban hành ngày 18 tháng 06 năm 2014; có hiệu lực từ ngày 01 tháng 01 năm 2015.
- [2] Quốc hội; “Luật số 62/2020/QH14 Luật sửa đổi, bổ sung một số điều của Luật xây dựng”. Hà Nội: Quốc hội khóa 14; ban hành ngày 17 tháng 06 năm 2020; có hiệu lực từ ngày 01 tháng 01 năm 2021.
- [3] R. D. Ciotti, S. M. Pasakarnis; “Managing the risk of non-payment: Resource for residential contractors”. *Legal Matters*. 2011; Summer:32-33.
- [4] D. Hien; “Khi nhà thầu không quen đòi bồi thường”. *Tạp chí điện tử Tài chính*. 2013. Available: <https://tapchitaichinh.vn/nghien-cuu-trao-doi/trao-doi-binh-luan/khi-nha-thau-khong-quen-doi-boi-thuong-65007.html>; truy cập ngày 08 tháng 07 năm 2021.
- [5] S. Tra; “Tháo gỡ vướng mắc trong thanh toán nợ đọng xây dựng cơ bản (Tiếp theo và hết)”. *Báo Nhân dân*. 2017. Available: <https://nhandan.vn/tin-tuc-kinh-te/thao-go-vuong-mac-trong-thanh-toan-no-dong-xay-dung-co-ban-tiep-theo-va-het-299832>; truy cập ngày 08 tháng 07 năm 2021.

- [6] S. Tra; “Tháo gỡ vướng mắc trong thanh toán nợ đọng xây dựng cơ bản (Kỳ 1)”. Báo Nhân dân. 2017. Available: <https://nhandan.vn/nhandinh/thao-go-vuong-mac-trong-thanh-toan-no-dong-xay-dung-co-ban-ky-1-299748>; truy cập ngày 08 tháng 07 năm 2021.
- [7] C. V. Bac; “Dispute resolution for epc contract by commercial arbitration and some recommendations on use of mediation”, in Proc. Efficient dispute resolution for EPC contract disputes (Unclog the stagnation in projects of significance in Vietnam); 19 April 2019; Ho Chi Minh, Vietnam. Available: <https://www.adr.com.vn/vi/tin-tuc/giai-quyet-hieu-qua-tranh-chap-trong-cac-hop-dong-tong-thau-epc-khoi-thong-tac-nghen-tai-cac-du-an-trong-diem-cua-viet-nam-tp-hcm-1942019>. Accessed on: July 8, 2021.
- [8] PV; “Vụ ‘Tranh chấp hợp đồng xây dựng’ giữa Công ty Tài Lộc và Tổng Công ty 36: Những chứng cứ chưa được Tòa sơ thẩm xem xét, đánh giá khách quan”. Tạp chí điện tử Luật sư Việt Nam. 2020. Available: <https://lsvn.vn/vu-tranh-chap-hop-dong-xay-dung-giua-cong-ty-tai-loc-va-a-tong-cong-ty-36-nhung-chung-cu-chua-duoc-toa-so-tham-xem-xet-danh-gia-khach-quan.html>; truy cập ngày 08 tháng 07 năm 2021.
- [9] PV; “Cuộc tranh chấp kịch tính giữa Hòa Bình và FLC: FLC đã trả 20 tỷ đồng”. Báo Dân trí. 2021. Available: <https://dantri.com.vn/kinh-doanh/cuoc-tranh-chap-kich-tinh-giua-hoa-binh-va-flc-flc-da-tra-20-ty-dong-20210603091237700.htm>; truy cập ngày 08 tháng 07 năm 2021.
- [10] Chính phủ; “Nghị định số 37/2015/NĐ-CP Quy định chi tiết về hợp đồng xây dựng”. Hà Nội: Chính phủ; ban hành ngày 22 tháng 04 năm 2015; có hiệu lực từ ngày 15 tháng 6 năm 2015.
- [11] Chính phủ; “Nghị định số 50/2021/NĐ-CP sửa đổi, bổ sung một số điều của Nghị định số 37/2015/NĐ-CP ngày 22 tháng 4 năm 2015 của Chính Phủ quy định chi tiết về hợp đồng xây dựng”. Hà Nội: Chính phủ. ban hành ngày 01 tháng 4 năm 2021; có hiệu lực từ ngày 01 tháng 4 năm 2021.
- [12] W. Hu, J. Chen, Z. Ren, G. Wang; “Identification and control of payment risks in international construction projects”, in Proc. I CIB W112 International Conference on Multinational Construction Projects: Securing high performance through cultural awareness and dispute avoidance; 21 - 23 November 2008; Shanghai, China. Rotterdam, Netherlands: International Council for Research and Innovation in Building and Construction; 2008. pp.1-10.
- [13] Chính phủ; “Nghị định số 10/2021/NĐ-CP về quản lý chi phí đầu tư xây dựng”. Hà Nội: Chính phủ; ban hành ngày 09 tháng 02 năm 2021; có hiệu lực từ ngày 09 tháng 02 năm 2021.
- [14] Chính phủ; “Nghị định số 139/2017/NĐ-CP quy định xử phạt vi phạm hành chính trong hoạt động đầu tư xây dựng; khai thác, chế biến, kinh doanh khoáng sản làm vật liệu xây dựng, sản xuất, kinh doanh vật liệu xây dựng; quản lý công trình hạ tầng”. Hà Nội: Chính phủ; ngày ban hành 27 tháng 11 năm 2017; có hiệu lực từ ngày 15 tháng 01 năm 2018.
- [15] Chính phủ; “Nghị định số 21/2020/NĐ-CP sửa đổi, bổ sung một số điều của nghị định số 139/2017/NĐ-CP ngày 27 tháng 11 năm 2017 của chính phủ quy định xử phạt vi phạm hành chính trong hoạt động đầu tư xây dựng; khai thác, chế biến, kinh doanh khoáng sản làm vật liệu xây dựng, sản xuất, kinh doanh vật liệu xây dựng; quản lý công trình hạ tầng kỹ thuật; kinh doanh bất động sản, phát triển nhà ở, quản lý sử dụng nhà và công sở”. Hà Nội: Chính phủ; ban hành ngày 17 tháng 02 năm 2020; có hiệu lực từ ngày 01 tháng 4 năm 2020.
- [16] Bộ Kế hoạch và đầu tư; “Thông tư số 01/2015/TT-BKHĐT quy định chi tiết lập Hồ sơ mời thầu quan tâm, Hồ sơ mời thầu, Hồ sơ yêu cầu dịch vụ tư vấn”. Hà Nội: Bộ Kế hoạch và đầu tư; ban hành ngày 14 tháng 02 năm 2015; có hiệu lực từ ngày ngày 15 tháng 4 năm 2015.
- [17] N. N. Trung; “Requirements on payment to contractor and subcontractor from laws and regulations of both Civil Law and Common Law jurisdictions and propose changes to Vietnam Construction Law and regulations. Proceedings”, in Proc. Protection of payment to contractors/subcontractor: Vietnamese practices and international experiences; 06 June 2020; Ho Chi Minh, Vietnam. 2020; pp. 1-25.

- [18] Bộ Xây dựng; “Thông tư số 09/2016/TT-BXD hướng dẫn hợp đồng thi công xây dựng công trình”. Hà Nội: Bộ Xây dựng; ban hành ngày 10 tháng 03 năm 2016; có hiệu lực từ ngày 01 tháng 05 năm 2016.
- [19] Quốc hội; “Luật đấu thầu số 43/2013-QH13”. Hà Nội: Quốc hội khóa 13; ban hành ngày 26 tháng 11 năm 2013; có hiệu lực từ ngày 01 tháng 7 năm 2014.
- [20] Chính phủ; “Nghị định số 63/2014/NĐ-CP quy định chi tiết thi hành một số điều của Luật đấu thầu về lựa chọn nhà thầu”. Hà Nội: Chính phủ; ban hành ngày 26 tháng 06 năm 2014; có hiệu lực từ ngày 15 tháng 8 năm 2014.
- [21] Quốc hội; “Bộ luật dân sự số 91/2015/QH13”. Hà Nội: Quốc hội khóa 13; ban hành ngày 24 tháng 11 năm 2015; có hiệu lực từ ngày 01 tháng 01 năm 2017.
- [22] Ngân hàng Nhà nước Việt Nam; “Thông tư số 07/2015/TT-NHNN quy định về bảo lãnh ngân hàng”; ban hành ngày 25 tháng 06 năm 2015; có hiệu lực từ ngày 09 tháng 08 năm 2015.
- [23] C. E. Schaub; “Doing Business North Of The Border”. Legal Corner. 2011; No. June: 25–49.
- [24] M. Son; “Doanh nghiệp cần biết tránh ‘bẫy’ khi ký bảo lãnh với ngân hàng”. Tạp chí điện tử Tài chính. 2015; Available: <https://tapchitaichinh.vn/tai-chinh-kinh-doanh/tai-chinh-doanh-nghiep/doanh-nghiep-can-biet-tranh-bay-khi-ky-bao-lanh-voi-ngan-hang-94676.html>; truy cập ngày 08 tháng 07 năm 2021.
- [25] T. M. Hai; “Bảo lãnh ngân hàng: Giấy tờ có giá hay vô giá? (Kỳ 1)”. Tạp chí điện tử Tài chính. 2012. Available: <https://tapchitaichinh.vn/tai-chinh-phap-luat/phap-luat-kinh-doanh/bao-lanh-ngan-hang-giay-to-co-gia-hay-vo-gia-ky-1-30750.html>; truy cập ngày 08 tháng 07 năm 2021.
- [26] T. M. Hai; “Bảo lãnh ngân hàng: đừng để vàng thau lẫn lộn”. Báo Đầu tư. 2012. Available: <https://tinnhanhchungkhoan.vn/bao-lanh-ngan-hang-dung-de-vang-thau-lan-lon-post20604.html>; truy cập ngày 08 tháng 07 năm 2021.
- [27] M. Elshout, M. Elsen, J. Leenheer, M. Loos, J. Luzak; “Study on Consumer's Attitudes Towards Terms Conditions Final Report”. Report for the European commission, consumers, health, agriculture and food executive agency on behalf of directorate-general for justice and consumers. Brussels: European Commission. 2016. Available: <https://ssrn.com/abstract=2847546>; accessed July 08, 2021.
- [28] C. Chomsky, M. Landsman; “Introducing negotiation and drafting into the contracts classroom”. Saint Louis University Law Journal. 2000, 44(4):1545-1560.
- [29] D. Molloy; “Building contracts”. Build. 2008; Build 108:25-26.
- [30] B. McKenzie; “Asia pacific construction contract management - A primer on avoiding or managing disputes in construction projects in Asia Pacific”. 2020. Available: [https://www.bakermckenzie.com/-/media/files/insight/guides/2020/ap-construction-contract-management-primer-2020\\_nov26.pdf](https://www.bakermckenzie.com/-/media/files/insight/guides/2020/ap-construction-contract-management-primer-2020_nov26.pdf). Accessed on July 08, 2021.
- [31] R. Paciaroni; “Attributes of a good construction contract”. The Voice. 2013; Summer:39-40.
- [32] V.T.T. Dương; “Đảm bảo thanh toán cho nhà thầu Phòng bệnh hơn chữa bệnh”. Tạp chí Tri thức Phú Yên. 2021; 05:21-22. Available: <http://lienhiephoihuyen.com.vn/ban-in-tap-chi-tri-thuc-phu-yen/2872-BAN-TIN-TRI-THUC-PHU-YEN-SO-5.html>. truy cập ngày 08 tháng 07 năm 2021.

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