



## **A QUALITATIVE STUDY ON THE DOCTRINE OF PRIVACY TO CIRCUMVENT ITS EFFECT ON SUBCONTRACTOR'S PAYMENT CLAIM**

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### **Abstract**

In common law jurisdictions, the doctrine of privity has been criticised by the judiciary and academic commentators, particularly the second rule of doctrine, which states that a person who is not a party to the contract cannot sue on it to obtain promised performance, although the contract has been formed with the intention to benefit him. In certain circumstances, this rule may produce unfair and injustice result to the third party of a contract, as it prohibits the third party from enforcing the right to get benefits conferred on them. The doctrine of privity becomes relevant in the context of tendering procedures when subcontractors, who are not direct parties to the main construction contract, are involved. Hence, the aim of this paper is two-fold: to highlight the difficulties of the existing legal mechanism associated with privity rule and to suggest possible ways to circumvent the effect of the doctrine of privity on subcontractors' payment claims in the Malaysian construction industry. By adopting the socio legal research approach, the impact of the doctrine of privity, the difficulties of the existing legal mechanisms, and the need for a possible law reform were examined. The findings were also validated by conducting semi-structured interviews with five construction law experts. Among others, the findings showed that enhancement to the existing legal mechanisms and statutory intervention can effectively circumvent the privity rule and protect the subcontractor's right for the payment claim.

**Keyword:** construction contract, doctrine of privity, subcontractor's payment claim, law of contract, legal mechanism

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## INTRODUCTION

The doctrine of privity has been recognised as one of the most fundamental parts of contract law in the Malaysian construction industry. This doctrine stipulates that a third party who is not a party in a contract cannot be conferred any benefit, right, or obligation under a contract (Poole, 2006). The doctrine of privity consists of two general rules. The first rule is the third party who is not a party to a contract cannot be held liable or subjected to any responsibility. This first rule is completely uncontroversial. The focal point of this research was the second rule of the doctrine of privity, which states that a third party is unable to enforce a contract to gain the promised performance, even though the contract was made to benefit them (McKendrick, 2000). The privity rule is derived from the English private law, as demonstrated in the classic case of *Tweddle v Atkinson* (1861) ER 369. In this case, the plaintiff failed to act against the defendant, as he was a third party to the contract, which in consideration of the contract did not allow the stranger to take advantage of the contract, even though the contracting parties have intended to benefit the plaintiff.

In most construction projects, the third party involved in a construction contract is the subcontractor (Jimmie & Andrew, 1994; Haron & Arazmi, 2020). The main contractor is usually liable for the payment of the subcontractor under the subcontract, but the subcontractor would have to face serious problems in the event of the main contractor going into liquidation. Liquidation is also referred to as winding up, an inability of the company to pay its debt or becoming insolvent, which can lead to the dissolution of a company (Goode, 1990). In the case of the main contractor's liquidation, the subcontractor will become an unsecured creditor that has no priority to be paid based on the *pari passu* principle (Ng, 2006). Therefore, the subcontractor will generally try to claim the payment directly from the client. At this point, the subcontractor is unable to sue the client to obtain payment because of the absence of a contract between the client and the subcontractor, even though the client has accepted the work and goods provided. Consequently, critical issues would arise from the doctrine of privity against subcontractors.

The injustice and inconvenience resulting from an established application of the privity rule have led to the arising of arguments. According to Lord Diplock in *Swain v Law Society* [1983] 1 AC 598, privity rule is considered "an anachronistic shortcoming that has for many years been regarded as a reproach to English private law". Hence, several common law countries, which include England, Canada, and Australia have enacted legislations to reform the privity rule and protect third party rights under contract law. The legislation of Contracts (Rights of Third Parties) Act 1999 by the Parliament of the United Kingdom was implemented in England, Northern Ireland, and Wales as the most notable statutory exception to privity rule. It allows the third party to enforce the rights under a contract, if the contractual parties in the contract did not perform

their obligation. In Malaysia's legal system, the privity rule is strongly embedded without a necessary legal reform despite the difficulties it has created, which can be proven by several law cases.

For instance, the cases of *University of Malaya v FBSM Ctech Sdn Bhd* [2018] 5 MLJ 397 and *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 have clearly stated that harsh and unanticipated impacts have been caused by the application of the privity rule to the subcontractors, who were the third party in these construction contracts. It was held by these courts that the subcontractors were unable to sue the clients to gain the promised performance, especially payment of the completed work, since there were no direct contractual links between them. The payment of a subcontractor is the responsibility of the main contractor because of the existence of a subcontract between them. The privity rule disallows the subcontractor from claiming the unpaid payment of works done directly to the client, if the main contractor goes into liquidation. Hence, it is an injustice to subcontractors to suffer economic loss when they have fulfilled their obligations and the client has received benefits from them.

To resolve the weakness of the privity rule, Malaysian courts have applied several circumventive mechanisms that could overcome the difficulties resulting from this doctrine. These mechanisms include collateral contracts, trust, agency, estoppel, assignment, and tort (Tan, 2009; Rosley et al., 2014). However, the effectiveness of these mechanisms remains a question. This paper presents the analysis findings of this socio-legal research on the application of these mechanisms, and the possibility of introducing a necessary statutory reform to effectively circumvent the effect of privity rule. This would mainly protect the subcontractor against the main contractor's payment default, as well as insolvency. The following section briefly describes the research methodology used in this study.

## **RESEARCH METHODOLOGY**

A doctrinal study is qualitative in nature concerning the development of legal 'doctrines' based on the examination of legal norms (Chynoweth, 2008; M-Suaree et al., 2022). For centuries, the application of a doctrinal legal approach in a study has dominated areas of law. However, those who pioneered the socio-legal research field typically believe that we can only have a more complete picture of the law, if we adopt a more scientific view of it, not only through legal analysis but also via an empirical examination. Socio-legal methods are usually conducted through observations to describe the prominence of the "law in books" and "law in action". These observations can provide better understanding on the law through science and on the environment and society compared to doctrinal or pure legal research (Chynoweth, 2008; Mante, 2021; Mccrudden, 2006).

The impact of the doctrine of privity, the problems of the existing legal mechanisms, and the need for a legal reform were examined, specifically based on the construction industry. Previous judicial decisions were analysed to identify any underlying problems with the existing legal mechanisms. The operation of legislative enactments in other common law jurisdictions were also examined in overcoming the effect of the privity rule. These findings were then validated by conducting semi-structured interviews with five construction law experts. The participants selected for this research are experts in construction law and legal advisory roles in Malaysia. They possess extensive knowledge and specialized expertise in the domain of construction contracts. These individuals are well-versed construction law experts with the ability to offer valuable insights derived from their substantial involvement in Malaysian construction contracts.

## **ANALYSIS OF EXISTING LEGAL MECHANISMS TO CIRCUMVENT DOCTRINE OF PRIVITY**

The following sub-sections present the analysis of existing legal mechanisms, namely, trust, estoppel, collateral contract, and assignment to circumvent the doctrine of privity, as well as the challenges and possible solutions based on the analysis of relevant judicial decisions with specific reference to Malaysian law cases.

### **Trust**

The trust mechanism is one of the most widely used mechanism by Malaysian courts to circumvent the privity rule. The promisee acts as a trustee for a third party when the promisee enters a contract with the promisor (McKendrick, 2009). In the case of the promisor failing to perform their obligations, the third party may be able to recover their loss directly from the promisee. For example, in the case of *Malaysian Australian Finance v The Law Union & Rock Insurance Co Ltd* [1972] 2 MLJ, the appellant who was the owner of the tractor formed a contract with the hirer. The hirer then formed an insurance contract with the respondent, as promised under the contract with the appellant. Therefore, the owner was the third party to the insurance contract. The issue arose when the owner wanted to enforce the insurance contract to claim the loss. The court held that the owner can take legal actions against the respondent under the trust mechanism.

It would also be difficult for a subcontractor to claim payment from a main contractor who becomes insolvent. The common issue is whether, for instance, a claim related to retention monies or performance bonds, can be considered as trust monies. This has been clearly decided in the case of *Masai Tat Sdn Bhd v Sdn Bhd & Anor* [2020] MLJU 803, where the pari passu principle required all unsecured creditors in winding up processes to share equally any available assets of the company in liquidation. Hence, the subcontractor may only

be able to claim the retention sum prior to other general creditors, if the contract formed between the main contractor and the employer has expressly stated that the retention money is held on trust for the subcontractor in the event of the main contractor’s payment default. The requirement to have a clear provision of trust is also illustrated by several case law, as shown in Table 1.

**Table 1:** Summary of selected case law on trust

Case law	Decision of Court	Rationale of judgement
<i>Qimonda Malaysia Sdn Bhd v Sediabena Sdn Bhd &amp; Anor</i> [2012] 3 MLJ 422	The Court of Appeal held that the retention money was held by the employer as trust monies for the contractor’s beneficiaries impliedly.	The existence of the implied term in the construction contract that the retention sum was the trust money held by the main contractor for the benefit of the subcontractor.
<i>Pembinaan Legenda Unggul Sdn Bhd v Geohan Sdn Bhd</i> [2018] MLJU 196	The Court of Appeal denied the fact that the retention sum can be deemed as the trust money.	There was no express term to prove the intention of both parties to create trust.
<i>Pembinaan BLT Sdn Bhd v Portneka Sdn Bhd</i> [2019] MLJU 811	The Court of Appeal denied the fact that the retention sum can be deemed as the trust money.	The failure to emanate retention monies from a contractor can be deemed as debt.
<i>SK M&amp;E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd</i> [2019] MLJU 211	The Federal Court stated that the trust was unable to be implied without the express term.	The Federal Court held that the express contractual term was needed to prove the formation of a valid trust.

### **Estoppel**

Estoppel is an equitable principle articulated by the equity rule resulting from the unwillingness to acknowledge the good faith principle applied in establishing the legitimacy of a contract in common law (Asmadi & Nazir, 2020). It can be applied to prevent unfairness from occurring when the promisor denies the promise made and cause the promisee to suffer loss. Basically, estoppel is a legal principle that can prevent the contracting party from arguing the facts that are inconsistent with the previous statement or action made. In the construction industry, estoppel is invoked depending on the promise made. Generally, the estoppel principle is allowed to be invoked, if the court held that implementing the promise is the only way to avoid causing injustice to the person who made the promise.

One of the requirements that need to be fulfilled to apply the estoppel is the existence of a promise by way of an express term to avoid uncertainty (Lee et al., 2020). The promisee should also provide consideration, since the doctrine of estoppel can only be invoked by a third party, if it can be proven that the promise has been made by the promisor, or the contract has conferred benefit to the third party (Anida, 2013).

However, estoppel is said to be only a shield and not a sword in circumventing the privity rule, since it is deemed as an equity principle (Tan, 2009). In the case of *Combe v Combe* [1951] 2 KB 215, the court held that the estoppel was only allowed to raise a defence, since the consideration of the contract was applicable. The third-party beneficiaries would have been unprotected, if they simply depended on the estoppel principle. In addition, estoppel is usually unavailable against a liquidator, as shown in the following Table 2.

**Table 2:** Summary of selected case law on estoppel

<i>Case law</i>	<i>Decision of Court</i>	<i>Rationale of judgement</i>
<i>Wong Chu Lai v Wong Ho Enterprise Sdn Bhd</i> [2020] MLJU 76	The Court refused to allow the application of estoppel to the liquidator.	The estoppel could not operate against a liquidator, as it will interfere with his statutory power in investigating the debt, assets, and creditors of the company.
<i>Perbadanan Perwira Harta Malaysia v Kuntum Melor Sdn Bhd</i> [2021] MLJU 1593	The decision made in adjudication, which was relying on the estoppel, was set aside by the judicial commissioner.	The adjudicator failed to examine the merits of the appellant's defence and instead relied on the estoppel to ignore it.

### **Collateral Contract**

The collateral contract is formed between the third party and the promisor in conjunction with the main contract entered by the promisor and promisee. The purpose of a collateral contract is to guarantee that the promisor will fulfil the promise in the main contract that is intended to benefit the third party (Tan, 2009). The effect of the doctrine of privity can be circumvented by the collateral contract, as the third party is allowed and entitled to take legal action against the promisor in case of a breach in the collateral contract. The collateral contract exists independently but it is related to the main contract (Seifi & Javad, 2018). The collateral contract should override any inconsistency with the main contract, and it should be amounted to promissory.

It is also important that the intention of the parties to create the collateral contract to be proven and the consideration to be provided by the third party. However, it is tedious and impractical to apply collateral contracts in large and complex construction projects because large numbers of collateral contracts are required by the involvement of many subcontractors and consultants in such projects. Furthermore, a collateral contract may not be a suitable mechanism to circumvent the privity of contract for recovering late or non-payment, if the main contract forms clearly states that there is no privity of contract between the client and the subcontractors, nominated subcontractors or suppliers, e.g., in Clause 62 of PWD203A (Rev.1/2010) and Clause 27.10 of PAM2018 (With/Without Quantities). Table 3 summarises relevant case law on collateral contract.

**Table 3:** Summary of selected case law on collateral contract

<b>Case law</b>	<b>Decision of Court</b>	<b>Rationale of judgement</b>
<i>Bauer Sdn Bhd v Hundred Vision Construction Sdn Bhd &amp; Anor</i> [2020] MLJU 543	The High Court held that there was no independent liability of the employer to pay the subcontractor.	The liability of the employer to pay the subcontractor has been directly precluded by another clause in the collateral contract.
<i>Tan Swee Hoe Co Ltd v Ali Hussain Bros</i> [1980] 2 MLJ 16	The Federal Court held that the collateral contract can be valid.	The existence of the collateral contract has not violated the extrinsic evidence rule, that the oral promise was not incorporated into the primary contract.
<i>KM Quarry Sdn Bhd v Ho Hup Construction Co Bhd</i> [2006] 7 MLJ 203	The High Court held that the employer and the subcontractor were not in privity to each other.	The clause in the subcontract has stated that all the other clauses in the contract were unable to create the privity of contract between the employer and the subcontractor.
<i>Y &amp; Y Property Development Sdn Bhd v City-Lite Letrik Sdn Bhd</i> [2015] 9 MLJ 411	The High Court has dismissed the application of the employer in this case by making a judgement that no arbitration agreement was established between the employer and the subcontractor.	The employer was unable to be deemed as a party to the subcontract by assumption and the subcontract has stated clearly that the subcontract was unable to create a privity of contract between the employer and the subcontractor.

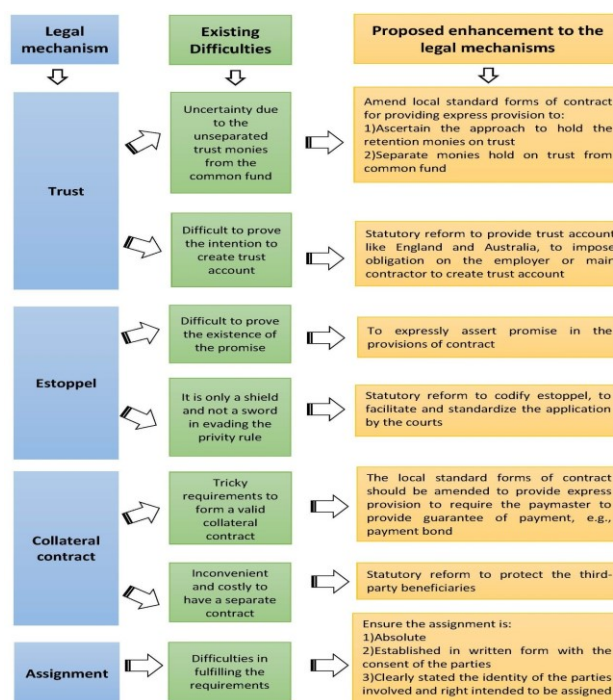
### Assignment

The assignment is generally applied by the contractor to assign the right of the subcontractor to be paid directly by the employer (Reza, Seyyed, & Mansour, 2019). An issue may arise when the employer argues that the assignment does not exist, and he is not liable to pay the subcontractor. The element to establish a valid assignment needs to be fulfilled so that the existence of the assignment can be implied. In this context, the party involved in the assignment and the benefit that must be assigned have to be ascertained. As shown in Table 4, the requirements of the assignment should be absolute and certain, which means that the assignor has the intention to transfer all or part of the right or beneficial interest to the assignee.

**Table 4:** Summary of selected case law for assignment

Case law	Decision of Court	Rationale of judgement
<i>Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd</i> [2015] 1 MLJ 284	The Court of Appeal held that the assignment was unable to be invoked.	The parties involved in the assignment were not clearly stated and there was also an uncertainty in the letter issued.
<i>Seagate Global Trading Sdn Bhd v Pelita Maintenance Resources Sdn Bhd &amp; Ors</i> [2019] MLJU 1002	The High Court made a judgement that the assignments between the parties were valid and absolute.	The deed of assignment exists in a written form with the consent of the second defendant, and all the rights and interest have been assigned absolutely by the first defendant to the plaintiff.

Figure 1 summarises the difficulties in dealing with the existing legal mechanisms and shows the proposed enhancement to the legal mechanisms to circumvent the effect of privity rule.



**Figure 1:** Analysis findings of the existing legal mechanisms to circumvent the effect of privity rule



## **LEGISLATIONS IN OTHER JURISDICTIONS TO CIRCUMVENT PRIVACY RULE**

Criticisms towards the privity rule have led to the legislative enactments in several common law jurisdictions (Tan, 2009). The purpose of legislative enactments is to protect third-party rights and balance the justice within the parties involved in a contract. The following sub-sections briefly present the analysis findings of several legislative enactments in England and Australia, which are regarded as notable jurisdictions in evading the effect of privity rule.

### **Australia (Queensland) - Subcontractors' Charges Act 1974 (SCA 1974)**

This legislation governs the right to secure payment from an employer for subcontractors by placing the onus on the employer to maintain a sufficient amount of money due to the main contractor until the court can make the decision, as stated in Section 11 of SCA 1974. It allows the subcontractor to claim the payment from the employer, if the main contractor defaults in payment or becomes insolvent. This legislation can create a direct legal liability between the employer and the subcontractor who are not in privity to the main contract. The requirements that need to be fulfilled to invoke SCA 1974 are a valid contract between the employer and the main contractor, and the payment claim must be the money yet to be paid by the employer to the main contractor. To claim the payment owed by the main contractor directly from the employer, the subcontractor is required to issue a notice of claim to the employer, and this notice becomes a statutory charge that allows the subcontractor to bypass the insolvency of the main contractor.

### **England - Contracts (Right of Third Parties) Act 1999 (CRTPA 1999)**

This legislation changes the benefit rule by allowing a third party to enforce a statutory right, if the contracting parties fail to perform the contract. Section 1(1) of the CRTPA 1999 provides that a third party right will arise in a contract, if the contract expressly gives the right to a third party. Hence, for a subcontractor to have the right to claim payment directly from the client, the main contract between the client and the contractor must expressly provide the right to the subcontractor to claim directly from the client. However, such a third party right should be provided cautiously with a certain limitation, i.e., if the client has not paid the payment for the work to the main contractor, as to avoid double claim. CRTPA 1999 is not meant to abolish the effect of the privity doctrine but is subject to fulfilling the requirements of the legislation. Thus, the right of the third parties can be protected via statutory power, even though they are not in privity to the contract.

## **PROPOSED STATUTORY REFORM**

The challenges in amending the standard forms of contract and unequal bargaining powers (i.e., the client or the main contractor dictates the use of a modified contract or contracts that are deemed siding to one of the parties) have raised the necessity of having a statutory intervention by way of statutory reform to appropriately circumvent the doctrine of privity. Generally, a statutory reform for the Malaysian legal system can be done via a general legislation or specific legislation. CRTPA 1999 in England is an example of a general legislation that can be introduced to provide a wider scope for protecting third-party rights for most types of contracts. However, this must be done cautiously, and the different types of third-party rights must be identified in the legislation, as to limit the main contracting parties' liability, namely, the client and the main contractor, against a third-party claim, e.g., the subcontractor's right to claim payment directly from the client because of the main contractor's insolvency.

A specific legislation could also address construction contract-related issues, e.g., application of the doctrine of privity and lack of security for payment. The Malaysian CIPAA 2012, for instance, is enacted to regulate the payment practice in the industry. According to Section 30 of CIPAA 2012, if the main contractor fails to pay the subcontractor, the subcontractor may use CIPAA 2012 to claim the payment directly from the employer, if there is money payable to the main contractor. However, this direct payment is only available to the subcontractor, if the parties have triggered adjudication under CIPAA 2012 and the main contractor fails to comply with the adjudicator's decision. Hence, a more rigorous approach is needed to effectively circumvent the effect of privity rule by way of amending the existing legislations, such as CIPAA 2012, to allow for protection of retention monies and the subcontractor's right to claim directly to the client, if the main contractor goes into liquidation. A new specific legislation could also be proposed to regulate all or certain aspects of the construction industry. In this regard, the SCA 1974 enacted in Queensland, Australia is a good example of a specific legislation that was introduced to allow subcontractors to claim payment directly from owners and to help secure the payment owed or due by giving priority of payment to the subcontractors ahead of any unsecured creditors.

An analysis of legislations in other jurisdictions have shown that the circumvention of the privity of contract is not a straightforward process. Unlike CIPAA 2012, which was intended to cover broader parties in regulating non-payment matters, e.g., main contractors, subcontractors, suppliers, and consultants, the present study proposed that any statutory reform for circumventing the privity of contract should properly address the identity of the third party and the type of right to be conferred. Hence, a more specific legislation like the SCA 1974 could be the best option to be adopted by the Malaysian construction industry to protect the subcontractor, especially against the main

contractor’s default in payment and in the event of the main contractor going into liquidation.

### **VALIDATION OF THE FINDINGS**

For validation purposes, these experts were asked to validate the effectiveness of the proposed enhancement of legal mechanisms and statutory reform. The proposed statutory reform was also validated in terms of public interest, certainty, and justice based on their extensive experience and expert knowledge. Based on a study by Wan Azlina (2016), purposive sampling was adopted and 5 respondents have agreed to participate in the interview session to validate the findings. The respondents were approached through an online professional platform, LinkedIn. The respondents were selected based on their working experience, area of expertise, and position in their company, as shown on their LinkedIn profiles. Invitations to connect were sent to the potential experts with a short message. Subsequently, permissions to conduct interview sessions were sent in the chat box after they accepted the invitation to connect. The backgrounds of the respondents are listed in Table 5, while the validation results are provided in the following Table 6.

**Table 5:** Background of respondents

<b>Respondent</b>	R1	R2	R3	R4	R5
<b>Gender</b>	Female	Male	Female	Male	Male
<b>Position in company</b>	Lawyer/Legal Advisor	Lawyer	Lawyer/ Legal Advisor	Legal Counsel	Legal Advisor
<b>Area of expertise</b>	Construction Contract Management	Construction Disputes Resolution	Civil cases	Oil and Gas Industry	Construction Contract Management
<b>Working experience</b>	11 years	18 years	7 years	12 years	30 years

The respondents have shared their experience and opinions, and subsequently, offered some recommendations to overcome the challenges of the existing legal mechanisms to circumvent the effect of privity rule. Their recommendations were consistent with the analysis findings of the existing legal mechanisms to circumvent the doctrine of privity. These construction law experts generally agreed that the statutory mechanism would be necessary to circumvent the effect of privity rule. The feedbacks given by the respondents have shown that the proposed enhancement to the legal mechanisms and statutory reform can provide justice, certainty, and protect public interest.

**Table 6:** Findings of experts' validation

<b>The effectiveness of the legal mechanisms to circumvent the effect of privity rule</b>	
Trust	"...completely agree... that the separation of retention money from the general fund is required." (R1) "Need to write in the contract that the retention sum is held on trust." (R3) "...the court held that the retention sum should be held in a trust account for subcontractor beneficiaries." (R5)
Estoppel	"Yes, estoppel is also very inconvenient...need to state provision of direct payment from client to subcontractor expressly in the contract." (R1) "...can have legislation in relation to this." (R2) "...agree, the judicial decisions should be standardised." (R3)
Collateral contract	"...can enact legislation to force the client to issue guarantee." (R1) "Client wants to limit the liability, so it is hard to use collateral contract widely, unless there is a legislation that can force the client to do so..." (R2) "It would not be less effective than the contract, as long as the guarantee is given, then, it is enforceable." (R4)
Assignment	"...the only way is to fulfil the requirement...need to state who is going to receive the right..." (R2) "...need to specify what rights need to be assigned..." (R4) "...need to draft the deed of assignment in detail and get consent from both parties." (R5)
<b>The effectiveness of the proposed statutory mechanisms</b>	
In terms of public interest	"...can secure subcontractor payment, in the condition that the client did not pay the main contractor for that particular scope of work." (R1) "The subcontractor can be protected under the statutory reform, even if it has not been stated in the contract." (R2)
In terms of justice	"...can be fair because need to prove the consideration from the subcontractor..." (R1) "Legislation is fair to subcontractors; it enhances the existing position of the subcontractors and prevent them from suffering loss..." (R5)
In terms of certainty	"The proposed amendment can provide more clarity between client, main contractor, and subcontractor..." (R1) "Agree, it states the way to describe the third party clearly, whether all third parties include the sub-subcontractor or only the subcontractor..." (R2)

## CONCLUSION

This research significantly contributes to the existing body of knowledge and serves as a valuable reference for future researchers. It achieves this by conducting a comprehensive study that examines the impact of the doctrine of privity within the context of the Malaysian legal system. Additionally, it delves into an analysis of the existing legal mechanisms within Malaysia while also considering legislative enactments in other common law countries. This multifaceted approach enhances the research's potential to inform and guide future studies in this field. The findings of this study have highlighted several possible enhancements to the existing legal mechanisms that could circumvent the effect of privity rule in the Malaysian legal system. The suggested enhancements could overcome the difficulties faced by the legal mechanisms by providing clarity and certainty that are needed to effectively circumvent the

privity rule. It can be done, among others, by allowing a clear contractual provision that specifies the requirements for the retention money to be held in a trust account and explicitly provide the subcontractor with the right to claim direct payment from the client in case of the main contractor's insolvency. However, these suggestions should be approached cautiously without compromising the client's interest and other rights conferred in the main contract.

The doctrine of privity becomes relevant in the context of tendering procedures when subcontractors, who are not direct parties to the main construction contract, are involved. When subcontractors submit bids or proposals during the tendering process, they are typically not in a direct contractual relationship with the owner. Instead, their contractual relationship is usually with the main contractor. Hence, it is important to properly draft tendering and evaluation procedures to ensure compliance with contractual provisions, especially those designed to circumvent the privity rule. An in-depth study is required to identify critical issues related to contractor insolvency and financial problems, and how these issues have seriously affected the subcontractors and the construction industry. Such a study could justify whether a statutory reform to circumvent the effect of privity rule should be introduced and limited to the Malaysian construction industry, by way of legislating or reforming the existing legislation through a specific legislation approach.

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