



SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

Society of Construction Law (Singapore) Annual Construction Law Conference 2016 - “Construction Law in Singapore: A Special Case”

Overview

On 4th August 2016, Darren Benger, Chairman of the Society of Construction Law (Singapore) welcomed the participants to SCL(S) annual construction law conference at Hotel Fort Canning which this year was structured in a format of debate, presentations and panel discussions. This full day conference brought together about one hundred and forty participants - legal practitioners, in-house counsel and other professionals from the construction industry from around the region - to discuss the central theme of specialisation in construction law and other trending construction topics.

Morning Sessions

Ke Note Address b the Honourable Justice Quentin Loh

The keynote address was delivered by the Honourable Justice Quentin Loh, Judge of the Supreme Court of Singapore, who had been tasked to lead the construction legal practitioners’ accreditation initiative at the commencement of the Legal Year 2016 by The Honourable Chief Justice of Singapore Sundaresh Menon.

Justice Loh highlighted the development of young lawyers as an important initiative because their lower level of exposure to construction law in dealing with construction disputes may result in the public’s lack of an informed view of these practitioners’ expertise, and also on time and cost predictability not being the natural order of things in construction where there was a high probability for disputes. Asian countries need infrastructure work in all its forms viz. power, water, drainage, road, rail, ports and airport and such projects are ongoing and will be developed in future too. As a result, the potential for disputes will also be relatively high. In this scenario the need for expert accreditation to improve standards of dispute resolution was undeniable.



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Singapore having a comparatively small pool of lawyers overall and with international law firms having arrived in recent years the need for accreditation becomes significant.

Justice Loh shared that the committee tasked to review accreditation was considering amongst various options, the setting up of a two-tier accreditation scheme managed by the Singapore Academy of Law which would distinguish between junior and senior lawyers, and with a curriculum and courses to be developed by selected organisations including SCL(S).

Session 1: Debating the Motion “Specialist Construction Practitioners –There is a Need for Industr Accreditation”

The session was chaired by Philip Jeyaretnam SC and the debaters comprised of Anneliese Day QC, Adrian Hughes QC, Simon Hughes QC from England and Christopher Nunns (SCL (S) chairman 2010 – 2012 and council member) who engaged in a robust argument of the pros and cons of expert accreditation.

Some of the more notable comments made were that since no method existed to compare practitioners, the motion should be amended to reflect the accreditation of firms and not individuals; that accreditation would simply be an event and ongoing training was more valuable; Scotland had an accreditation model that has led to fewer complaints; and regulation of lawyers was already in place and therefore nothing more was needed.

Several motions were ultimately put to delegates to vote by a show of hands viz. there was a need for industry accreditation – those in favour/against broadly tied; accreditation of firms not individuals – not carried; SCL to drive the international accreditation effort – those in favour/against broadly tied; and the accreditation scheme as proposed – not carried.



Session 2: Presentation and Panel Discussion on “Compliance and Due Diligence in the Construction Industry ”

This session moderated by Anil Changaroth (SCL(S) chairman 2012 – 2014 and its representative on the SCL(International) Liaison Committee) explored via presentations and panel discussion both regulatory and practical questions surrounding compliance and due diligence in the construction industry. Bribery, corruption and money laundering are fast becoming the key compliance issues that face the construction industry in today’s world. Contractors and employers are facing greater scrutiny by regulators over the way business was conducted, in particular, during the securing of contracts.

Maurice Burke, Partner, Hogan Lovells Lee & Lee noted that it was difficult to precisely determine the losses arising from bribery and corruption but the problem continues to grow; regulatory compliance with the various bribery Acts by corporations and individuals was therefore important as the penalties for failure can be severe involving significant fines and/or imprisonment and corporations would be at risk of damage to reputation if they do not comply. The global cost of bribery and corruption in the construction industry was estimated to be in the order of 5% of global GDP, resulting in an increased cost of doing business. Nearly 75% of construction companies suffered from a fraud or corruption incident annually according to reports.

The construction industry was fertile ground for such incidents as construction projects can be large scale, complex, multi- tiered, subcontracted, joint ventures, require numerous licenses and permits, occur over long durations and are often in high-risk jurisdictions. As part of far-reaching steps towards dealing with anti bribery and corruption legislation, a compliance system was required that was subject to regular review and periodic audit.



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David Lawler, Managing Director, Forensic Investigations at Navigant traced the increased sophistication in the bribery and construction arena since the 1970s. In many instances it was no longer the simple case of a direct payment in order to receive an advantage and more complex schemes were now being devised involving payment via third parties or ‘agents’ and offshore companies. Notable ‘red flags’ would be payments for ‘consulting’; unclear undocumented scope of work; round sum payments; and large and regular retainers. Care was required when contracting with third parties and risk based due diligence needs to be utilised with an ongoing monitoring regime.

Afternoon Sessions

Session 3: Panel Discussion on “The Singapore International Commercial Courts and its role in the resolution of Construction Disputes and development of Construction Law”

This session was moderated by SCL council member Mr. Toh Chen Han with 3 speakers on the panel, namely Mr. Francis Xavier SC, Mr. Chan Leng Sun SC and Mr. Thio Shen Yi SC, discussing the January 2015 establishment of the Singapore International Commercial Courts (SICC) as a division of the Supreme Court which was also a further boost to Singapore as an international legal services hub in Southeast Asia.

The discussion also considered the synergy between arbitration through the Singapore International Arbitration Centre and mediation through the Singapore International Mediation Centre, the sort of cases that have been heard by the SICC so far, how proceedings there compared with international arbitration as an alternative as well as the advantages/disadvantages of both.



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Leng Sun discussed the 7 cases that had been commenced before the SICC or been transferred there by the High Court, including a dispute concerning investment funds, an LNG dispute, and cases concerning guarantees and the supply of goods and services, and investment disputes where British Virgin Islands companies were parties. Francis focused on his case that was the first suit before the SICC involving an Indonesian mining venture, which had minimal links to Singapore.

What was of particular interest to the audience was the discussion on the advantages or disadvantages of proceedings in SICC compared to the High Court or in international arbitration proceedings before SIAC. The primary advantages in SICC proceedings discussed were that the rules on evidence were less formal and foreign law could be introduced by submission rather than proving it as a matter of fact by calling an expert witness to opine/testify on the same (such as required in Court generally) and that arbitration awards were much easier to enforce in the New York Convention countries (which numbered over 150 at present) compared to a High Court/ SICC judgment.

Advantages of SICC/Court proceedings over arbitration was in chain contracts or multi-party transactions. In such contracts and transactions where it was easier to add parties by application and not necessarily by obtaining each of their consent, it was likely to result in a multitude of arbitrations arising out of one commercial transaction. Nowadays, with parties agreeing to exclude appeals for SICC cases, the proceedings were becoming aligned with international arbitrations. It was also mooted that the above gives greater latitude to cases before the SICC, compared with international arbitration at SIAC, though some arbitral institutions were moving/have moved towards allowing limited appeals from arbitral awards.



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Session 4 – In House Counsel Panel discussion on “What Keeps You Awake At Night?”

The session was moderated by Mr. Paul Sandosham, Honorary Secretary of SCL(S) and the speakers were in-house counsel from a variety of large corporations, comprising Mr. Cameron Ford, Mr. David Lavery and Mr. William Zhang. Paul listed 5 categories for discussion namely: key issues/challenges; working with business teams; competition and money laundering in construction contracts; managing risks; and dealing with external counsel.

A common thread that resonated with all the speakers was in the forefront of their concerns relating to regulatory and compliance aspects of their roles as well as managing risks including corruption and competition law. Other main concerns were over due diligence issues, data protection and the safeguarding of Internet Protocol rights in their work in the region especially while dealing with third parties such as joint ventures, consortium partners and government/licensing officials.

Insofar as the use of external counsel was concerned, the speakers shared that with sufficiently large internal legal teams most of their work was carried out in-house, with external lawyers engaged only for dispute resolution (commercial and criminal) and these were usually local lawyers they or their organisations know and have dealt with previously. Some of these lawyers may have met them before and had exchanged views and answered quick queries without rendering a bill for such service. These were factors likely to be kept in mind when engaging new counsel.

Concluding Remarks

The format for this annual conference brought a refreshing change to SCL(S) annual conference now in its 11th year. While the Case Law update was missing this year, the SCL(S) annual update in January each year would still cover this topic and notably the interest this year was



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entirely around the central theme of construction practitioners accreditation which kept the participants engaged throughout the conference.

On the matter of accreditation, the following are noteworthy of SCL(S)' involvement:

- (a) continued engagement with SCL(International) (<https://www.sclinternational.org/>) and the impending international meeting in mid-September in São Paulo Brazil during the SCL 6th International Construction Law Conference (<http://scl2016.com/>). On the agenda for the meeting of about twenty-five SCLs from around the world would be the consideration of a uniform SCL international accreditation programme for Construction Industry practitioners; and
- (b) “*Construction Law 101*” programme now in its 7th year and the new 2-year “*Construction Expertise 101*” programme that would have various construction industry experts discussing/sharing topics from their respective professions over two hours each evening, with five professions featured in each year of the programme.

The overview and concluding remarks were made by Anil Changaroth (SCL(S) Chairman 2012-14) of CHANGAROTH CHAMBERS LLC (<http://www.changarothchambers.com/>) with the morning two sessions reviewed by Kevin Attrill, (Director, Global Construction Practice) of Navigant, (<http://www.navigant.com/>) and the afternoon two sessions reviewed by Andre Arul of Arul Chew & Partners <https://www.arulchewlaw.com/andre-arul.html>)