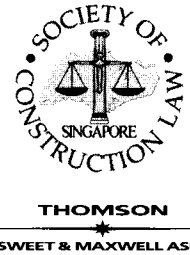


SINGAPORE CONSTRUCTION LAW NEWSLETTER



2005-06 Management Committee

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Newsletter

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CHAIRMAN'S MESSAGE

As I write this message, the final details are being put in place for the Inaugural International Conference of Societies of Construction Law. Michael Hwang and his committee has assembled a truly formidable assembly of experts in this field, both in terms of the depth of expertise as well the diversity of experiences. We expect strong representations from all our affiliated SCLs abroad and, for this reason, we will be looking to our members to support and strengthen our local presence in this event. Among the special features of the conference are the dedicated sessions to the oil and gas industry and issues arising from mega projects. The presentations in these sessions offer a timely snapshot of the current dynamics of these parts of our industry where the roles and interests of parties in project situations do not necessarily fall within the neat silos of owners and producers.

This issue of the newsletter will also mark the last time which I will pen this column as Chairman. The forthcoming Annual General Meeting will see the election of a new Chairman. I have enjoyed very much the term of office over the past two years. It is a period where the Society here basically built on the platform which Philip Jeyeratnam and his team founded four years ago. I have retained very much the same team and I am sure many in the present team will continue to serve the Society. For my part, I consider myself privileged to have worked with Karen Fletcher, Joseph Liow, Naresh Mahtani, Christopher Nunns, Mohan Pillay and Michael Symons, as well as several others which, because of space constraints, does not permit me to name them here. At the personal level, their contributions and commitment have been as unstinting and they are extensive. Members may not be aware that a lot of the work of the Society is carried out from their offices and these offices are frequently also used to support the Society's administrative processes. The Society owes them a considerable debt which I am pleased to record here.

It leaves me to invite readers to look forward to the Society's events in the coming months.

Chow Kok Fong
Chairman, Society of Construction Law

Contributions

We welcome observations and comments from members on matters relevant to the construction industry. If you wish to submit a contribution, please email it to the Chief Editor at a.pillay@pacific.net.sg. The submission deadline for the next issue is **10 February 2007**. Contributions should not exceed 500 words in length. If you would like to submit an article for publication, please contact the Chief Editor to discuss the proposed subject and length of the article.

SCL(S) CALENDER OF EVENTS 2006 — Karen Fletcher

DATE	VENUE	EVENT DETAILS
24 May Wednesday	The Executives' Club, OCBC Centre 6:00pm	How to Avoid & Defend Prosecution for Noise Pollution Joseph Liow & Prof Chew Chye Heng
28 August Monday	The Executives' Club, OCBC Centre 6:00pm	Wine, Cheese & AGM
18 September Monday	Capital Tower FTSE room 6:00	Dispute Boards – for Resolution & Avoidance of Disputes Toshihiko Omoto, Japan National Representative, Dispute Resolution Board Foundation (DRBF)
16 to 17 October	Grand Copthorne Waterfront Hotel	Society of Construction Law International Conference
22 November Wednesday	The Executives' Club, OCBC Centre 6:00pm	Letters of Intent and their Problems Gordon Smith, Goh Phai Cheng

SCL WEBSITE NEWS

Find out more from our Website: www.scl.org.sg <<http://www.scl.org.sg>>

Our new website is updated regularly. Do check the website out for upcoming seminars and activities as well as articles and news concerning the construction industry. There is also a dedicated

segment on our website which provides constant updated information regarding the upcoming SCL International Conference 2006 to be held in Singapore from 15 - 17 October 2006.

— **Brendon Choa, SCL (Singapore) Website Coordinator**

SCL (S) NEW MEMBERS

We are pleased to announce the following new members to our Society which brings our total membership number to 130:

Kang Yin
Khoo Sze Boon
Chan Kok Way
David Haslam
Faye Yeo Sheue Huey
Anil Changaroth

Lui Yen Chow
Loo King Keong
Stephen Rae
Ng Keung
Ho Chien Mien

INVITATION TO JOIN AS MEMBER

If your work is directly or indirectly connected with the construction industry and the law relating to it and you have a serious and active interest in construction law, why not consider being a member of the Society of Construction Law (Singapore).

It is no hassle to join. Just fill up your Application for Membership Form (downloadable from our website: www.scl.org.sg) with your particulars and mail it with your cheque for the Membership Administration Fee and First Subscription Fee (for year 2006) to:

SCL Membership Administration
Karen Fletcher
141 Cecil Street
#05-00 Tung Ann Association Building
Singapore 069541
Tel: 65-6226 4317
Fax: 65-6226 4231

For Full Membership, the Membership Administration Fee is S\$120.00. First Subscription Fee for year 2006 is S\$150.00 if

you join in January 2006 or pro-rated @ S\$12.50 per month if you join after January 2006.

For Full-time Student Membership, the Membership Administration Fee is S\$60.00. First Subscription Fee is S\$72.00 if you join in January 2006 or pro-rated @ S\$6.00 per month if you join after January 2006.

Cheques are to be made payable to the "Society of Construction Law (Singapore)".

You may download our Application for Membership Form from our website: www.scl.org.sg <<http://www.scl.org.sg>> or call SCL Administration to fax or mail our Application for Membership Form to you

THE ROLE OF SPECIALIST TECHNICAL EXPERTS IN DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

The roles of specialist technical experts have been evolving rapidly. Traditionally, they have been oft called upon by parties in disputes to provide opinion (as distinct from factual) evidence to assist courts and tribunals in resolving difficult technical, engineering and quantification issues.

(As stated in section 47, Evidence Act, Cap. 97, expert opinion can be sought on points of "science or art"; *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteela Pacific Holdings Ltd* [2001] SGHC 386, refers to all subjects involving "specialized knowledge and skill").

During the past decade however, technical expertise have been in greater demand in other roles in dispute resolution: for example, as members of committees of inquiries into worksite accidents (with further streamlined procedures in the Workplace Health and Safety Act 2006); as members of Tribunals, assessors and Tribunal-appointed experts; and recently, increasingly so as members of Dispute Boards in projects; as Mediators, Adjudicators, Expert Determinators; and in Early Neutral Evaluations.

Challenges

We are all aware of three main challenges associated with experts' evidence during litigation and arbitration proceedings: (1) adversarial and partisan expert reports with a lay tribunal often having to "choose" or adopt a preferred view (2) opposing experts being unwilling to narrow down specific differences and issues and (3) tribunals having to sieve through multitudes of expert reports. It has become standard practice for experts to provide declarations that they are impartial and independent, and that their duty is to the tribunal (as also provided by rules of procedure, e.g. Rules of Court, Order 40A rule 2). However, the requirements of parties in disputes have put great pressure on experts to assist in advocating cases for their clients and in providing dogmatic viewpoints, rather than alternative views and solutions, as one would prefer from "men of science".

Some recent cases have reminded experts of their duties to the tribunal. In *Choon Hin Stainless Steel Pte Ltd v Siew Kong Glass Makers Pte Ltd* [2005] SGDC 234, the District Court found it difficult to rely on the evidence of an expert who had failed to comply with the procedural requirements in Order 40. In this case, as well as in *Soon Li Heng Civil Engineering v Woon Contractors* [2005] SGHC 34, the courts rejected the evidence of experts who, though well-qualified and experienced, had not inspected the subject matter of their reports but had instead given their evidence purely on the basis of the information given by their respective clients.

Recommendations on more effective use of experts

The ramifications on the parties, to use the words of Lord Woolf, in his 1996 Report on "Access to Justice" (available at <http://www.dca.gov.uk/civil/final/index.htm>) is that: "the full, 'red-blooded' adversarial [system]... is appropriate only if questions of cost and time are put aside."

There has been much discussion at recent international conferences and in dispute journals, as to how experts' opinion evidence, instead of being adversarial in nature in common law jurisdictions, can be made more independent, objective, user-friendly and effective. For example:

(1) Perhaps all tribunals in arbitrations with technical or industry issues ought to have at least one "non-lawyer" technical expert as a member, expert assessor or tribunal-appointed experts, with these procedures being expressly required in the arbitration agreement and institutional rules.

The procedures in relation to tribunal-appointed experts is set out in most institutional rules, for example, Article 20 of the ICC Rules, Rule 24 of the SIAC Rules, as well as in Art. 26 of the Model Law (See International Arbitration Act, Cap 143A).

However, care has to be taken by the Tribunal in its reliance on the knowledge and views of a tribunal-expert or tribunal-appointed expert. The parties have a right to be kept apprised of the views of any expert working within or close to the tribunal, and also to be given reasonable opportunity to comment on such views. The position in the United Kingdom is that (as stated in *Hussman v Al Ameen* [2000] 2 Lloyds Rep 83) consultation with the expert should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment. In Singapore however, the High Court in *Luzon Hydro Corporation v Transfield Philippines* [2004] 4 SLR 705 was inclined not to apply this as a stricture. The High Court respected a "confidentiality" of communications between tribunal-appointed expert and the Tribunal, unless it was clear from the terms of appointment of the expert that all communications oral or written had to be disclosed to the parties. (See exchange of views of Dundas H.R. and Hwang M. (June 2005). Experts – OGEMID discussion, *Transnational Dispute Management*, Vol 2 Issue 3).

Likewise, in adjudications, although an adjudicator is entitled to appoint an expert to assist him, care has to be taken that the parties are notified of this, and that the principles of natural justice are followed — such as the parties being informed on, and having a right to comment on the selection and views of the expert or on the adjudicator's own expert views. (*Try Construction v Eton Town House Group Ltd* [2003] BLR 286; *Balfour Beatty Construction Ltd v Lambeth Borough Council* [2002] EWHC 597)

(2) Meetings of experts: The prevailing current practice is to have meetings of experts (from opposing sides) just several days or weeks before a hearing, after all other procedures and house-keeping are done. However, in order to be truly useful, such meetings ought to be held well in advance of hearing dates, so that the experts are given enough time to narrow their differences if possible, and put up a joint summary of areas of agreement or otherwise.

(3) Witness-conferencing: Adversarial cross-examination, sometimes unfittingly, often tears opinion evidence to disparate pieces, with attempts by parties to put things together again in their final submissions. "Witness-conferencing" ought to be encouraged, and facilitated, in relation to technical issues, as it is more conducive to reviewing experts' opinions in a considered manner. To take a comparative illustration from civil law jurisdictions (such as Germany), the courts instruct and examine the experts, and regulate the extent to which the parties have contact with the experts; and there is an inherent suspicion of strong views from party-appointed experts and partisan cross-examination of experts.

ADR involving greater use of Experts

Dispute Boards ("DBs")

Dispute Boards are being increasingly appointed in large-scale projects, to enable disputes to be nipped in the bud during the duration of the project. It is usual for technical experts to be on DB panels, and for inquisitorial procedures to be used. The DB is kept informed of the progress of the project and visits the site regularly (say monthly or quarterly). Anecdotal evidence (see for example, Gaitskell, R. QC (Nov 2005) "Current Trends in Dispute Resolution", *Journal of Chartered Institute of Arbitrators* 71, 288-299) suggests that most disputes coming before DBs

are resolved quickly by the parties, and very few proceed to arbitration or litigation after the end of the project.

Due to the tremendous cost-savings and the popularity of DBs, it is envisaged that there will be a greater role for technical experts, to work alongside construction and dispute lawyers in large projects worldwide in the coming years.

Expert Determination ("ED")

Similarly, ED procedures will become increasingly popular in construction circles as another method to avoid protracted and expensive legal battles. ED can be provided either in the contract or facilitated ad hoc during negotiations or litigation. There is no overarching regulatory framework for EDs. In Singapore, *Evergreat Construction Co. v Presscrete Engineering* [2005] SGHC 224 held that, in the absence of fraud or corruption, the court had no power to interfere with an expert's decision, as the parties had already agreed to rely on the expertise of an expert for a final and irrevocable decision; and that only a breach of the expert's terms of appointment would suffice to set aside his decision.

Expert Neutral Evaluation ("ENE")

ENE is a process whereby the parties appoint a person or panel to conduct a preliminary assessment of the issues in dispute. The results of ENE opinions, although not enforceable, can be extremely useful, as reality-checks to assist the parties in considering how far they should proceed with their claims and defences. If an ENE does not result in a settlement, it can still help in facilitating more focused negotiation and more focused and limited submission of issues to litigation or arbitration.

"Subject Matter Experts" and "Probability Analysis"

"Probability Analysis" methods assist parties, in their own courtrooms, to determine "settlement ranges" in an objective and

scientific way (rather than the more common subjective, "gut-feel" and "expectation" ways which parties use to make decisions). Items considered in such analyses include, for instance, expected date of award, the possible and probable outcomes, costs, availability of witnesses. There are several such methods (See for example, the formulae and equations illustrated in the articles by Anton van Langemaar, "Establishing Settlement Ranges Using Subject-Matter Experts (SMEs) and Probability Analysis" (Feb 2005), *Journal of Chartered Institute of Arbitrators* 71, No. 1, 64-72) and O'Reilly, M. (Feb 2006) "Commercial Litigation and Arbitration Risk Assessment Techniques", *Journal of Chartered Institute of Arbitrators*, 72, No. 1 2-18).

The Way Forward — Multi-tiered dispute resolution

It is trite knowledge in the industry that we are heading towards an era of multi-tiered dispute resolution. In fact, multi-tiered clauses and arrangements have found favour with the courts, e.g. in *Ashgar v Legal Services Commission* [2004] EWHC 1083. A typical multi-tiered process would be for example: Negotiation – Dispute Board decision – Negotiation – Expert Determination – Negotiation again – Adjudication – Negotiation – Mediation – Negotiation – Arbitration/Litigation – Any appeals provided by law. Of course, the dispute can be resolved and short-circuited at any stage.

A significant feature of multi-tiered approaches, in connection with the subject of this article, is of course the greater involvement of specialist technical experts in construction dispute resolution.

Naresh Mahtani and Dhanya Sarah John

Alban Tay Mahtani & de Silva

(This article is part of a more extensive paper being written by the authors)

IAN DUNCAN WALLACE, QC

It is with great sadness that we announce the passing away of Ian Duncan Wallace QC, on 1 August 2006. Considered the doyen of the English construction bar, Mr Wallace will be best remembered in Singapore for having drafted the SIA Standard Form of Contract.

Mr Wallace was called to the English Bar in 1948 and practiced continuously since 1953 as a specialist in the field of construction law. He was of course well known for editing one of the standard references on construction law, *Hudson on Building and Civil Engineering Contracts*, from 1959 to the 11th edition in 1994. Perhaps lesser known is the fact that Mr Wallace was one of the Honourary Members of this Society.

His is a figure that has loomed large and cast its long shadow over many generations of construction professionals. That is unlikely to change anytime soon.

— Mohan Pillay

Corporate Governance of Listed Companies in Singapore

by Assoc Prof Tan Lay Hong, Tan Chong Huat and Long Hsueh Ching

A book published by Sweet & Maxwell Asia

This book is an essential guide for current and aspiring directors and officers of listed companies and companies intending to list on the Singapore Stock Exchange. It covers a wide range of corporate governance aspects including the current local regime and laws and practices found in the UK Combined Code and the US Sarbanes-Oxley regime. Case studies of recent corporate scandals involving China Aviation Oil, Amtek and BreadTalk, etc are summarised and set out for easy reading. The latest amendments to the Listing Manual which will take effect from 1 September 2006 relating to corporate governance are also discussed.

For more details, please contact Sweet & Maxwell Asia at any of the following:

- 16, Collyer Quay, #22-00, Hitachi Tower, Singapore 049318
- smasg.marketing@thomson.com
- (65) 63330800 (tel)
- (65) 63330900 (fax)

**DISPUTE BOARDS
THEIR ROLE IN THE RESOLUTION AND AVOIDANCE OF DISPUTES
by Professor Toshihiko Omoto**

Monday 18th September, 2006

The Talk – This seminar will discuss what the Dispute Boards are. Dispute Review Board (DRB) is commonly used in the North America. Dispute Adjudication Board (DAB) is mandatory in FIDIC 1999 edition and in the Harmonized Conditions of Contract adopted in 2005 by the World Bank, Multilateral Development Banks and International Funding Institutions. The International Chamber of Commerce (ICC) introduced Combined Dispute Board (CDB) Rules in 2004. The speaker will discuss what the benefits of DB are; what the differences are among different types of DBs; what qualifications are required as a Dispute Board Member; how the DB Member should behave etc. The speaker also discusses the differences between the DAB in the Red Book and the DAB in the Yellow/Silver Book.

The Speaker:-

Professor Toshihiko Omoto, Dr.MSc,BSc, FJSCE, FICE, CEng, FCIARB, AAA Panelist is a civil engineer and has 30 years experience in the construction industry, mostly on international projects. For 25 years he worked with a major Japanese contractor, 15 years of which he was involved in the resolution of engineering and construction disputes. Since 2000 he has operated as an independent consultant. He is currently the Japan Representative of the Dispute Resolution Board Foundation and the former Co-chairman of the Japan Sub-committee of the Chartered Institute of Arbitrators. He is listed in the FIDIC President's List of Approved Adjudicators. In 2006, he became a full time Professor on Conflict Management in Kyoto University. He is also the author of many papers for publications in professional and academic journals.

Venue: The FTSE Room, Capital Tower, 168 Robinson Road
Date/Time: 18 September, 2006. 6:00pm for 6:15pm
Cost: Members free, \$40.00 guests/non-members, including refreshments.

Please return the registration application slip below, together with your cheque, if applicable, made payable to **"Society of Construction Law (Singapore)", 141 Cecil Street, #05-00 Tung Ann Association Building, Singapore 069541 or Fax to 6226 4231**. For enquiries please contact Karen Fletcher or Jessie Quek on tel: 6226 4317
Registration is required by 13 September 2006

REGISTRATION

"DISPUTE BOARDS" : 18th September 2006

Name: _____ My membership number is _____

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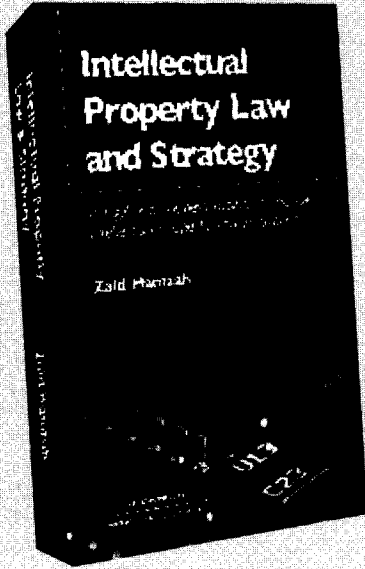
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- I am not a member but would like to attend and enclose payment for \$40.
 Name _____ email _____
 Address _____

I enclose a cheque for SG\$ _____ made payable to **"Society of Construction Law (Singapore)"**

Places are limited and can only be allocated in order of priority upon receipt of registration. We regret that we are unable to issue an invoice and cannot accept payment at the event. Refunds for cancellation are not possible after 13th September 2006. Members registering to attend 'free of charge' are required to give 7 days notice of cancellation.

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INTELLECTUAL PROPERTY Law & Strategy



Intellectual Property Law & Strategy focuses on the development of strategies to harness IP as a value driver. Business leaders as well as policy makers who are able to understand and critically assess the strategic importance of managing this intangible asset will be better able to extract value and create an overall business environment that will stimulate innovation and nurture economic growth.

This book is designed to provide a foundation for IP and innovation management for researchers, businesses and legal professionals. Policy makers would also benefit from this book by having a deeper understanding of how private enterprise leverages on intellectual property as a value driver and understanding the dynamics of developing strategic national intellectual property policies.

Author **ZAID HAMZAH**
ISBN: 981-05-5589-X



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- How to Develop & Implement Legal Strategies in Intellectual Asset Management

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