Society of Construction Law

Construction Law Conference 2016
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Mr Chairman, Distinguished Speakers, ladies and gentlemen, good morning. It gives me, as usual, great pleasure to be here amongst all of you and so many familiar faces; at a gathering such as this. It certainly makes me feel as if I never left the "construction Bar".

But today I have a serious matter to raise. Some of you from abroad may not realise why the measure of specialist accreditation being proposed is necessary. So let me start with some relevant local background.

First, Singapore has always had a fused profession. So we are both solicitors as well as advocates. We spend a good deal of our time with our clients, unlike Barristers, who can in some sense practice a little apart from their clients. We also run partnerships with all that it entails – administration, HR issues, dealing with business and human 'conflicts' of interest, running the financial side of a business, collection of fees and so on. We are seldom sole practitioners with one clerk who runs our lives, collects our fees and generally make our professional lives run smoothly. In short, our ability to concentrate and only do lawyering and honing our skills as an advocate who is in court at least three, if not five, times a week is just not possible.

Secondly, this is also a problem today because our young aspiring lawyers get little "air time" before our judges. They don't get the experience of being on their feet and arguing their cases day-in and day-out. Big and medium practices, especially in heavy construction disputes are fought in teams. This means our young lawyers seldom get to discuss, first hand, with the lead partner on strategy, tactics and forensic issues, but instead interact very much more with the senior associate above them or the 2nd or 3rd chair in the team who is usually a junior partner. They develop rather myopic views of the dispute because it has been carved up into bits and they get assigned some particular bits. They also tend to practice only in one area, they do not get a broad based legal exposure.

Thirdly, because of our small size, a population of some 3.375 million citizens and 3.9 million if you add permanent residents, and a Bar of some 4,986 (as of March 2016), we have to cater for the whole range of legal services required in a city-state. Specialisation, especially confining one's area of practice into one or two areas, is a luxury that only a very few practitioners can achieve. In comparison, the UK, with a population of some 64 million can easily throw up 15,000 to 20,000 able and credible legal professionals of international standing.

However today, we need to be specialists, not only in our area of the law but it is also essential to have a good working knowledge of the industry and its background. We need to keep abreast of not only what is going on in our backyard, but the surrounding region and more and more, keeping up with global trends and practices.

Our world, as Tom Friedman says, has gone flat. We are so interconnected now that what happens in one part of the world has repercussions, sometimes amplified, elsewhere in one form or another. Examples are legion.

Thus a construction lawyer, worth his salt, should know the latest developments in the law and in the construction industry not only in Singapore and Malaysia, but elsewhere. He should know something about what the phrase - "The Architect shall in all matters certify strictly in accordance with the terms of the Contract" - means in Clause 31(13) in the SIA Conditions of Contract, (Lump Sum Contract) (9th Ed., September 2010); he should know the controversy surrounding enforceability of DAB decisions under Clause 20 of the 1999 FIDIC Red Book, and the phrases "binding" on the one hand and "final and binding" on the other; and when someone asks: "Who owns the subcontractor's float?" he should not blankly ask "I beg your pardon?" or worse still: "Float? What float?"

There are too many lawyers who do perhaps one or two construction disputes a year and think it is simply another 'contractual dispute'. Their knowledge of building contracts and their approach to building contract dispute resolution leaves very much to be desired. This cannot continue. Members of the public who go to them can be, and are often, short-changed.

One of the main aims of a Specialist Accreditation Scheme for Construction lawyers is public access. Members of the public are entitled to expect the lawyer they engage to know their construction law and especially construction dispute resolution so that their dispute can be resolved in the most efficient and cost effective way. They are entitled to a lawyer who knows how to guide them in preparation for their hearing in what is usually a document-heavy case and suggest various alternatives available for different aspects of their case. A register of accredited specialists will go a long way to address this need.

What is being studied, and will probably be proposed, is a voluntary scheme. It will not be a mandatory and therefore an exclusionary scheme in that if you do not have that accreditation you will not be entitled to practice is that field. It will not prevent a lawyer, without such accreditation, from conducting a construction case. There is nothing preventing a client, who trusts a particular lawyer he has used before, to continue to use that lawyer in a construction dispute.

A second, and more important, reason for a Specialist Accreditation Scheme for Construction lawyers, is to encourage our young lawyers to increase their level of knowledge, up their skill-sets and expertise. They do so by getting accredited

- which means they first have to attend certain set courses, attain relevant knowledge and master the finer points of construction law. They will also need to show what relevant professional work they have done in the construction disputes or front-end work. To encourage this, there will probably be a two tier accreditation, a lower tier for the younger lawyers and a second tier for the more experienced lawyers.

This is necessary to raise the level of expertise of our young lawyers to 'world class'. They must be able to compete, level-for-level, PQE-for-PQE with like qualified lawyers around the world who are knowledgeable and on top of the game in building and construction law. They must be able to pit and measure themselves against such players, because these foreign lawyers will be, if not already here, in Singapore, whether in arbitrations, international mediations or the SICC.

Whether we like it or not, we are increasingly going to be pitted against lawyers on the international stage. We have to cross swords with battle-hardened warriors with quite a few tricks up their sleeve. Today our senior lawyers already engage them in international arbitrations around the world. We can no longer be frogs in our little well.

The Government of Singapore, the Singapore Academy of Law and the Courts have invested heavily in money and time to develop and promote Singapore as an international dispute resolution hub. They have done so in a co-ordinated and concerted effort to grow the legal pie. The tree has begun to bear fruit. Our SIAC has grown from strength to strength, you know the statistics as well as I do. You know the international accolades and recognition received. The Financial Times of 3 June 2016 ran an article: "Singapore is becoming a world leader in arbitration"; it said Singapore is challenging established centres of arbitration like London, Paris and Stockholm. The International Court of Arbitration of the ICC has named Singapore as the leading arbitration hub for Asia for the 5th year running. It also records that in more than 71 per cent of all new Singapore-seated arbitrations filed in 2015, one or more of the parties was not Singaporean, and in half of these cases, a non-Singapore arbitrator was appointed. [Asian Legal Business, Asia Ed., July 2016].

Although I may be preaching to the converted in this audience, let me nonetheless rehearse some facts and figures in the public domain. Despite the current economic difficulties facing the Singapore economy, according to the BCA forecast [BCA Media Release 15 January 2016], construction contracts worth $27 billion to $34 billion are to be awarded in Singapore in 2016 alone. The BCA forecasts that construction demand will be sustained in the coming years with the average construction demand in Singapore expected to be at $26 billion to $35 billion in 2017 and 2018 and $26 billion to $37 billion in 2019 and 2020.

The OECD has estimated that the global infrastructure financing gap for telecommunications, road, rail, electricity (*ie*, transmission, distribution and generation) and water for Asia, amounts to something like a US$8 trillion bill between 2010 and 2020 to build the needed infrastructure to drive their economic growth.[1] There is a PWC paper: "A Summary of South East Asian Infrastructure Spending; Outlook to 2025" which estimates that the Asian market is slated to represent nearly 60% of global infrastructure spending by 2025. Their country reports infrastructure spending in the billions.[2] For those of you who have travelled the region, just sit back and think of how much infrastructure has to be built into these Asian countries as their populations move up the value chain, grow more urbanised, more sophisticated and clamour for what we take for granted in Singapore – a reliable electricity supply, a reliable and clean water supply, a good sewerage and drainage system, good roads, rail and air transport, telecommunications and internet connectivity, good schools, good housing, good manufacturing bases, and the list goes on.

It is an inevitable truth that all these contracts bring with them disputes. Construction disputes generally have a higher percentage of disputes. I know one large building engineering and construction company that factors in 7% into their tenders, as a matter of course, for dispute resolution. In the recent Singapore Annual Review Conference 2016, Mr Chow Kok Fong gave us statistics from a PWC Report that in a study of 33 projects listed in the USA, only 3 of the projects were completed on time and within budget.[3] In a study of 975 light and heavy industrial projects in the US Engineering News Record of 8 August 2012, only 5.4% of the projects met "best of class" predictability in terms of cost and time schedules.[4] Successful delivery is *not* the natural order of things in the construction industry. This must be music to the ears of dispute resolution lawyers.

The Arcadis Global Construction Disputes Report of 2016 noted that for Asia, the average construction dispute amount remains high, US$85.6 million in 2014 and US$67 million in 2015, (compared to a global average of US$52 million)

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[1] Straits Times, 31 March 2016, http://www.straitstimes.com/opinion/plugging-asias-11-trillion-infrastructure-gap (accessed 30 June 2016)

[2] PricewaterhouseCoopers LLP, "A Summary of South East Asian Infrastructure Spending: Outlook to 2025", 2014, http://www.pwc.com/sg/en/capital-projects-infrastructure/assets/cpi-sea-infrastructure-spend-summary-201405.pdf at p 2.

[3] PricewaterhouseCoopers LLP, "Managing Capital Projects through Controls, Processes, and Procedures: Toward Increased Project Transparency and Accountability", 2014, https://www.pwc.com/us/en/capital-projects-infrastructure/assets/pwc-controls-processes-and-procedures.pdf, at p 4.

[4] Janice L. Tuchman, "CII Sees Room to Improve Industrial Project Performance", Engineering News Record, 8 August 2012, http://www.enr.com/articles/2328-cii-sees-room-to-improve-industrial-project-performance?v=preview.

and it predicts an increase in the number of disputes in 2015.[5] Interestingly, it also states that the average length of disputes for Asia has increased markedly over the past 5 years, from 11.4 months to 19.5 months in 2015.[6] That perhaps underlies one of the ills of arbitration where clients complain that they take far too long to be heard and resolved.

In 2007, the Committee to Develop the Singapore Legal Sector under the chairmanship of V K Rajah, our then Judge of Appeal, delivered a report reviewing the entire legal services sector in the face of international and regional competition. It made recommendations on the future direction of the legal profession and recommended formal accreditation schemes for particular fields of specialisation similar to that in the medical profession.[7] This recommendation was accepted by the Ministry of Law.

Specialist Accreditation was also discussed at the Singapore Academy of Law (SAL) Strategic Retreat in 2010 chaired by Justice Steven Chong. The Final Report recommended that, to raise the bar for small law firms, an accreditation scheme should be implemented. This report states: "Accreditation will serve the dual purpose of acknowledging skilled practitioners within the Bar and assist the public in identifying practitioners whether from the big law firms or small law firms who are equipped to address their legal problems. In the long run, it is envisaged that an accreditation scheme will improve the standard of the Bar in general, including those practising in the small law firms."[8] This report identified six areas of law suitable for accreditation: shipping, insurance, intellectual property and information technology, construction, tax and conveyancing.[9]

It is therefore imperative that we provide education, passing-on of knowledge and skills to make up for our small numbers.

Construction accreditation was not the first scheme contemplated. The SAL Professional Affairs Committee had received a final draft report on accreditation of Insolvency practitioners before June last year. However, further progress was held back because of the pending omnibus Insolvency legislation.

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[5] Arcadis, "Global Construction Disputes Report 2016: Don't Get Left Behind", https://www.arcadis.com/en /united-states/our-perspectives/2016/global-construction-disputes-report-2016don-t-get-left-behind/ at pp 16–17 (accessed 13 June 2016).

[6] Arcadis, "Global Construction Disputes Report 2016: Don't Get Left Behind", https://www.arcadis.com/en /united-states/our-perspectives/2016/global-construction-disputes-report-2016don-t-get-left-behind/ at pp 16–17 (accessed 13 June 2016).

[7] "Report of the Committee to Develop the Singapore Legal Sector", September 2007, at paras 3.29 –3.31.

[8] "The Singapore Academy of Law Strategic Planning Retreat 2010: Final Report of the Main Committee", 16 November 2010, at para 5.

[9] "The Singapore Academy of Law Strategic Planning Retreat 2010: Final Report of the Main Committee", 16 November 2010, at para 81.

Specialist Accreditation is not unique to Singapore. There are specialist accreditation schemes in New South Wales and Queensland in Australia, Canada, Scotland, Florida and Texas in the United States, and similar schemes in Belgium, France, Germany and Switzerland.

Our report is not yet finalised. I can tentatively say the accreditation scheme will be established and run by the Singapore Academy of Law. It has been chosen as a pilot accreditation scheme because it involves a discrete number of lawyers and law firms. They do not comprise an overly large number or percentage of the practising lawyers. It is envisaged that candidates have to attend a specified series of courses and pass an examination for Tier 2 candidates. Their relevant experience and practice in construction law will also be assessed and finally there will be an interview by a panel headed by a Supreme Court Judge.

The curriculum is currently being studied. It will involve courses run under the umbrella of the SAL for a start to establish standards, content and a set curricula. We hope that the SCL will play its part in volunteering some of its senior members to run some of these courses. I know the Council of the Law Society has also offered to pitch in.

I hope the Bar will embrace these proposals. They are necessary for the good of the practitioners in Singapore it will pay dividends much sooner than some think, and especially when the pool of well-trained lawyers step up to the plate and make us proud as a dispute resolution hub for construction law in not only Asia but on the world stage.

I am sorry I am not able to stay and hear what our distinguished colleagues from abroad and delegates have to say about accreditation. I see from the attendees list, end-users and I can only repeat that I wish I could stay and hear their views. But duty calls and I need to start my two-day hearing at 10.00 am today.

It remains for me to wish you all the very best for a great conference. I am sure you will have a very stimulating and thought-provoking conference.

Thank you.