

SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

# SINGAPORE CONSTRUCTION LAW NEWSLETTER

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SWEET & MAXWELL

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## Newsletter

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## CHAIRMAN'S MESSAGE



I hope you are enjoying the new expanded and full colour version of this Newsletter, which was unveiled in the August issue.

### The 2009 SCL AGM

We held our mid term AGM in August. There were no Council elections as this Council's 2-year term expires next year - so you will be looking at electing a new Council at the next AGM in 2010.

The 2009 AGM witnessed some change to the previous format - in addition to annual reports by the Chairman, Treasurer and Secretary, the Chairs of each of our 7 Standing Committees presented individual reports to members. Chris Nunns, our Honourary Secretary facilitated a short discussion with members on the possibility of introducing a new class of Corporate Membership.

The AGM also considered a member's request to review the Society's decision to introduce a charge of \$35 for members to attend our previously free regular SCL evening talks. The focus of the query was whether the SCL annual membership fee of \$150 should be reduced in light of the \$35 charge, and the impact of that charge on our membership growth and attendance at our talks.

I highlighted the following points in explanation, and am pleased to report that the AGM, and the member concerned, understood and accepted the Council's decision to impose the \$35 charge.

1. Our Annual Membership Fee of \$150, which has remained unchanged from when SCL(S) was set up, largely goes to meeting the recurrent expenses of SCL - it does not cover the costs of our regular talks.
2. The Council made the conscious decision to impose affordable members' charges, instead of raising membership fees generally. This allowed members to pay for talks they wish to attend, rather than simply subsidize every talk, whether they attend or not.
3. The member's charge of \$35 compares very favourably with, and is at the lowest end of, the members' fees for evening talks charged by other Singapore professional organizations like the SISV, CI Arb, Law Society and SI Arb.
4. We have organized more than twice as many talks this year (as at the 2009 AGM) compared to the same time last year.
5. There has been no negative impact on membership growth. On the contrary, our membership grew by more than 25% this year from 163 (at the 2008 AGM) to 208 (2009 AGM).
6. Average 2009 attendance at our talks is up 20% from 2008 figures, and by 40% from 2007 figures.

### Annual SCL - Law Society Construction Law Conference 2009

I made a brief mention of this in my last message.

This year's Conference, the 5<sup>th</sup> in the series, saw nearly 130 delegates in attendance. Sir Vivian Ramsey (English High Court Judge and Joint Editor of *Keating on Construction Contracts*) delivered the key note address. The Conference included panel discussions looking at a possible upturn in the industry with speakers from afar as London, Abu Dhabi, Malaysia, Vietnam and China in addition to some leading commentators from Singapore.

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Planning for the Conference began much earlier this year, when we were in the grip of the economic downturn. We however made the conscious decision that the Conference would consider not just the inherent uncertainties brought by the economic crunch, but also look past the gloom and examine how to plan for the recovery.

It is only right that I gratefully acknowledge the tireless work of the organizing committee led by the Karen Fletcher, Vice Chair of the SCL and Chairperson of our Prof Development Committee. She has been working with her Committee of Anil Changaroth, SCL Council Member and Samuel Chacko, from the Law Society, these last few months to put together this Conference.

#### **Year in Overview**

One of the key objectives I announced, as newly elected Chairman at last year's AGM was to broaden the appeal of the Society. I proposed to do this delivering greater value to our members through:

1. regular Social/networking forums;
2. expanding our key professional development programs to include not just talks and seminars, but also training courses and site visits;
3. the publication of a SCL members Directory; and
4. reaching out to the needs and interests of specialist segments of the industry

The Council has made good progress on some of these areas in its first year. In the coming 2<sup>nd</sup> year of its term it will turn its focus to completing its work on the others.

In working towards these goals, the Council established 7 Standing Committees shortly after it was elected last year.

As evident from the AGM reports of the Committee Chairs, the Society has had a busy year of activities. I would like to record my thanks to the support and enthusiasm of the Council, without whom it would have been impossible to make such progress.

I set out below the key highlights of this Council's work in our first year, and our focus as we move into our second year in office.

#### **2009 Initiatives**

Our first year in office has seen a number of "firsts" for the Society as well as some new initiatives which will gather momentum as we go into our second year in office:

- **New Professional Development programs** - Under the energetic Karen Fletcher, Society Vice Chair, and Council member Anil Changaroth, these went beyond talks and seminars to include site visits and a very well received customized 2½ day "Engineering 101 for Non Engineers" training workshop, with council member Audrey Perez as workshop leader.
- **Inaugural Annual Dinner** - The Social and Networking Committee, led by Brendon Choa and Audrey Perez, organized not just the regular networking meets, but rolled out our Inaugural Annual Dinner event on 30 July 2009.
- **Expanded Full Colour SCL Bulletin** □ In August, we launched our expanded 12 page full colour version of the SCL Newsletter, in place of the previous 4 page black and white issue. Credit for this is due to Naresh Mahtani, immediate past Chairman and the current head of the Publication Committee, as well as to Sweet & Maxwell, who supported this change.
- **Member Discounts from Sweet & Maxwell** - SCL members are now entitled to attractive discounts of 10% - 15% on all construction related titles they publish.
- **New SCL Website** - The Website Committee under the guidance of Christopher Vickery and Peter Chow has been busy overseeing a major revamp of our website. Members were given a virtual tour at the AGM. It is designed to offer members ease of access to current and useful updates. The new website promises to be a valuable resource and user friendly tool.

#### **Membership**

By our August AGM, our membership had crossed the 200 mark with 208 members. This represented an increase of more than 25% from the 163 members reported at the 2008 AGM. This increase has been slowly building up over the years. It follows on the back of membership increase of 14% in 2008 and a 10% increase in 2007.

In the 2 months or so since our AGM, our membership has further increased from 208 to 222 members, as at end October 2009, a healthy increase of 32% over our 2008 numbers.

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**Looking Ahead to 2010**

Amongst other initiatives:

- the Membership Committee, is considering an on line Members Directory & will report shortly on the possibility of corporate membership; and
- the Professional Development Committee will, in addition to the very well received weekend training program “Engineering 101 for non-Engineers”, launch an additional training workshop “Construction Law 101 for Non Lawyers” in 2010;
- the External Relations Committee will continue its work in identifying and formalizing reciprocal arrangements and building relationships with industry users, other societies and organizations with mutual interests;
- the Specialist Sectors Committee, having now identified members from across the relevant segments, will aim to organize suitable activities to address the needs and interests of specialist segments of the industry.

Finally, Council member Hardesh Singh stepped down from the Council in September as the demands of his job evolved into his spending a sizeable chunk of each week outside Singapore. On behalf of the Council, I would like to thank Hardesh for coming

forward in 2008 to serve SCL(S), and for his assistance and support of the Society as Council member.

**Concluding Remarks**

I hope the current Council’s 1st year report card has matched your expectations. We are keen to carry through our many programs as we enter our 2nd and final year in office.

The Council looks forward to your continuing support and participation in our ongoing activities and programs. I welcome your feedback and comments on what we have been doing and perhaps as importantly, what we have *not* been doing, or not doing right.

All comments, positive or negative, are welcome. You can email me c/o the SCL Secretariat [secretariat@scl.org.sg].

As we near the end of a tumultuous year with the hope of a truly better year ahead, may I extend the Council’s year end wishes to you and your family for an enjoyable festive season and a happy, peaceful and satisfying New Year.

**Mohan R Pillay**  
**Chairman**

**Post-event Update on SCL AGM 2009**

The AGM on 19th August 2009 was preceded by a talk by Audrey Perez on the subject of “Are Construction Projects Ever Completed”, which was attended by over almost 40 members and guests.

At the AGM which followed immediately after the talk, the annual reports by office bearers were followed by individual reports from the Chairs of each of the Standing Committees which had been established at the beginning of the 2008 - 2010 term to concentrate the efforts of Committee Members into specific roles and responsibilities.

Following the approval of the audited accounts for 2008 & 2009 and the appointment of Honorary Auditors for next year, the

Secretary facilitated a short discussion with members on the possibility of introducing a new class of Corporate Membership. Feedback from members was appreciated.

The AGM concluded with a request by a member, under AOB, for a discussion and review of the Society’s decision to introduce a nominal charge for attendance by members at the regular evening talks. Chairman addressed the query in some detail, as reported in the Minutes of the AGM. The member stated that he was satisfied with the Chairman’s explanation of the charge.

The AGM was followed, in our usual tradition, by wine, cocktails and snacks in gratitude to those members who took the time to attend.



## SCL / Law Society of Singapore - Joint Construction Law Conference 2009 – Tales from the Front Lines!

Now in its 5th year, this year's SCL/LS joint Construction Law Conference was held on 23rd September 2009 at the Grand Park Hotel, City Hall. With the focus of the conference being the economic recovery from the industry's points of view, the morning session addressed "*The Economic Situation – Where We are Now and What Does it Mean*" while the afternoon session dealt with "*Tales from the Front Lines*".

The conference with over 125 participants, kicked off with a brief introduction by Mr Mohan Pillay, Chairman of SCL Singapore, followed by the keynote address by the Honourable Sir Vivian Ramsey, High Court Judge and Head of the Technology and Construction Court, London. Speaking on the topic of "*Construction Claims in Times of Economic Uncertainty*", Sir Ramsey provided a realistic down to earth insight into the position in the UK and elsewhere.

The conference then moved straight into the general theme, with Mr. Y C Chee (an accountant and Senior Partner of RSM Chio Lim LLP and executive director of Stone Forest Corporate Advisory Pte. Ltd.) who spoke on "*Managing the Risks Arising from Suspension/Termination and Insolvency*". Mr. Chee provided a refreshing technical and non-legal approach to insolvency. Mr James Harris (Managing Partner of Lovells Lee & Lee) followed thereafter with "*Protecting the Investment & the Future of Development Finance*", a look at infrastructure financing in some of the major construction projects, managing debt and equity repayment. The morning session concluded with a panel discussion, comprising all the speakers from the morning session and chaired by Mr. Philip Jeyaretnam SC. There was a lively discussion with practical answers to several general concerns.

The afternoon session in two parts started with a "*Regional Legal Outlook*". Chaired by Sir Ramsey, Mr. John Bishop (partner with Pinsent Masons, China), Mr. Ganesh Chandru (senior associate with Rajah & Tann LLP), Mr. Paul Sandosham (partner and head of Middle East practice Abu Dhabi with Wong Partnership) and Mr. Benjamin Yap (partner, Ho Chi Min City with Kelvin Chia Partnership) provided first-hand views of the construction sectors in China, Malaysia, Abu Dhabi and Vietnam. They collectively provided a quick run-down of the historical, current and legal frame work of the construction sectors in those countries/regions.

The last session of the conference returned to leaders of the industry. Entitled "*Insights from Industry*" and chaired by industry veteran Mr. Seah Choo Meng (Director and retired Chairman of Davis Langdon & Seah Singapore Pte Ltd), Mr Jon Skipworth-Button (Director with Gammon), Mr. Jeremy Choy (Project Director, Asia Square, MGPAAsia Developments), Mr. Desmond Hill (Deputy General Manager of Penta-Ocean Construction Co Ltd) and Mr. Deepak Kingsley (General Counsel, Swiber Group) spoke from the view points of major contractors, private equity financing, and the energy sector. They collectively provide deep insight into the concerns of contractors, financing behind major projects, tender pricing, public and private sector projects and what the near future holds.

Mr. Thio Shen Yi SC, Chairman of the Law Society's Continuing Professional Development Committee closed the conference summarising the conference as a multi-disciplinary and jurisdictional exchange of cutting edge views on the current and future state of the industry.

The conference was an overwhelming success, with the industry experts as well as the construction lawyers providing their views on the issues and concerns of the construction industry as it hopefully moves out of the economic downturn.

*Reported by Anil Changaroath*



*Keynote speaker, Sir Vivian Ramsay*



*SCL Chairman, Mohan Pillay*



*Seah Choo Meng, Chairman of 'Insights from Industry' session*





## Construction Claims in Times of Economic Uncertainty – by Sir Vivian Ramsey (An Abridged Version of Keynote Address at SCL—Law Society Joint Construction Law Conference 2009)

### Introduction

The past year has seen difficult times for the worldwide construction industry. The collapse in banking confidence created a deep and sudden loss in business confidence. With the complex multinational dependencies which now make up the global economy the recession that followed has created worldwide problems.

In this paper I consider the cause of the current global crisis and predictions about the future. I review the way in which this has had an impact on the construction industry and the impact of this upon claims within that industry. Then I see how those involved in dispute resolution can help to ensure that the construction industry has efficient and cost-effective methods of dealing with the claims that inevitably follow.

### The current economic crisis

The traditional economic business cycle is plotted as a sine curve with supply and demand driving the cycle and with a relationship to interest rates, money supply, inflation/deflation and the rate of employment. This leads to cycles of recession and economic growth at particular intervals. Recent economic crises have been caused by sudden events: the dot-com crisis, the 9/11 attacks and, now, the sub-prime mortgage crisis. That has meant that instead of a gradual change in economic activity there has been more of a “step change” without a smooth curve transition.

The sub-prime mortgages crisis arose when unwise lending led to collateralised mortgage debt being sold to banks and financial institutions. As the risk of these instruments came to be realised, bank share values dropped and banks no longer had liquidity. Consumer confidence dropped, house prices fell, and investment and consumer spending fell causing recession and rising unemployment which deepened the crisis.

The effect on the construction industry of this situation was immediate. First, the fall in the price of houses means that the housing market collapses. Housing accounts for a significant part of the construction industry and new housing came to a halt. Secondly, the fall in business and consumer confidence means that there is no reason for further investment in projects. New projects are not commenced and existing projects in the course of design or construction are no longer needed and are shelved, moth-balled, suspended or terminated. Thirdly, without liquidity in the financial system, developers and contractors cannot borrow new finance and existing financial arrangements face problems of default and withdrawal of funds.

The solution to such problems has essentially been two-fold: lowering of official interest rates and government intervention. Lower official interest rates are only effective if money can be borrowed commercially at low interest rates. That has not happened.

The solution of public works projects in time of recession has been a long and well tested remedy for recovering from recession. In theory, it allows government to obtain projects at lower cost. However, in the short term it increases government debt which has a long term impact on taxes and government services. It also has an undesirable impact on tendering practices where companies enter the market to profit from the opportunities made available by large government projects.

Already there are signs of the much vaunted “green shoots”. Some people within the industry predicted that it might be 2013 before the construction industry in the UK returns to levels of activity seen in 2007. Much will depend on the media response.

The possibility of “green shoots” is currently a newsworthy story and stock markets are rising. There will inevitably be “ups and downs” but the sudden descent into recession is likely to see a quicker rise out of recession, driven by the need to invest. The housing market which led the collapse is likely to be the first to start to recover.

What then is the impact of the crisis and the solutions to that crisis on the construction industry?

### Impact on the construction industry

The first thing to note about the construction industry is that it covers a wide and diverse range of activities. Besides being diverse in types of construction, the industry is truly global. Engineers and contractors work internationally and raw materials are sourced worldwide.

That means that different parts of the construction industry are affected differently and at different times. The international nature of the industry has two effects. First, the economic impact of the recession within different countries will vary. Secondly, the economy of one country is very often affected not just by the impact of the domestic economy but also by the economic impact on engineers, contractors and raw material suppliers who have work in other countries.

The first and main way in which a recession affects the construction industry is through a lack of cashflow and liquidity which means that parties to construction projects are not paid or are paid late.

One of the main features of construction projects is the relatively long time that the projects take to complete. When there is a gradual change in the business cycle projects decrease with decreasing economic activity and increase with increasing economic activity. In the case of the present economic crisis, the fall into recession was sudden and this had a more immediate and deeper impact on construction projects than would otherwise have been the case.

In order to analyse the effect of this impact on construction claims, it is first necessary to consider the drivers for construction claims and the various heads under which claims are made.

### The drivers of construction claims

Traditionally the drivers for claims in the construction industry have been additional cost arising from additional or changed work. Very often there is related delay or other disruption arising from that additional work or the way in which the work is performed. At the heart of projects is the wish of both parties to complete the work as soon as possible at the lowest cost or price. The client wants the project as soon as it can be completed and the contractor wants to complete one project and move onto the next.

In times of recession, the client may not want the project completed soon and the contractor may not have projects to move onto. Clients seek ways to delay completion and slow down payment and contractors seek ways to delay completion of projects and so keep the workforce occupied but at the same time minimising cost overruns.

In addition some of the traditional heads of claim have to be viewed in a different light. First, the balance of making a claim based on cost compared to price may change. Prices which were set at a time of high economic activity will often be higher

than the cost which a party will have to expend when economic activity drops and costs fall. Rates and prices therefore need to be reviewed with care in the light of a falling cost regime.

Secondly, fixed price lump sum contracts which have often benefited a client may now be less attractive when costs are falling and when the client wishes to review the scope of the project. This is related to a third topic: fluctuations clauses. Generally contractors have seen fluctuations as being a way to increase income and not just a way in which to obtain increased payment for goods which increase in price. Now that the indices for work and materials are dropping, negative fluctuations start to have an effect by reducing the price which a contractor is paid.

A fourth topic is interest and financing charges. These are usually recoverable for delayed payment or for failure to pay claims. Often they are assessed at one or two percent above base rate. The financial crisis has had a strange impact. Whilst the official base interest rate may be 0.5%, the cost of financing to contractors is frequently much higher than two percent above that rate. Care is therefore needed in assessing the method of recovery of interest and financing charges.

Fifthly, as business confidence diminishes in some countries and increases in others, currency fluctuations can have a large impact on international contracts. Whilst it is possible to hedge against currency fluctuations, the terms of the hedge must be considered with care and the cost of hedging against some currencies may tempt contractors or employers to take a risk to avoid that cost.

Sixthly, liquidated damages often create difficulties where delay has benefited the employer who did not want the project to be completed as soon as possible. That can give rise to "no loss" arguments which are sustainable in certain jurisdictions either on the basis that proof of damage is still required for liquidated damages or under a statutory provision that allows liquidated damages to be reviewed by a court or arbitral tribunal. Equally, the assessment of the sum set for liquidated damages may need review.

Finally, there can be a number of problems with a claim for loss of overheads and profit. Such claims are sometimes based on an argument that the contractor would have earned overheads or profit by being able to enter into other contracts instead of his resources being held on a particular project for a longer period. Such claims need a careful appreciation of the facts before they can be put forward. Claims based on historic rates of profit of a company will need to be reviewed in the light of current profitability. Equally, overheads of companies with a falling turnover may be difficult to claim as a percentage of the overall turnover of the company.

These examples show that the premises upon which claims are made will need to be examined with care in the current economic climate. There can be no presumption that a claim made at times of high economic activity can be transferred automatically into current times. The underlying premises must be reviewed.

#### **Particular construction claims**

To see the effect of the recession on construction claims, it is convenient to consider claims which occur when projects are not started; claims which arise when projects are shelved and claims which occur when projects are terminated.

First, claims for contracts not being started. Whilst, in general, there might seem to be no claims, there are potentially losses which may form the basis of claims. Consultants often take a risk by carrying out work in the early stages of a project at no fee or a much reduced fee. They may consider that they have some understanding with an employer that if a project is not started then they will be paid some costs.

Secondly, claims for contracts which are shelved during construction. When an employer wishes to delay or postpone completion, there are various methods which obviously depend on the terms of the contract. One way is to use contractual provisions for suspension of the works. Another way of shelving the project is by ordering a variation to remove part of the works. A further way is for the employer to take the view that he would be in a better position if he terminated the contract. Finally, the employer may seek a negotiated solution with the contractor.

Thirdly, claims for contracts which are stopped. At some stage the employer or the contractor may decide that the contract should be terminated or the contractual provisions may give rise to automatic termination. How and when this may arise will depend on the terms of the contract. In general termination clauses are of a number of types. They may allow for termination at will, generally by the employer.

Termination may also occur because of some type of "default". In most contracts there is a provision for automatic termination when there is insolvency, including in the UK forms of self certified administration.

If the contract does not contain a provision for termination at will and if there is no insolvency then an employer who wants to stop the project may seek to rely on a default which is elevated in importance to give a ground for coming within the termination for default provision. In some contracts there may be a provision for termination for events of "force majeure" and the definition may be wide. For instance, "events of major economic disruption" may be included.

If all else fails, an employer may decide that the best possibility is to seek to terminate at law by elevating a complaint to a repudiatory breach, or the equivalent in other legal systems and then use that repudiatory breach to lead to a termination. The downside risk is that the termination by the employer may later be found, itself, to be a repudiatory breach. However, depending on the project the employer may consider that the loss of profit claim by the contractor would be difficult to sustain.

As with suspension, the possibility of negotiating a solution is always a possibility. Sometimes this will be a step taken after one party has sought to increase its bargaining position by terminating under the provisions of the contract or at law.

It can be seen that the options available to an employer or contractor to suspend or terminate a contract when there is an economic reason to do so need careful consideration. The terms of the contract and the available remedies at law will have to be reviewed but it may be that a negotiated solution is best. What happens, though, if the parties cannot resolve the position themselves but they have to find some other way to resolve their dispute?

### Methods of Resolving Construction Disputes

Times of economic difficulty, more than ever, need an efficient, cost-effective and fair method of resolving disputes. Many contracts have multi-tier provisions which are agreed in advance and may make the path to dispute resolution cumbersome, lengthy and expensive. The possibility of re-negotiating the dispute resolution method should not be overlooked, although parties locked in a dispute often perceive that the other party is seeking a unilateral benefit from such negotiations after the dispute has arisen.

Although there are many different ways of dispute resolution, I shall consider nine methods.

**Dispute Avoidance** : There has been greater emphasis on the open approach where the parties “put their cards on the table” as soon as a problem is foreseen. This arises from a change in approach in the management of contracts in such forms of contract as NEC3. Currently a good example of this approach is the London 2012 Independent Dispute Avoidance Panel.

**Negotiation**: I have referred above to the fact that negotiation is now becoming popular. It enables the parties to resolve problems by using the parties’ decision makers with or without assistance from a third party.

**Early Neutral Evaluation**: This is a method which allows a third party to make a non-binding decision based on information provided by the parties. The use which the parties make of it will depend on what is agreed. It is very often used in conjunction with dispute avoidance or a negotiated settlement.

**Mediation**: This is the most popular method where the parties are not able to resolve the dispute themselves. One of the problems is the perception that an effective mediation needs further steps to be taken to obtain evidence and information from the other party. This can lead to very large costs being spent on steps which have no impact on the mediation.

**Conciliation**: This term is often referred to as mediation with a result. In other words the mediator or conciliator provides a decision if the parties are unable to resolve the matter. It has to be decided whether the decision is non-binding or conditionally binding and whether the decision can be referred to in adjudication, court or arbitration.

**Dispute Review or Dispute Adjudication Boards**: This may be a combination of dispute avoidance, conciliation, neutral evaluation and adjudication, as described here but with the involvement of a project panel. The cost of providing for and maintaining the board can often be a factor in deciding whether to have a board.

**Adjudication**: Many countries have now or are considering adopting some form of rapid decision on disputes, with that decision being temporarily binding. In times of economic pressure this fast route to payment is an essential tool in keeping cash flowing.

**Arbitration**: The UK experience has been that for a number of reasons domestic arbitration has become less popular but international arbitration continues to thrive. Arbitration is now effectively litigation in the private sector, but with a degree of privacy and confidentiality. Many UK standard forms are not now providing for arbitration.

**The Courts**: The courts and especially specialist courts such as the TCC have seen a large increase in work both in assisting in relation to parties’ choices of other forms of dispute resolution and also ensuring that parties have a place where they can have their disputes finally resolved by specialist judges if the methods of alternative dispute resolution fail.

### Conclusion

Times of economic uncertainty tend to create disputes in the construction industry. There is a greater need for quick, efficient, cost-effective methods to deal with disputes where payment difficulties and liquidity problems are more likely. Good and creative advice is needed. Claims and disputes need careful handling and the choice of dispute resolution mechanism is a crucial element of the necessary advice.

**Sir Vivian Ramsey,**  
**Judge in Charge of the Technology and**  
**Construction Court, London**

16 September 2009

As a subsidiary of Thomson Reuters, Sweet & Maxwell Asia is one of Asia’s foremost information providers for the legal and regulatory professions. Sweet & Maxwell Asia delivers information that is current, comprehensive and authoritative.

We are proud to be partnering the Society of Construction Law (SCL) in providing their valued membership with useful publications/resources in the important practice area of construction law. A wide range of selections, from the latest title *Singapore Construction Adjudication Review* to the all-important *Keating on Construction Contracts* (UK) are available.

All SCL members will enjoy great discounts when purchasing any of the titles listed at the following web address: <http://www.sweetandmaxwellasia.com.sg/events/SM-Construction-Law-Titles.pdf>.

The discounts are as follows:

- 15% for all Singapore titles
- 10% for all imported titles

## Are Construction Projects Ever Completed? (19 Aug 2009)

SCL members as well as other participants from the construction industry attended the pre-AGM talk delivered by Mrs Audrey Perez, a Council member of SCL (Singapore).

Audrey shared with the audience a description of the multi-faceted Defect Liability Period (“DLP”) and Post DLP as it stands today in Singapore that inevitably affects projects’ risk sheets, with Contractual: Technical and Practice illustrations. To wrap-up the topic, Audrey made reference to five milestone judgments providing views and decisions from the Courts in Singapore on some aspects of DLP and Post DLP, such as the right of Contractors to attend to defects and a warning from the Courts for parties to keep their common sense *vis-à-vis* defects. The audience showed great enthusiasm on the subject, raising many queries after the talk.



Audrey Perez



## The Importance of Insurance in the Construction Industry in Today’s Economic Conditions

The talk was presented by Justyn Jagger (Head of DLA Piper South East Asia Dispute Resolution Group). Justyn discussed what a CAR policy covers, the interpretation of some common clauses, the operation of exclusion clauses, notice provisions and the insurer’s right of subrogation. The topic was most relevant for the construction industry in the current economic conditions. More than 70 participants from the construction industry attended the talk. The talk was chaired by Peter Chow, a Council Member of the SCL in Singapore and partner of Bryan Cave.



Justyn Jagger



Peter Chow





## Inaugural SCL Annual Dinner (30 July 2009)

The SCL Singapore Inaugural Annual Dinner was held on Thursday 30 July 2009 at Oso Ristorante at Bukit Pasoh, which was fully booked for the event, with more than 70 members and their guests enjoying the evening complete with great company, a delicious meal and well-selected wines. Feedback received from the diners described the event as warm, friendly, intimate, charming and delightful. Mr Philip Jeyaretnam SC, the founder of the Society, entertained us with a memorable and witty after-dinner light talk which he entitled “Constructing a Society - Collision & Collusion” about the Society’s early days and its history, while the Chairman of the Society, Mr Mohan Pillay briefly updated us on the SCL’s march forward. The Society looks forward to more and more members and their guests joining our social events, which give a wonderful opportunity for networking and catching up with fellow practitioners in the construction industry. The Society extends a warm appreciation to the sponsors for the event, namely Davis Langdon and Seah, Dragages Singapore and Pinsent Masons LLP, for their generous contribution to make this event an absolute success.



We are pleased to publish below, with his permission, Philip’s witty and entertaining after-dinner talk at the SCL dinner in July 2009.

## Speech by Philip Jeyaretnam SC at the SCL 1<sup>st</sup> Annual Dinner 2009 □ “Constructing a Society □ Collision or Collusion?”



1. Thank you Mohan for your kind introduction and for your invitation to speak tonight. I have been very impressed by the growth of the SCL, Singapore over the years since I had the honour and

privilege of being Chairman. Mohan has said many kind words about me, but I have to say I wondered how he had put together an evening of such class and refinement! However, now I understand. One word □ *Audrey*.

2. I remember the first time that Monique Ciocchetto and Stephen Rae, who had had experience with the Hong Kong society, came to see me. They began with the words – “*something is missing in the construction industry in Singapore*”. I wondered immediately what was missing – piles, rebars, whatever it was it sounded like there might be a brief in there for me. Then they explained what was missing □ congeniality, camaraderie, alcohol. And the solution of course was to start a Singaporean Society of Construction Law, one that would reach across the different professions in the industry □ lawyers, engineers, quantity surveyors □ and even bring together contractors, consultants and developers.
3. I am glad to say that those first ideas have been taken up, and have reached a logical conclusion in tonight’s event □ an occasion precisely for congeniality, camaraderie and copious amounts of alcohol. Seriously, I must congratulate Mohan and the organising committee for this fantastic dinner.
4. I’ve been tasked to amuse you with a little ramble of some 10 to 15 minutes over the history of the Society. I propose to loosely unite and structure my remarks under the rubric

of “*Constructing a Society □ Collision or Collusion*” Yes, sometimes a single vowel makes all the difference. The theme of my talk is really quite simple □ building networks adds value, and so finding points of commonality, ways to collude if you will, enables a society to grow. Let me talk about this theme under four headings:

- a. Organisation and management
- b. Membership
- c. Domestic external relations
- d. International external relations

### Organisation and management

5. After Stephen and Monique approached me, the first challenge was how to establish a broadly based society, how to bring together people who were rivals in the legal profession, or who sat on different sides of the table. My solution was twofold □ one thing was to make the committee a large one so it could accommodate more or less anyone who might conceivably want to be on it. I knew there were at least 5 or 6 large construction practices each of which needed to “buy in” to the project. On top of that we identified key names in the QS and project management field, including Seah Choon Meng who is here this evening. We looked for people with influence among developers and owners. For contractors, Eugene Yong, again present among us tonight and then head of SCAL was the natural choice to build a bridge. Contractors didn’t need too much persuasion to see the potential benefit of a broad church like the SCL, a neutral forum for the discussion of standard terms and building practices. Many of them felt that there were really only two standard terms in Singapore building contracts:

- a. *Article 1* □ *The contract drawings are intended to be correct. If drawn wrong it should be discovered by the Contractor, corrected, and done right at his own expense, and if he fails to spot the error then he should pay for it.*
- b. *Article 2* - *Any evidence of satisfaction or happiness on the part of the Contractor is just cause for withholding final payment.*

And they naturally hoped SCL could do something about this.

6. The second thing was to find the doers, the workers. In a new society, where the rewards of participation are far from clear, the primary attributes are enthusiasm, energy and the belief that things will turn out right in the end, regardless of the customary human tendency to panic and for things to generally fall apart. In this endeavour, I really have to thank Monique, who never let anything get her down. She did a sterling job, and eventually found Karen Fletcher to shoulder the burden, and now Karen is the Vice Chair.
7. But this sort of challenge should be familiar to anyone in the building industry. Phase 1 of a building project is enthusiasm, phase 2 disillusionment, phase 3 panic, phase 4 the search for the guilty, phase 5 the punishment of the innocent and finally phase 6 completion and the anointing of all those who kept their asses covered by doing and saying as little as possible.

#### Membership

8. We also knew that we had to get value to our membership as quickly as possible. And so even before we were registered we got things going by taking advantage of a visit by Vivian Ramsay □ who I'm delighted to hear is coming for this year's SCL-Law Society conference – to hold our first talk. This was an occasion where a little sweet-talking of the Public Entertainments Licensing Unit made all the difference □ because in the absence of a registered society, we were not providing a talk to members but to the public, and we all know how dangerous that can be. So with PELU's guidance, it was an invitation-only event.
9. And that endeavour to give value to members through education has been taken up with great success by my successors □ making the newsletter something that is really worth receiving and reading, colluding with the Law Society to start a joint annual conference, and inaugurating an international series of conferences for the various societies of construction law. The collusion with the Law Society was made quite simple because for that one year of 2004 I was both President of the Society and Chairman of this Honourable Society. So left hand only needed to shake right hand. And that first conference provided another inspiring example of collusion – because Latiff Ibrahim and Gordon Smith spoke together of their opposing experiences in working on the building problems at 3 Church Street, now known as Samsung Hub.
10. Education and conferences provide a great platform for networking, but the leaders of the Society have shown great wisdom in focusing on networking itself, even without much of an educational content, as with the regular members □ evenings and of course the annual dinners, of which this is the first.
11. As a result the membership has grown and now exceeds 200. And tonight more than a third of members are present, which is great testimony to the value that members perceive from their membership.

#### Domestic external relations

12. Naturally, any new society has to find a space for itself. And to this end I explained the mission and purpose of the society to the council of the law society, explaining how its inter-disciplinary nature distinguished it from the law society. It was the last year of Pala's presidency, and I was second vice president to Arfat. My explanation allayed any concerns.
13. We also wrote to the various professional bodies, to the Chief Justice, the Attorney General and others, to announce our arrival. CJ Yong in particular wrote a very kind and encouraging reply.
14. And we discussed a patron, someone who could help open doors for the Society. The popular choice was retired Justice Warren Khoo, whose then chairmanship of SIAC also fitted in with our need to build relations externally. He came for our first AGM and gave a great speech – ending with the point that the SCL could and should contribute to law reform, because it could draw on so many diverse perspectives.
15. Justice Khoo's idea struck a chord with all of us. We organised a very successful one day conference of industry participants in November 2003 on Security of Payments. And I recall how helpful and effective Chris Nunns was in organising and promoting that conference. With Chow Kok Fong's help, we got representatives from BCA to attend, and it was a truly valuable event for them as well as for us. Kok Fong of course later succeeded me, and brought the Society up a few notches, before Naresh and then Mohan came in to maintain and accelerate its steady ascent.

16. So collusion was our watchword □ collusion with anyone who could help advance our agenda but especially with Law Society, SCAL and BCA in particular.

#### International relations

17. The beginnings of the Society were inspired by the one in Hong Kong, of which as I've said Monique and Stephen had direct experience. But we received support not just from the Hong Kong Society but from the UK one as well, in the form of financial grants, which however small, made a real difference at the start.

18. But most impressive of all was the Society's hosting of the first inaugural international conference of societies of construction law. The initial idea for this was Kok Fong's, and Naresh as the incoming Chairman executed it flawlessly. I strongly believe that that conference really helped to put Singapore on the world map. It showed the benefits and the fruits of seeking to collude and cooperate □ turning a local network into an international one to the real benefit of members.

#### Conclusion

19. Let me end with a little joke about collisions, the promise of collusion, and the inevitable war of the sexes:

A woman and a man driver are involved in a horrific collision, but amazingly both escape completely unhurt.

As they crawl out of the wreckage, the man sees the woman has long black hair, almond eyes and true

inner beauty. Then the woman turns to the man and gushes breathlessly: □That's incredible □both our cars are demolished but we're fine. It must be a sign that we are meant to be together!

Sensing a promise, the man stammers back, □Oh yes, I agree with you completely!

The woman goes on, □And look, though my car was destroyed, this bottle of wine survived intact, too! It must be another sign. Let's drink to our love!

'Well, OK!' says the man, going with the moment. She offers him the bottle, so he downs half of it and hands it back.

□Your turn, □says the man.

□No, thanks, □says the woman, □I think I'll just wait for the police. □

20. And with that cautionary tale, good night, enjoy the evening, but always, always, stay within the limit!

**Philip Jeyaretnam**  
30 July 2009 @ 10pm

## LIST OF NEW MEMBERS WHO JOINED IN 2009

Nicholas Watts  
Serina Teo Ai Leng  
Kwong Swee Kum Dalencia  
B. Rengarajoo  
Mohamed Ismail Sujavudeen  
Kirindeep Singh  
Sim Soon Kee Francis  
Doreen Lim Lay Imm  
Bryan Kane  
Matthew Minuzzo  
Alexander Mosson  
Matthew Williams  
Michael D. Gray  
Chng Beng Guan  
Peter Hall  
Matthew Buchanan


Yeo Hwee Peng  
Sandra Skinner  
Marcus Jerome Gordon  
Zhang Jiandong  
Chong Kuan Keong  
Christopher Chong Chi  
Chuin  
Yeo Boon Tat  
Denash Gopal  
Simon Dunbar  
Kenny Chooi  
Mareejoseph Gittany  
Simone Fenton  
Simon Stanford  
Asanga Gunawansa  
Ng Mei Yen

Koh Beng Soon  
Lynette Chew Mei Lin  
Low Chee Yeen  
Robert Brown  
Zoe Stollard  
Ng Yuen  
Tan Wee Wah Kenneth  
Barbara Hambleton  
Cheah Kok Lim  
Teo Jenny  
Michael Christie  
Christopher Leong  
Andrew Cook  
Julian R. Wallace  
Alexis Chan  
Issac Lim

Goh Boon Cheong  
Harold Hee  
Yap Soo Chen (Joey)  
Soo Hoon Wing  
Dorothy Khoo  
Alastair Stirling  
Paul Gervay  
Steve Fortune  
PM Nagesh  
Balakrishna Patali  
Kwok Yih Chyuan  
Teo Teck Weng  
Paul Teo  
Jonathan Howes  
Alex Wong Li Kok

## SCL(S) CALENDAR OF EVENTS AUGUST TO DECEMBER 2009

DATE	2009 EVENT DETAILS
19 Aug 09	Pre-AGM talk "Are Construction Projects Ever Completed"
19 Aug 09	Annual General Meeting 2009
23 Sept 09	Conference: "5th Joint SCL-Law Society Construction Law Conference"
22 Oct 09	Social Event: 2nd Networking Cocktail 2009
12 Nov 09	Seminar: "Procurement of Energy Related Infrastructure Projects in Singapore"

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