



# SINGAPORE CONSTRUCTION LAW

SOCIETY OF CONSTRUCTION LAW (SINGAPORE) OFFICIAL NEWSLETTER

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## Newsletter

Editors: Jenny Teo & David Shuttleworth

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## Chairman's Message

A very belated welcome to 2013. The first two months of the year seem to somehow have whizzed past at lightning speed!

### CONSTRUCTION INDUSTRY

The industry started off the year somewhat like at the halfway mark in a century sprint.

In mid December 2012, the Government announced that it would keep up its rapid pace of land release to meet the “*unrelenting strong demand from home buyer*”<sup>1</sup>, earmarking a total of 32 sites including several that could potentially yield 4,000 private homes in the first half of 2013. The Housing & Development Board (“HDDB”) on 2nd January announced 23,000 Build-to-Order flats to be launched in 2013<sup>2</sup>.

On the same day of the HDB’s announcement, Sri Lanka and Philippines were identified as new sources for the recruitment of foreign construction workers. The Building and Construction Authority (“BCA”) will in the first half of 2013 appoint companies to set up test centres in these countries to help employers diversify its sources of foreign construction worker<sup>3</sup>. The centres will ensure potential workers go through a rigorous training regime of 12 construction skills including steel reinforcement works, tiling and plastering, lasting between 3 to 6 months, while staying at the training centre. The focus on productivity, skills and work attitudes have been made increasingly stringent since around 2011 and this announcement of new sources of workers and test centres is a real shot in the arm for the industry.

In mid January 2013, the government announced its seventh and most sweeping package of property cooling measures in over 3 years, described by our Deputy Prime Minister Mr Tharman Shanmugarathnam as the most significant to date. The package took effect on 12th January 2013.<sup>4</sup>

### SCL(S)

The society has also started the year on an exciting note with its now annual start to the year – seminar on *Updates & Development in Construction Law 2013*. This year’s event attracted over 150 participants. This was followed on in February with the seminar on *Effective Use of Experts* by Crown Chambers LLC attended by over 100 participants.

Continuing with SCL(S)’s engaging of its MOU partners; also brought about its first site visit viz. SCL(S) with the Royal Institute of Chartered Surveyors (“RICS”) jointly visited the Iskander development project in the Malaysian state of Johor. SCL(S) also was the supporting organisation for the Singapore Institute of Architects (“SIA”)’s seminar on using *Expert Determination to resolve Disputes quickly and economically*. These events will be reported in the next newsletter.

In the pipeline are plans for the *Annual Construction Law Conference* in early July, a joint programme with the Singapore Courts on training construction industry practitioners with the use of the Scotts Schedule in avoiding and/or resolving construction disputes, and a joint SCL(S) – Construction Industry and Institution programme to build houses/facilities in Batam, Indonesia for charity.

<sup>1</sup> Straits Times, 15th December 2012, page 1

<sup>2</sup> Today, 3rd January 2013, page 2

<sup>3</sup> Straits Times, 2nd January 2013, page 1

<sup>4</sup> Business Times, 12th January 2013, page 1

## CONCLUDING REMARKS

From the recent events in the Construction industry, there appears to be a need for a more effective understanding of Construction law and its role in relation to the mechanisms of the industry as well as in addressing disputes that may arise.

So how does the role of SCL(S) align with the above scenario? The SCL(S) objective (as outlined in its Constitution) is:

“... to promote the education, study and research... in the field of construction law and related subjects... for the benefit of the public and the construction industry ”

In line with the above, SCL(S) will focus on educating and empowering both its members and the public with relevant knowledge to deal with the changing needs of the industry based

on a sound foundation of Construction law – so as to keep ahead of the game, let’s say!

The team heading the SCL(S) has had over six months now settling in to their roles and several of the initiatives formulated will, in the next six months, start to take shape. The members have also come forward to volunteer their time on various committees and we are happy to have Alex Wong of Hogan Lovells Lee & Lee coming onboard as vice chair of the Website, Research and Resources committee and Uma Menon of Driver Trett and Cia Ai Eng of Drew Napier joining the Publications committee. We hope to see a few more of such individuals joining our committees soon.

Thank You,  
**Anil Changaroth**

## Updates & Developments in Construction Law 2013 – 23 January 2013

**Moon Kua**

L&S Contract Advisory & Dispute Management Services Pte Ltd



Kicking off the SCL(S) 2013 calendar, the Chairman, Anil Changaroth, welcomed more than 140 participants to its highly successful annual event which has now become a rooted tradition for the SCL(S).

The event, chaired by Mr Christopher Nunns, saw the invited speakers, Mr Edwin Lee (Eldan Law LLP) and Mr Raymond Chan (Chan Neo LLP), whisk the audience through an impressive tour of a number of important cases relating to the construction field.

Edwin commenced by reviewing the cases on the Building and Construction Industry Security of Payment Act (“the SOP Act”). He briefly discussed the positions prior to December 2012; the Court of Appeal’s decision in *Chua Say Eng* (“CSE”) that the limitation period does not apply to the service of payment claims. Challenges to the jurisdiction of the adjudicator would also now have to be made in

the court; the case of *RN & Associates v TPX Builders* demonstrated that courts would not support the setting aside of an adjudication determination which should properly be the subject of an adjudication review; and in *JFC Builders v Lion City Construction*, the High Court ruled that a claimant is precluded from making repeat claims. However, this appeared to depart from the Court of Appeal’s pronouncement on repeat claims which the judge thought were obiter because the facts of CSE did not involve a repeat claim. Edwin concluded his presentation with some take home points for both the claimant and respondent.

Raymond covered the cases on performance bond and those relating to professional negligence. The Court of Appeal in *BS Mount Sophia v Join Aim* restated the legal principles for restraining a call on a performance bond and emphasised that the courts’ discretion to grant an injunction should not be lightly given unless the entire context of the case has been thoroughly considered. The case of *Store+Deliver+Logistics Pte Ltd v Chin Siew Gim* concerned a claim by the employer against the architect for breach of professional duties. The court held that the architect is liable to the employer for damages for late completion of the works but limited the employer’s recovery to losses which could be proven. This principle could similarly be extended to the situation where the delay in obtaining the TOP or CSC could be attributed to the acts or omissions of an architect or the design consultants. This raised some concerns from the floor on whether the architect in this instance could in turn bring an action against the relevant authorities! The other point to note is for experts involved in disputes relating to building defects, courts would not be quick to adopt an expert report which contains merely an estimate of the rectification costs without further particularization of the cause of defects and party liable for such defects. Last but not least, the presentation ended with *Tan Juay Pah v Kimly Construction Pte Ltd* where the court pronounced that the authorized examiner did not owe any duty of care to the main contractor and as such, he is under no obligation to indemnify the sub-contractor for the loss and damage of a workplace accident arising from the breach of his professional obligations under the Workplace Safety and Health Act.



# Construction Law 101 (3rd Run) - 7, 12, 15, & 21 November 2012

**Lim Joo Hong**

Sembawang Engineers and Constructors Pte Ltd



Attending a 4-day construction law course after of ce hours (with the Deepavali holiday in between) sounded really daunting at first. But I was really pleased with my decision to go ahead with it, for what I got out of it was a lot more than what I expected.

The course was attended by engineers, quantity surveyors and project managers from construction-related firms such as sub-contractors, main contractors, consultants and asset owners. It was a surprise that the conference was also attended by a dentist who happened to be an avid learner of construction law.

I was honoured by the opportunity to learn from Mr Mohan Pillay, an experienced lawyer in the field of construction law from Pinsent Masons MPillay LLP. He was an excellent

speaker who painted a clear picture about the fundamentals of construction law. Technical concepts ranging from contract and tort between parties to the conditions precedent in standard form contracts were clearly explained by him, substantiated with engaging examples and leading authorities. He made difficult concepts easy to grasp.

It was certainly rewarding to attend this course – highly recommended for those who wish to enrich their knowledge in this field.

## SCL(Peru) Launched

**Anil Changaroth**

Aequitas Law LLP

On the 28th January 2013, the Peruvian Society of Construction Law was established with a select group of 18 founding members, representing 4 law firms, 5 local and international construction companies, 1 Japanese engineering consultants and 2 employers.

Initiated by Jose Steck and Jose Andres Lama with advice and support of SCL(UK) and its Chairman, Keith Kirkwood, SCL(Peru) set its objectives, emphasizing the principal aims of contributing in the research and understanding of construction law; analyze, review and prepare guidelines and protocols on construction law issues and employ the international principles of construction law.

SCL(Peru)'s Council includes President Jaime Gray and Secretary Jose Steck (both of Navarro Sologuren Paredes & Gray Law Firm); Executive Director Jose Andres Lama and Director Alexander Campos (both of Pizarro, Botto & Escobar Law Firm); and Director Eric Franco (of Volcan Mining Company).

SCL(Peru) now joins the ever expanding SCL international partnership that includes SCL UK, Australia, New Zealand, Hong Kong, Malaysia, Mauritius, Gulf, Caribbean, Europe and Singapore.



# One Chapter Closes, Another Opens

**Edwin Lee Peng Khoon**

Partner, Eldan Law LLP, Accredited Adjudicator

This article discusses the impact of the recent landmark Court of Appeal decision on adjudications under the Building and Construction Industry Security of Payment Act (“the Act”) in *Lee Wee Lick v Chua Say Eng* [2012] SGCA 63 (“*Lee Wee Lick*”), and the 2 subsequent High Court cases of *RN Associates v TPX Builders Pte Ltd* [2012] SGHC 225 (“*RN Associates*”) and *JFC Builders Pte Ltd v Lion City Construction* [2012] SGHC 243 (“*JFC Builders*”). It suggests that while some commonly encountered issues in adjudications are now closed by virtue of the Court of Appeal’s decision, other live issues have been wounded but not mortally so, and yet some others may have arisen as a consequence.

It used to be the case, before November 2012, for Respondents faced with an adjudication application to trot out objections to the payment claim as being time-barred or not being “intended” to be a payment claim, or as being a repeat claim. Any of the objections, if available on the facts, would usually prove fatal to the application.

The availability of these objections arose out of several High Court decisions, namely *Chua Say Eng v Lee Wee Lick* [2011] SGHC 109 (“*Chua Say Eng*”), *Sungdo Engineering & Construction v Italcor Pte Ltd* [2010] 3 SLR 459 (“*Sungdo Engineering*”), and *Doo Ree Engineering & Trading v Taisei Corp* [2009] SGHC 219 (“*Doo Ree*”). The 2011 High Court case of *Chua Say Eng* appeared to cause about a 20% reduction in the number of adjudications filed, from consistently about 160 in 2009 - 2011, to only approximately 130 for 2012.

## TIME-BAR

Support for the first objection of time-bar may be found in the High Court’s decision in *Chua Say Eng*. In that case, the contractor’s contract had been terminated on 28 April 2010, and the contractor thereafter issued its payment claim on 2 June 2010 for work done up to the date of termination. The contract did not provide for any time for the service of a payment claim, and therefore the default provisions under the Act and its Regulations applied. Regulation 5(1) provided that the payment claim had to be served “by the end of the month following the month in which the contract was made.”

The Respondent in that case submitted before the adjudicator that the above wording in Regulation 5(1) meant that work done within a particular month ought to be claimed by the next month. They further submitted that if the work done was not so claimed in a payment claim on time, then claims for such works would be forever time-barred under the Act. The claimant could no longer pursue it in adjudication, but may only do so in court or arbitration. This was because, according to the Respondent, even though Section 10(4) of the Act allowed for payment claims to be rolled up and claimed in a cumulative manner, a new payment claim may only be rolled up together with another earlier valid payment claim. Since the works were not claimed in a valid payment claim by the following month, then Section 10(4) could not apply because there was not valid payment claim to roll it up with.

The adjudicator in that case did not consider that the Act and its Regulations set out any particular time-bar for claims to be made. It accepted the Claimant’s submissions that the Respondent’s argument would have meant that Regulation 5(1) should have been worded as requiring payment claims to be served by the end of the month “following the month in which the works were done”. Instead, the phrase in the Regulations used was “following the month in which the contract was made”.

The Respondent applied to set aside the adjudicator’s determination. The High Court Assistant Registrar, hearing the case at first instance, refused the setting-aside application, and agreed with the adjudicator’s determination.

The Respondent then appealed to the High Court, who accepted the arguments and set-aside the adjudication determination. The Claimant then appealed to the Court of Appeal, and this resulted in the Court of Appeal’s decision in *Lee Wee Lick*.

In allowing the appeal, the Court of Appeal held that the Act did not provide for any such time bar, and that if the Regulations applied payment claims could be made at any time, with the restriction that it may only be made only once each month. This decision has therefore (subject to Section 10(4) of the Act) dealt a mortal blow to any possibility for future respondents to object to payment claims on the basis of it being time-barred.

## INTENTION THAT A PAYMENT CLAIM BE A PAYMENT CLAIM

Following from the High Court decision in *Sungdo Engineering*, a Respondent’s refrain when objecting to a payment claim would be that not only must the payment claim conform to all the technical and formal requirements under the Act, it must also be “intended” to be a payment claim. Such intention was to be assessed from the surrounding circumstances, and the nature of the documents served on the Respondent.

This additional requirement arose because on the facts of *Sungdo Engineering*, while the document served complied with all the requirements for a payment claim under the Act, due to its informal nature the High Court had held that it could nonetheless not have been intended as a payment claim. The High Court had reasoned that “intention” must be a requirement because if a party had expressly stated on a document that would have qualified as a payment claim that the document was not a payment claim, surely that document could not be a payment claim. Thus was the additional requirement of “intention” introduced, and an element of subjectivity entered the assessment of the validity of a payment claim, with adjudicators being confronted with all manner of objection as to why a payment claim may not have been “intended” as a payment claim.

Some doubt was placed on this additional requirement in of “intention” in the subsequent High Court case of *Chua Say Eng*. There, the High Court held that the court in *Sungdo Engineering* could not have expressed the “intention” requirement as an additional requirement for compliance under the Act. Instead, it was just a statement of best practice.

The Court of Appeal in *Lee Wee Lick* endorsed the High Court’s view, and held that the only requirements for compliance were those contained in the Act.

## REPEAT CLAIMS

*Doo Ree* is a decision of the Assistant Registrar, who held that a Claimant may not submit a payment claim that is the same as the previous one if the previous claim was not part of a larger claim. He reasoned that based on the wording of Section 10(4) of the Act, while previous claims may be rolled up, they must be a part of a larger new claim, and cannot merely be a repeated claim for exactly the same amount.

The Court of Appeal in *Lee Wee Lick* at [92] stated that they did “not approve” the decision in *Doo Ree* that the Act prohibits all repeat claims.

Such a statement would normally prove to be a decisive blow to any Respondent who is considering raising an objection that the payment claim is a repeat claim in any adjudication. This time, however, the issue does not appear to have been mortally wounded by the Court of Appeal’s statement.

In the subsequently reported High Court decision of *JFC Builders*, Woo J nonetheless held that repeat claims are not allowed by virtue of Section 10(1) of the Act. While this judgment had been made before the Court of Appeal issued its decision in *Lee Wee Lick*, the written grounds were only issued subsequently. The High Court considered at [77] that the Court of Appeal’s disapproval of the case of *Doo Ree* was dicta, and no reasons had been given by the Court of Appeal for doing so.

In *JFC Builders*, the High Court therefore held that a payment claim which merely repeats an earlier claim without any additional item of claim, whether for additional or repair work or otherwise was an invalid repeat payment claim under the Act.

## NEW ISSUES – ADJUDICATOR’S AND COURT’S ROLES

At least three new issues have arisen as a result of the recent cases.

### Adjudication Review

First, in the case of *RN Associates*, the High Court stated that it would not be appropriate for the High Court to consider issues in an adjudication if a Respondent did not avail itself of the adjudication review procedure available under the Act. *RN Associates* was a case in which the Respondent had served a payment response, and hence could have taken its objections in relation to non-compliance with the Act to adjudication review.

The High Court held at [61] that since the Respondent had chosen not to apply for an adjudication review, it was not for the court to set aside the adjudication determination on grounds which properly belonged to an adjudication review. Ang J stated that “[a]ny mistake as to validity requires an examination of the evidence and an application of the law and is a substantive issue going to the merits, which the Adjudicator has the right to decide and which I cannot interfere with.”

It should however, again be noted that the *RN Associates* judgment was made before the Court of Appeal issued its decision in *Lee Wee Lick*, but the written grounds were issued subsequently thereafter. This decision did not have the benefit of considering the *Lee Wee Lick* case, where the Court of Appeal had held at [65] that “[i]f the Respondent wishes to argue that the adjudicator was not validly appointed or that the adjudicator has not exercised his power to determine the adjudication application properly... such argument should be made to the court”. It would therefore not be altogether clear whether the failure to apply for adjudication review would necessarily preclude the right to raise objections to the court.

In light of the *RN Associates* case, however, it would be likely that all prudent Respondents would apply for adjudication review as a prelude to raising objections in court. It is envisaged that the number of adjudication review applications would increase as a result, at least until the position is clarified further.

### Adjudicator’s Role

Second, just as in *RN Associates*, the Court of Appeal in *Lee Wee Lick* stated that the adjudicator’s role in an adjudication application is a restricted one. The Court of Appeal stated that the adjudicator is not competent to decide whether he had been validly appointed to adjudicate the matter. Instead, his role is confined only to deciding the adjudication application, and to consider whether the application complies with Sections 13(3)(a),(b) and (c) of the Act. Questions regarding the validity of his appointment should be made to and decided by the court.

While it may seem that the adjudicator’s role has therefore been curtailed and confined to considering compliance with Sections 13(3)(a),(b) and (c) of the Act, it will be noted that issues regarding compliance with Sections 13(3) are not as narrow as they would appear.

In particular, Section 13(3)(a) provides that the adjudication application should be made within 7 days after the “entitlement of the claimant first arises under Section 12”. Section 12 in turn refers to when an adjudication application may be made. In order for an adjudicator to consider a Claimant’s entitlement to make an adjudication application, it would be arguable that the adjudicator would nonetheless still have to consider the validity of the payment claim itself, without which a claimant would not be entitled to make an adjudication application. That may mean that an adjudicator would still have to consider the timelines for the making of the payment claim, commencing from the time by which a payment claim needs to be made. It may hence appear that the Court of Appeal decision in *Lee Wee Lick* did not circumscribe an adjudicator’s role all that much.

### Court’s Role

Finally, the Court of Appeal in *Lee Wee Lick* stated what may be one of the most important points for future litigants concerning the Act – and that is that non-compliance with the Act is not always necessarily fatal to the adjudication application. Notwithstanding the use of the mandatory language “shall” in the Act, even where there has been non-compliance, the court would still have to consider whether the provision of the Act is “so important that it is the legislative purpose that an act done in breach of the provision should be invalid.”

Such a position would presumably cause Respondents to be more circumspect in their objections, by not just picking on each and every conceivable breach, but focusing on the mischief that is intended to be addressed by the provision, and the prejudice brought about by any breach. This is surely to be welcomed as a more enlightened approach for adjudications.



*In his over 15 years of practice, Edwin has conducted both cases in court as well as at arbitration, and has advised government authorities, developers, contractors, and consultants on numerous aspects of building contract law. Being actively involved in adjudication, Edwin has also been appointed onto the Construction Adjudication Accreditation Committee, which oversees the selection and assessment of adjudicators.*

# Statutory Adjudication in Malaysia Construction Industry Payment and Adjudication Act 2012 – An Insight

**Datuk Sundra Rajoo**

Director, Kuala Lumpur Regional Centre for Arbitration

Payment has always been the thorn in the Malaysian Construction Industry. Thus, the Construction Industry Payment and Adjudication Act 2012 (Act 746) that was gazetted on 22 June 2012 (CIPAA 2012) is a welcome development to construction industry players in Malaysia. It removes the pervasive and prevalent practice of conditional payment (pay when paid; pay if paid) and reduces payment default by establishing a cheaper and speedier system of dispute resolution in the form of adjudication. Act 746 also provides for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as a right to reduce the rate of work progress or to suspend work or even to secure direct payment from the principal.

## INTRODUCTION

The construction industry in Malaysia is an important catalyst of the country's economy. The 8th Malaysian Plan shows that the construction sector advances about 1% every year and contributes 3.7% of the Gross Domestic Products (GDP). During the period of the 10th Malaysian Plan, the growth is expected to be at the rate of 3.7% each year and contribute to 3.1% of the GDP<sup>1</sup>.

The growth of the construction industry is in line with the aim of the Economic Transformation Programme (ETP) and Malaysia's aim to be a developed and high income country towards the year 2020. The boom of the construction industry is also a consequence of the participation of various parties in the chain of construction project execution such as manufacturing, supply of construction goods, rental of machinery and equipment, supply of labour and various other services.

The construction industry is regarded as an industry with high potential of continuing growth. One of the challenges that need to be dealt with is payment issue which involves various parties in the construction chain which includes main contractor, sub-contractors, sub-sub-contractors, consultants and construction goods suppliers.

Payment default has been the main issue of dispute in the construction industry. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have constrained the construction industry. Payment default triggers a domino effect in the construction industry affecting all the players. The main reason for this is because construction projects, especially mega projects, are stretched over long periods of time and involve a large sum of monetary payment per progress payment. Hence, any delay or payment on condition would inadvertently have a huge impact on the construction project.

The Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012 or Act 746) was passed by the Malaysian Parliament on 22nd June 2012. Particular promoters namely CIDB, MBAM and RISM have been pushing the government to enact this piece of legislation since 2003 to address the cash flow problems in the industry. The primary objective of Act 746 is to address critical cash flow issues in the construction industry. It aims to remove the practice of conditional payments ('pay when paid' and 'pay if paid') and reduce payment default by establishing a cheaper, speedier system of dispute resolution in the form of adjudication.

The government's initiative in introducing the CIPAA 2012 is one of the government's transformation agenda which is to stabilise the construction industry. This form of dispute is not something new or related solely towards mega construction projects. Experience from other countries showed that the consequences of payment default can result in insolvencies.

Several countries in the world namely the United Kingdom, several States and Territories in Australia, New Zealand and Singapore have taken these problems to heart and have enacted specific legislation to deal with disputes of this nature in the construction industry. The United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996, Australia saw the advent of the Building and Construction Industry Security of Payment Act 1999 amended in 2022 (NSW), Building and Construction Industry Security of Payment Act 2002 (Qld), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payment) Act 2004 (NT), New Zealand enacted the Construction Contracts Act 2002 and Singapore ushered in the Building and Construction Industry Security of Payment Act 2004.

At the time of writing, CIPAA 2012 has yet to come into operation. It is anticipated that the Act will come into operation in 2013 and provide a statutory solution to payment default in the construction industry.

## SCOPE AND COVERAGE OF CIPAA 2012

The scope and coverage of CIPAA 2012 can be gauged from 4 perspectives namely in terms of location of work, parties, type of work and contracts. In respect of location of work, the construction work must have been carried out wholly or partly within the Malaysian territory. Essentially it would mean that if a suspension bridge had its support beams manufactured in Malaysia and was installed in the territory of Hong Kong, it would still be subject to CIPAA 2012.

In terms of parties, contracting parties in a construction contract such as individuals, corporate bodies and statutory bodies are bound by CIPAA 2012. It is also provided under Section 2 of CIPAA 2012 that the Government of Malaysia is bound by CIPAA 2012 for a construction contract entered into by them against any other parties.

As for type of work or contracts that are bound by CIPAA 2012, a construction contract can be a construction work contract or a construction consultancy contract. Even a construction supply contract would fall within the ambit of CIPAA 2012<sup>2</sup>. It is clear from

<sup>1</sup> Hansard, Second and Third Reading for the Construction Industry Payment and Adjudication Bill 2011, 2nd April 2012.

<sup>2</sup> Section 4 CIPAA 2012 - Interpretation

the reading of CIPAA 2012 that all types of construction works would be included. Construction works in the form of preparatory works, permanent works and even procurement works are bound by CIPAA 2012<sup>3</sup>. Construction work of any subject matter *inter alia* for a building, structure, harbour works, railway, aerodrome, electrical work, oil & gas work, tunnel, reclamation work and telecommunication work would be caught under this new regime<sup>4</sup>.

However, the provisions of CIPAA 2012 do not affect natural persons entering into a construction contract in respect of a building wholly intended for his own occupation and which is less than four storeys high. The definition of “wholly intended for his own occupation” would definitely raise a need for judicial interpretation. For example, an individual could build four units of apartments below four storeys high but with the intention to occupy only one unit of that apartment. Would he then be able to plead that CIPAA 2012 does not apply to him for the construction work on the said apartment because the apartment is also for his own occupation in the future?

CIPAA 2012 simply provides a statutory right for the parties to demand payment for work done and to create a simple process to ensure that a decision and payment is made. This of course is in the form of adjudication as a process. In fact, the parties can commence adjudication and concurrently arbitrate or litigate the matter as well<sup>5</sup>. Reference can be made to *Macob Civil Engineering Ltd v. Morrison Construction Ltd*<sup>6</sup> whereby Dyson J (as he then was) aptly summed up the link between adjudication, arbitration and litigation:

*“The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement...Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced and intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.”*

## ADJUDICATION – THE RULES OF ENGAGEMENT

The adjudication process is prescribed by CIPAA 2012. Unlike arbitration or mediation, adjudication does not require the parties’ agreement for the process to begin. As such, once either party opts for adjudication it becomes a compulsory process wherein both parties are involved whether they agree to it or not. Adjudication is a dispute resolution system that is intended to be simple and fast.

The process of adjudication begins with the serving of a payment claim by an unpaid party against the non-paying party<sup>7</sup>. The non-paying party can thereafter serve a payment response against the unpaid party; the non-paying party can either dispute the amount claimed in the payment claim or admit to the amount<sup>8</sup>. A party in deciding to refer a dispute to adjudication must bear in mind that a dispute referred to adjudication is subject to the limitation periods under Malaysian laws<sup>9</sup>.

An adjudication proceeding is initiated when a Claimant (unpaid party) serves a written notice of adjudication on the Respondent<sup>10</sup>. The process continues with the Claimant serving a written adjudication claim which will contain the nature and description of the dispute and the remedy sought after<sup>11</sup>. A Respondent will be able to reply thereafter by serving an adjudication response<sup>12</sup> to answer the adjudication claim which may be followed by an adjudication reply<sup>13</sup> (if necessary) by the Claimant.

The process as prescribed by CIPAA 2012 is concise and the time accorded to the adjudicator to produce the written decision itself is forty five (45) days from the receipt of the adjudication reply or response unless the parties extend the time.<sup>14</sup> The entire process promises an outcome within an approximate one hundred (100) day time frame from the day the payment claim is served until the decision is passed. This would ensure that the cash flow problems in the construction industry can be dealt with swiftly.

Adjudication is not a dispute resolution system that provides the adjudicator with the luxury of time to hear all the parties and listen to evidence in great detail akin to an arbitration or court trial. A list of powers granted to the adjudicator can be found in Act 746.<sup>15</sup> Some of the procedures adopted by the adjudicator, besides conducting a short trial would be to review the construction contract and other documents<sup>16</sup> to decide whether there is compliance with the standard of work required by that contract. The Evidence Act, 1950 does not apply to adjudication proceedings under this Act<sup>17</sup>.

The adjudicator can also visit the construction site to investigate the dispute<sup>18</sup>. The adjudicator would then give a decision with the primary aim to alleviate cash flow problems between the disputing parties and to remove payment conditions<sup>19</sup> such as ‘pay when paid’ and ‘pay if paid’.

Besides that, the CIPAA 2012 Regulations will be introduced when the Act comes into force in order to complement the Act by addressing any loopholes in the adjudication proceeding. In order to facilitate the proper conduct of the adjudication process, KLRC being the adjudication authority will also introduce the KLRC Adjudication Procedural Rules.

In short the focus is primarily and steadfastly on removing cash flow problems in the construction industry by helping move things along by dispensing fast decisions on payment disputes alone. It was never meant to be a process that allows the parties the luxury to ventilate every single proposition in great detail unlike litigation in court or arbitration for that matter.

## KLRC AS THE ADJUDICATION AUTHORITY

KLRC is appointed as the adjudication authority in Malaysia by virtue of Part V of CIPAA 2012. An adjudication authority is a body which is tasked with ensuring that the process of statutory adjudication is properly implemented in a particular legal jurisdiction. Across other jurisdictions that implement statutory adjudication, one can see that many adjudication authorities have been set up<sup>20</sup>, whereas Singapore has only one adjudication authority<sup>21</sup>. The functions that the adjudication authority performs

<sup>3</sup> Harbans Singh (2012) KLRC Adjudication Training Programme Unit 1 Slides

<sup>4</sup> Harbans Singh (2012) KLRC Adjudication Training Programme Unit 1 Slides

<sup>5</sup> Section 37 CIPAA 2012 Relationship between Adjudication and other Dispute Resolution Process [1999] BLR 93

<sup>6</sup> Section 5 Payment Claim, CIPAA 2012

<sup>7</sup> Section 6 Payment Response, CIPAA 2012

<sup>8</sup> Limitation Act 1953, Sabah Limitation Ordinance, Sarawak Limitation Ordinance

<sup>9</sup> Section 8 Initiation of Adjudication CIPAA 2012

<sup>10</sup> Section 9 Adjudication Claim CIPAA 2012

<sup>11</sup> Section 10 Adjudication Response CIPAA 2012

<sup>12</sup> Section 11 Adjudication Reply CIPAA 2012

<sup>14</sup> Section 12(2) Adjudication and decision, CIPAA 2012

<sup>15</sup> Section 25 Powers of the adjudicator, CIPAA 2012

<sup>16</sup> Section 25(m) CIPAA 2012

<sup>17</sup> Section 12(9) Adjudication and decision, CIPAA 2012

<sup>18</sup> Section 25(h) CIPAA 2012

<sup>19</sup> Section 35 Prohibition of conditional payment, CIPAA 2012

<sup>20</sup> United Kingdom – Adjudication.co.uk, Chartered Institute of Arbitrators, Dispute Board Federations etc. New Zealand – Building Research Association of New Zealand, Adjudicators Association of New Zealand (AANZ) etc. Australia – The Institute of Arbitrators & Mediators Australia (IAMA), Adjudicate Today, Able Adjudication etc

<sup>21</sup> Singapore Mediation Centre

are mainly nominating and appointing an adjudicator, facilitating training to aspiring adjudicators and providing the necessary administrative support to facilitate the conduct of adjudication. This is in line with Section 32 of CIPAA 2012 which lists out the functions of KLRCA as an adjudication authority under the Act.

To get the ball rolling as the sole adjudication authority in the country, KLRCA has conducted nationwide road shows<sup>22</sup> to create awareness in the public particularly in the construction industry on the legal implications of CIPAA 2012 and its impact as a new statutory method of dispute resolution. Talks were also held with the Attorney General's Chambers<sup>23</sup> and Public Works Department<sup>24</sup> on how CIPAA 2012 would affect them. This has led to the organising of the CIPAA 2012 Conference which was held in Hilton Kuala Lumpur on 24 October 2012. The event was attended by 500 delegates wherein various aspects on statutory adjudication were presented by experts in the industry, both local and international.

As the adjudication authority, KLRCA is responsible for the determination of the standard terms of appointment and fees of an adjudicator and the setting of the competency standard and the criteria required of an adjudicator in Malaysia. In line with the above, KLRCA would also act as the default appointing authority in the event, a request for appointment is referred to by the parties or by parties who are not able to agree on an adjudicator<sup>25</sup>. In order to perform such duty, a panel of qualified and competent adjudicators both from the country and internationally would be needed.

In doing so, KLRCA has specially designed the Adjudication Training Programme to enable proper certification for all future adjudicators in Malaysia. It is mandatory for anyone who is interested in providing adjudication services in Malaysia to take part in the programme.

The KLRCA Adjudication Training Programme consists of in-depth lectures on the workings of CIPAA 2012, construction law, construction process and the writing and preparation of adjudicator decisions conducted by experts in the construction industry. Those who have successfully completed the programme and passed the prescribed examination will be awarded with the KLRCA Certificate in Adjudication and will be eligible to apply to join the KLRCA Panel of Adjudicators. The criteria to be an adjudicator will include a relevant degree or diploma, 7 years of working experience preferably in the building and construction industry and a Certificate in Adjudication from KLRCA. This will effectively ensure that the quality of adjudicators is of the highest standard possible.

KLRCA has also been tasked with providing administrative support for the conduct of adjudication and any functions as may be required for the efficient conduct of the adjudication process under CIPAA 2012. To this extent, KLRCA will be introducing the KLRCA Adjudication Procedural Rules to facilitate the proper conduct of adjudication, *inter alia*, the registration process of cases and the appointing of adjudicators from the KLRCA Panel of Adjudicators upon request from parties. KLRCA will also take on a role of being the stakeholder of adjudicator's fees<sup>26</sup> wherein parties shall contribute and deposit the adjudicator's fees in equal share to the Director of KLRCA. In the event that the adjudicator fails to decide the dispute within the period specified under Section 12(2) of CIPAA 2012, the adjudicator will not be entitled to his/her fees.

## FORESEEABLE IMPACT OF CIPAA 2012

With the emergence of CIPAA 2012, the construction industry in Malaysia will be seeing a great transformation in many aspects especially with regards to dispute resolution. Special attention is given to resolving the industry's main problem which is relating to timely payment.

The construction industry will see a change in the payment culture where pervasive and prevalent payment cultures namely "pay when paid", "pay if paid" and "back to back payment" will be deemed void. The industry will also see unfair and pervasive practice of constricting cash flow in the construction supply line being curbed.

With such tight scrutiny on payment in the industry, this will lead to improvements in the quality of work and promote a higher level of professionalism in the industry. Employers in the industry will eventually practice good governance with regard to administration of payment and as such will minimize payment disputes from proceeding to arbitration or courts.

As for contractors in the industry, they will ameliorate the harsh and pervasive risk allocation imposed on them by employers. Contractors will be able to enjoy receipt of regular and timely payment which leads to a better cash flow.

Another important introduction in CIPAA 2012 is Section 30 of CIPAA 2012 which allows a winning party in an adjudication to obtain direct payment from the principal of the losing party. With this provision, sub-contractors will take great pleasure in that they will also receive regular and timely payment. This will develop a healthy and professional body of downstream suppliers/sub-contractors which effectively supports the upstream players.

In preparing for the regime of statutory adjudication, contract personnel in corporate bodies will have to ensure documentations in a construction contract are documented properly. Contractual terms will also have to be redrafted to be in line with CIPAA 2012.

It is high time that statutory adjudication as an effective, swift and robust dispute resolution is introduced in Malaysia to ensure that the industry grows at a world class level.



*Sundra Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). He is also the President of the Asia Pacific Regional Arbitration Grouping (APRAG), a federation of nearly 40 arbitral institutions in the region. Datuk Sundra is a Chartered Arbitrator and an Advocate & Solicitor of the High Court of Malaya (non-practising). He is also a Professional Architect and Registered Town Planner. He serves on the panel of numerous international arbitral institutions and organizations. He is a Visiting Professor at Universiti Teknologi Malaysia. Datuk Sundra has authored several books on arbitration and contract law. Datuk Sundra was conferred the Panglima Jasa Negara by his Majesty the Malaysian King on the occasion of his Majesty's birthday on 2 June 2012.*

<sup>22</sup> Kuala Lumpur (Bar Council) 14 January 2012, Kuala Lumpur (Wisma MCA) 11 February 2012, Penang (Bayview Hotel) 18 February 2012, Ipoh (Syuen Hotel) 5 March 2012, Kota Kinabalu (Novotel) 17 March 2012, Miri (Miri Marriott Resort & Spa) 21 March 2012, Johor Bahru (Thistle Hotel) 23 March 2012, Kuantan (Zenith Hotel) 28 March 2012, Kuala Lumpur (Wisma MCA) 3 May 2012 & Penang (Bayview Hotel) 4 August 2012

<sup>23</sup> 13 July 2012

<sup>24</sup> 25 September 2012 & 6 November 2012

<sup>25</sup> Section 21 CIPAA 2012 Appointment of Adjudicator

<sup>26</sup> Section 19(4) CIPAA 2012 Adjudicator's Fees and Expenses, Etc.

# Personal Data Protection Act and Its Effect on SCL(S)

**Brendon Choa**

Chair of Website, Resources & Research Committee

The Personal Data Protection Act ("PDPA") was passed in Parliament on 15 October 2012. This legislation, which governs the collection, use and disclosure of personal data by private organizations, came into effect on 2 January 2013. In general, the data protection regime under the PDPA seeks to create a balance between the need to protect individuals' personal data against an organization's need to obtain and process such data for legitimate and reasonable purposes. In particular, the need to protect individuals' personal data means it seeks to safeguard such data against misuse, at a time when such data has become increasingly valuable for businesses and more easily collected and processed with infocomm technology.

Under the PDPA, private sector organizations, such as SCL(S), must seek the consent of their customers or members before collecting and storing their data, and inform their customer or member about the purpose of the data collection. They also have to ensure a comparable standard of protection for personal data if they are transferring it outside Singapore, through measures such as contractual agreements. There are stiff penalties for organizations found in violation of the rules.

As you may have noticed, SCL(S) has recently modified the formats of its respective membership application and membership renewal forms to ensure that any personal data collected from applicants or members are compliant with the PDPA requirements. In particular, SCL(S) now sets out clearly in the forms the purposes for the collection, use or disclosure of the personal data collected from such individuals, on or before collecting such personal data and obtaining their consent for the same. We will review our processes regularly to ensure continued compliance with the PDPA.

## SCL(S) 2nd Networking Cocktails - 14 November 2012

**Leonora Roccisano**

William Roberts Lawyers Pte Ltd

The 2nd Networking Cocktail event for 2012 was a relaxed, formality free event. Its 30 attendees forgot their stresses of the day, mingling with well-known and newly acquainted contacts in the dimly lit and edgy Hood Bar and Café at Bugis+.



Other than a warm welcome and appreciation speech by the Chairman, Anil Changaroth; a quick discussion of the SCL(S)'s upcoming "new look" social calendar by the Chair of Social and Outreach Committee, Sunny Sim; and short excerpts of next year's professional development program by the Chair of the Professional Development Committee, Moon Kua; attendees spent the evening catching up, making introductions, and enjoying good food, beer and wine. The great service at this laid back venue certainly facilitated this. Indeed, the evening continued long after its planned conclusion.

Next year's events are now even more highly anticipated by both members and non-members from the construction industry.

# CI Arb-SCL(S)-Keating Chambers Joint Seminar – 24 October 2012

**Paul Sandosham**  
Cavenagh Law LLP



In line with efforts to work more closely with its reciprocal partners and other related organisations, the SCL(S) together with the Chartered Institute of Arbitrators (Singapore) (CI Arb) and Keating Chambers, London, jointly hosted a talk on 24 October 2012 at Hotel Fort Canning, Singapore. Over 70 delegates attended the event which was co-chaired by Messrs Tan Liam Beng and Paul Sandosham.

The attendees were treated to an in-depth analysis of two recent court decisions which have had a significant legal impact on the construction industry. David Thomas QC spoke on the topic "Problems in the Pipeline - Does FIDIC have dispute resolution issues to address?" arising from the Singapore Court of Appeal's Decision in *CRW Joint Operation v PT Perushaan Gas Negara (Persero) TBK [2011] SGCA 33*. David

analysed the decision of both the High Court and Court of Appeal in the case, and looked closely at the FIDIC Red Book dispute resolution mechanism, in particular, the question of the enforceability of decisions by the dispute adjudication board (DAB). He explored possible options available to a party which had a DAB award in its favour, in light of the Court of Appeal's decision in the case.

David's talk was followed by a presentation by Lucy Garrett on "Concurrent Delay in Construction Contracts", in light of the decision in *Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)*. Lucy shared her insights as co-counsel in the *Adyard* case on the effect of the Court's decision on liability for concurrent delay. Lucy traced the development of the law of concurrent delay in construction contracts, and offered her thoughts on the current state of the law.

The talks were followed by drinks and canapés on the terrace kindly sponsored by Keating Chambers, where delegates were able to mingle and network in a social setting. The SCL(S) takes this opportunity to express its thanks and gratitude to David and Lucy for their respective presentations as well as CI Arb (Singapore) and Keating Chambers for kindly co-hosting the event.



# SINGAPORE CONSTRUCTION INDUSTRY & LAW UPDATES

**Technical:** Jointly developed by the Building and Construction Authority (BCA) and Infocomm Development Authority (IDA), the new BCA-IDA Green Mark for New Data Centres scheme will be launched on 14 March 2013. This is a new addition to the BCA-IDA Green Mark Scheme first launched in October 2012.

The first of its kind in Asia, the BCA-IDA Green Mark for New Data Centres encourages new data centres to adopt energy-efficient design, technologies and systems in the planning and design phase. The scheme relies on energy modelling to assess the performance of a proposed data centre design. Information on the criteria of assessment is available on the BCA website. The data centres will be rated according to Green Mark Platinum, GoldPLUS, Gold or Certified ratings.

**Case Law:** *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 04 is the first local case to address the question of whether an adjudication determination can be set aside on the ground that the adjudication application was lodged out of time, i.e. in breach of s 13(3)(a) of the SOP Act. The answer is yes. AR Jordan Tan found that the timelines stipulated in s 13(3)(a) are mandatory. Under s16(2) of the SOP Act, the adjudicator "shall reject" any adjudication application that is not made in accordance with s 13(3)(a). Reading s 13(3)(a) with s 16(2), a breach of s 13(3)(a) is therefore a ground for setting aside an adjudication determination in a case where the adjudicator fails to reject the application despite the breach. The adjudication determination may be set aside "however slight the breach". Claimants would be wise to file their adjudication applications in time.

## CALENDAR OF EVENTS

### UPCOMING EVENTS

No.	Date	Event
1	9 April 2013	Structural Failure and The Role of Forensic Engineering in Legal Disputes
2	9, 11, 17 & 19 April 2013	Engineering 101 (5th run)

*For information on past events, please refer to the Post Event Updates on our website: [www.scl.org.sg](http://www.scl.org.sg)*

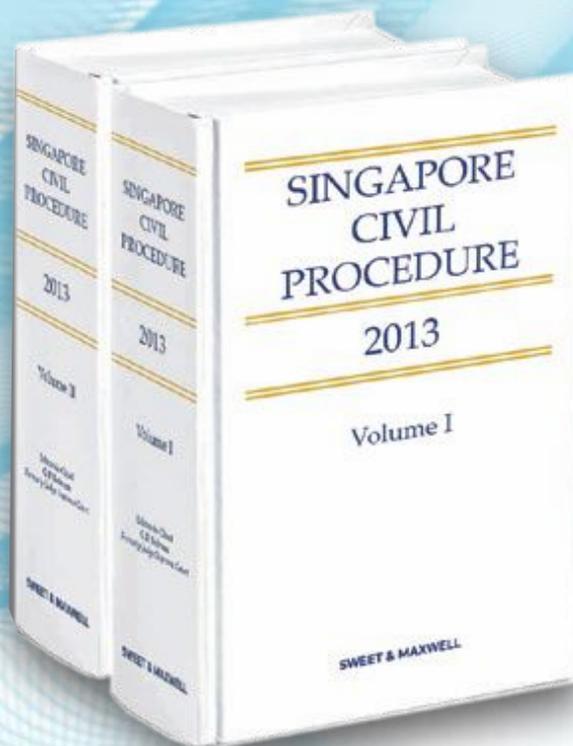
## LIST OF NEW MEMBERS WHO JOINED SCL (SINGAPORE) BETWEEN NOVEMBER AND DECEMBER IN 2012

1. Jonathan Ang
2. Vincent Ng
3. James Susheelan Damodharan
4. Aziz Tayabali Samiwalla
5. Jianfu Chu
6. Kian Koo Song
7. Mei Ching Cindy Lim



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**Sundaresh Menon**

Chief Justice  
Supreme Court of Singapore  
November 2012