

SOCIETY OF CONSTRUCTION LAW

INAUGURAL INTERNATIONAL CONFERENCE

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There is a strange contradiction which strikes the visitor to Singapore. The heat and humidity which assault you as you leave the airconditioned luxury of the airport is redolent of youthful adventure in the festering klongs of Bangkok or the crumbling alleyways of Hanoi. Your expectations of cultural challenge, economic advantage, gloriously shabby accommodation and gastric volatility soon fade.

The lack of litter, the luxury and a strange lack of colour is in some ways a greater shock. You soon learn that the Singaporeans enjoy order, and are perhaps not fond of surprises; a fitting place for people with an interest in the arcane niceties of construction law.

The conference flyer promises a forum to network and to keep abreast of international developments in construction law. Like all conferences, there are moments when your attention wanders. You glance at your watch, doodle on the impressively thick folder of materials, or wonder if you really should have eaten quite so much for lunch. However, unlike many conferences, this is run and attended by like minded people, genuinely interested in the subject matter; moments of boredom are genuinely few and far between.

We start with an update on the FIDIC suite of construction contracts, take a brief diversion through the industries of the Middle East, India and China, and issues affecting the oil and gas industry, then return to negligence and insurance. The second day closed the conference with a discussion of *mega projects*, chaired by our own Tomás Kennedy-Grant QC.

Delegates were largely made up of members of the six Societies of Construction Law: UK, Hong Kong, United Arab Emirates, Malaysia, New Zealand and, our hosts, Singapore. The Australians were represented in reasonable numbers, most wondering why they had not formed their own society; a situation which is sure to be rectified very shortly. There were 34 presenters (6 of them QCs or SCs, 17 partners in global law firms and the balance chief executives or project directors of project companies), each with considerable expertise and a different perspective of their respective industries.

Trends

We've come a long way from the traditional structure, evidenced by the original ICE form of contract (largely reflected in NZS3910), where the owner's consultant prepares designs, which the contractor then tenders on and builds for a lump sum under the consultant's supervision.

Financiers have generally become more comfortable with construction risk, and contractors more accepting of wider project outcomes. This has provided a greater number of contracting structures and a realisation risk can be managed more imaginatively than has been the case under traditional contracting structures.

In this context, the New Engineering form of Contract (NEC3) has become the dominant force in contracting in the UK, reflecting a more mature identification of risk and a greater willingness by all parties to share pain. Stronger contractors have seized upon this opportunity to offer more project and risk management expertise, and to take more of an interest in the procurement as a process.

In his official opening of the conference, Mr Chao Hick Tin, the Attorney-General of Singapore, identified the greatest constraints on the construction industry as being the number of disputes, and the cost of resolution. The blame for this he laid fairly at the door of the legal profession for its failure to promote dispute avoidance (he cited *financial exhaustion* as being the main driver for settlement, rather than any positive actions by legal advisors), and to set an example of professionalism for the rest of the industry.

Major projects continue to focus on allocation of risk, but rather than from the traditional starting points of what the contractor can control (what is *fair*) against what the owner can get away with, to a realisation that risks are to the project, and one or other party is in a better position to manage that risk.

Dispute Resolution

Statutory adjudication (in similar terms to our Construction Contracts Act 2002) is in place in most jurisdictions and is being considered in the rest. In most cases, after an initially slow up take, adjudication has become very popular.

The parallel jurisdiction between such adjudication and contractual ADR has led to a considerable fall off in arbitrations. There remains an underlying feeling that more complex issues are better suited to ADR procedures; this, however, seemed to be more wish than reality. Most practitioners seemed to accept that a greater ability to integrate adjudication into contractual ADR procedures would be desirable; something which is difficult with the provisions which preclude a binding agreement on the adjudicator or the nominating authority at the time of award (section 33(3) of our Act).

There was general acceptance that disputes boards, consisting of one or three appropriate experts appointed at the time of award to review progress and deal with disputes (either by binding determination or recommendation) as they arise, were a good thing. Many financiers in the UK, Europe and the US (including the World Bank) now insist on using a Disputes Adjudication Board, and it is probable that the construction for the London Olympics will include provisions for a sitting Disputes *Avoidance* Board.

Duties of Care

The evergreen issues of duty of care and recovery of economic loss enjoyed an extensive outing.

In the UK, having congratulated themselves on the farsighted logic of *Brentwood v Murphy*, they now find themselves in difficulty. The finding in *Brentwood* that a builder is primarily responsible for defects, is struggling with wider application. There has been some truly tortured logic in later cases, including holding that a designer is a builder and how to separate the under surface from the tarmac on a road or one part of a building from another for the purposes of singling out the defective part from the damaged part for loss purposes.

While we are spared the contortions of recoverability of pure economic loss, the difficulty of establishing a duty of care seems to be common in all jurisdictions. There has been a considerable reflection in the UK and elsewhere on this issue, and it appears that *Brentwood v Murphy* is unlikely to be the last word on the matter. For ourselves, while the analysis by the Court of Appeal in *Rolls-Royce v Cart Holt* is helpful, establishing a duty remains a matter of degree.

We heard much in Singapore about elephants – hard to describe, but you will know one when you see it.

Insurance

Much like historic tensions between financiers and contractors, there seems to be a universal mismatch between allocations of risk in construction contracts, and the cover offered by *contractor's all risk* policies. Two things seemed to be abundantly clear – first that these policies do not actually cover all risks, and second the wording changes significantly from one policy to the next, often depending on which jurisdiction you are in.

While the starting point is traditionally that all damage is covered unless excluded, the use of expressions like *unforeseen* and *sudden physical loss* is reasonably common in such policies and can have the effect of limiting the extent of cover from the outset.

There is considerable discussion around the traditional exclusions of (1) fraud or theft, (2) war, riot and terrorism, (3) inherent vice and deterioration, (4) natural perils, (5) transit, and (6) faulty design or defective workmanship. We focussed on the last exclusion, and in particular the five levels of exclusion for defective workmanship.

Whether negotiated by brokers on your client's behalf, or supplied with standard wording, it is clear that it is worth spending some time examining policy wording to ensure that it reflects the contractual allocation of risk, and that your client is aware of any uninsured shortfall. Often, the exclusions are negotiable for a fee. It does appear, however, that for those of us further from the insurance market, such negotiations can be harder to achieve.

After two days of stimulating discussion, extensive networking, cocktails, fine food and a gala dinner, we were all ready to return to our busy offices and our families. The general mood was that the conference had been a great success, and thoroughly enjoyed by all. The only challenge will be when and where to hold it next.