



### Workshop On Dispute Avoidance - No. 3 by Ir. Dr Ooi Teik Aun

Ir. Dr. Ooi Teik Aun is the current Chairman of Dispute Resolution Practice (DRP) Subcommittee.

This series of Workshop on Dispute Avoidance is held on a quarterly basis and is aimed to encourage members to freely exchange and discuss matters of practical interest with the panel members on a without prejudice basis. Relevant case law will be quoted to illustrate the outcome of the issues at hand.

This workshop is the 3<sup>rd</sup> series to be held at Wisma IEM TUS room on 26<sup>th</sup> July 2017 at 5.30pm -7.30pm and 25 participants attended with active discussions.

Ir. Dr. Ooi chaired the proceedings with Ir. C K Khoo, Ir. Ho Kin Wing and Ir. Leon Weng Seng as panel members of the workshop.

The workshop was delighted to receive before the date of the proceedings, an issue related to Loss & Expenses (L&E) claim. It sought to discuss why the Employer is not paying for the L&E claim. The requirement of serving notice within 28 days from the date of AI, CAI or the commencement of Relevant Event for Extension of Time (EOT) under *Cl.23 PAM 2006* Conditions of Contract is mandatory, failing which the right to claim will be extinguished.

The ensuing action under *Cl.24 – Loss & / or Expenses Caused By Matters Affecting the Regular Progress for the Works* also requires the Contractor to write to the Architect to claim L&E with an initial estimate, again within 28 days from the date of the AI, CAI.

This is also a condition precedent to any entitlement to L&E under contract or common law. It has to be supported by documents, calculations as substantiation. The contractor is urged to keep complete details duly verified by the works inspectors (C.O.W., RA or RE) and if these are relevant, the claim can be considered for payment. This view was expressed by Ir. Ho and Ir. Leon.

On the period of 28 days, Ir. C. K. Khoo raised the case of ***New Zealand Insurance Co Ltd v Ong Choong Lim (t/a Syarikat Federal Motor Trading)*** [1992] 1 MLJ 185 and ***Pacific Bank Berhad v Kerajaan Negeri Sarawak Civil Appeal No. Q-01-8-2011(Q)*** which concerns **S29 of the Contract Act 1950** (see below), and for the benefits of all, the following details were researched and included in this write-up.

## S29 States

***“Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.”***

The **Pacific Bank** case has the following clause in the Bank Guarantee:-

***“All claims, if any in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under this Guarantee.” (“the Said Clause”).***

The **Federal Court**, on 23.4.2014, held:

- (a) ***The liability of the guarantor under a guarantee depends on the language of the guarantee prescribes a time limit for a demand to be made before a cause of action can arise, so be it. The plain and ordinary meaning must be given.***
- (b) ***There is a need to distinguish between an agreement prescribing the time limit in which to make a demand (and if the guarantor does not pay, a cause of action i.e., a right to sue, arises), and an agreement which limits the time period for suing on the failure to pay. Section 29 of the Contracts Act only invalidates the latter as such an agreement would limit the enforcement of the right.***

As this is a claim on a Bank Guarantee (BG), it will be interesting to see if the validity of similar time limitation for other forms of commercial contracts would be upheld by the Courts.

A number of questions was asked by the workshop participants, in particular on the quantum of L&E as it is difficult to be precise. If the estimate turns out to be substantially different, would it affect the validity? The panel is of the opinion that as it is an estimate, laxity is allowed. The quantum can be updated by the Claimant as more information is revealed.

The panel also advocated dispute avoidance as the costs of resolving dispute can be substantial and it may not commensurate with the amount awarded.

It is also disruptive to the normal running of the works in progress, apart from the emotional distress.

The panel also shared how legal costs were computed and in most cases, the recoverable legal costs are not the same as the actual costs spent and the winning party still needs to bear the difference, which again can be quite a lot.

Workshop No. 4 will be held in October 2017 and intending participants are invited to put forth issues / problems for discussions.



Participants at Workshop No.3



Panel Speakers(R to L)

Ir. Khoo Choong Keow, Ir. Leon Weng Seng and Ir. Ho Kin Wing