



Joint Course On Alternative Dispute Resolution For Practitioners

by Ir. Dr Ooi Teik Aun

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

The Joint Course on Alternative Dispute Resolution (ADR) for Practitioners was held over 2 days on 27 and 28 March 2017 (Monday & Tuesday).

It was the third series organized by IEM with 3 other organisations, viz Pertubuhan Akitek Malaysia (PAM), The Malaysian Institute of Arbitrators (MIArb), Royal Institution of Surveyors Malaysia (RISM). 26 participants attended the event.

DAY 1 - ARBITRATION : PRACTICAL ASPECTS

Ms Karen Ng Gek Suan delivered in the morning the first lecture "**Introduction to Arbitration**" and Ms Shirley Hor on "**Arbitration : Practical Aspects**".

INTRODUCTION TO ARBITRATION

Ms Karen introduced the concept of Arbitration with emphasis on its advantages and disadvantages versus litigation. Various institutional arbitration clauses were included in the discussion on institutional and ad hoc arbitrations. The importance of properly drafted arbitration clauses was highlighted.

ARBITRATION : PRACTICAL ASPECTS

Ms Hor journeyed through the arbitration proceedings from its commencement and cited **S10(1)(a) Arbitration Act 2005** that court proceeding shall be stayed pending arbitration.

The process begins with appointment of arbitrator, preliminary meeting, the discovery and inspection of documents, followed by hearing and exchange of written submissions, and publication of award.

Ms Hor outlined some techniques to cut down unnecessary time by not having oral hearing, chess clock procedure and hot tubbing (joint meeting) of experts.

The challenging and enforcing of awards referred particularly to **S37 (setting aside)**, **S42 (reference on question of law)**, **S39 (ground for refusing recognition or enforcement)**. Two case laws were discussed.

CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012 (CIPAA)

Ar. David Cheah took the afternoon session with an overview of CIPAA, stating the payment problems in the construction industry. The Act aims to cure the cashflow issue faced by especially the subcontractors. It conceptualized on “pay first argues later” which is of temporary finality. CIPAA imposes a statutory regime and it came into force on 15 April 2014. All construction contracts are caught under this Act retrospectively and it prohibits conditional payment term which is rather rampant in subcontracts. It is a speedy process taking 90 days from notice of adjudication for a reasoned decision to be rendered and can be enforced through High Court. It also allows for suspension / slowdown of works and direct payment from Principal.

From KLRCA’s statistics, as many as 300+ cases (as of April 2016) were adjudicated and has impacted positively the cash flow significantly. Various clauses in CIPAA and case laws were detailed for discussion.

DAY 2 - COMMON ISSUES IN CONSTRUCTION CONTRACTS MANAGEMENT: AVOIDING COMMON DISPUTES

Ir. Harban Singh occupied the morning session with “***Common Issues in Construction Contracts Management : Avoiding Common Disputes***”. He started off outlining the various Standard Form of Contracts (viz JKR / PWD, CIDB, PAM, IEM, FIDIC, etc.) and went on to categorise particularised claims and global claims. These claims encompassed damages and LAD, VO’s, EOT, Loss & Expense, determination of employment, defects, etc. Apart from claims by Contractors, he highlighted claims from construction professionals.

EXPERT WITNESS & OPINION

Ir. Leon Weng Seng presented the above for the afternoon. Experts are important witness giving independent opinion to assist the tribunal. He must be qualified and possessed specialist knowledge and of law, experience, integrity, proper training, effective communication, etc. He needs to exercise independence and impartiality. His roles and responsibilities, regardless who appoints him, need to adhere to the principles enunciated in the ***Ikarian Reefer*** case in addition to those in the rules of courts.

He bears the responsibilities of his evidence and opinion being independent, unbiased and objective, with stated facts or assumptions and list the document he refers to. Should he change his opinion, he must expeditiously inform the parties. The expert report will carry a declaration as to the statement of truth and duly signed by the expert.

Ir. Leon shared his experience in getting experts together in what is known as hot tubbing where experts freely expressed or challenged each other’s’ opinion guided by the tribunal. This is effective in finding the truth. The experts can also be challenged with regards to his qualification and it was also highlighted that experts may not be immuned from suit (as in UK after 31 March 2011).



Participants at Joint Course on Alternative Dispute Resolution for Practitioners



Ar. David Cheah delivering his presentation