

Report of Talk on Liquidated Damages Under Construction Contracts

DISPUTE AVOIDANCE AND RESOLUTION PRACTICE

reported by



Ir. Dr. Ooi Teik Aun

On 9 December, 2016, there was an evening talk on “Liquidated Damages Under Construction Contracts” at the TUS & C&S rooms, 2nd Floor, Wisma IEM.

The session, attended by 55 participants, started with Ir. Leon Weng Seng explaining what “**Practical Completion**” meant as it affected the Date of Certificate of Practical Completion (CPC) of a contract. It signified the end of Liquidated Damages (LD) if a Certificate of Non-Completion (CNC) had been issued by the S.O.

In England, the imposition of a sum of money for late completion may amount to penalty instead of Liquidated Damages which is a genuine pre-estimate of the Employer’s loss where proof of loss is not required. However, this is not the case in Malaysia because all LDs are considered penalties and the court must determine reasonable compensation for the Employer. This provision is embodied in **S75 Contracts Act 1950**.

In the famous Selva Kumar case, the Federal Court pronounced 2 kinds of contracts. For the first class, where reasonable compensation is difficult to assess, proof of actual loss is not required. For the second class, proof is essential when assessment of reasonable compensation can be carried out with settled rules.



The participants at the talk

Ir. Leon highlighted the LD clauses in PAM, CIDB, IEM Forms of Contract. He also discussed situations where the LDs are rated “\$ Nil”, “£ Nil”, “N/A”, “Zero” and the General Damages claimable in such cases. The defaulter can cite reasons such as Employer’s waiver, act of prevention, interference with certifying process, absence of trigger date for imposition of LD, extension of time and condition precedent, etc. as grounds for challenging the LD imposition.

Ir. Leon highlighted recent developments (November, 2015) in England on the concept of “legitimate commercial interest” and discussed at length 2 cases (**ParkingEye Ltd v Beavis, and Cavendish Square Holding BV v Makdessi**). There was active participation from the floor in the discussions and the talk ended at 7.30 p.m. with great applause for the speaker. ■