

# Talk on “The Use of Expert Witnesses in Litigation and Arbitration”

SUB-COMMITTEE ON DISPUTE RESOLUTION PRACTICE



by Ir. Dr. Ooi Teik Aun, Hon. FIEM

A talk on “The Use of Expert Witnesses in Litigation and Arbitration” was held at Prof. Chin Fung Kee Auditorium, Wisma IEM, on 13th December, 2013. Despite the heavy thunderstorm that preceded the lecture that evening, it attracted 35 participants.



Ir. Dr. Wong presenting his lecture

The lecture was delivered by Ir. Dr. Wong Fook Keong, a Professional Civil Engineer registered with the Board of Engineers, Malaysia (BEM), a Chartered Civil Engineer of the Engineering Council of United Kingdom, a Chartered Arbitrator and a BEM Accredited Checker in Geotechnical Works. He is on KLRCA panel of Arbitrators, Adjudicators and Mediators. He has more than 30 years of experience in Consulting Engineering Practice in the field of Geotechnical, Civil and Structural Engineering and is often called upon to give expert opinion evidence on engineering and construction related disputes in litigation and arbitration cases.

“Malaysia engineers generally shy away from giving expert evidence in Court or Arbitration,” said Ir. Dr. Wong. He proceeded to explain when an expert witness is needed. “Expert evidence is required or admissible when there is a need to furnish the judge or arbitrator with information which is likely to be outside their experience and knowledge” he said, adding that “the arbitrator should decide solely on the basis of the evidence he has heard and not on the basis of his own expertise”.



Some of the participants

## DUTIES AND RESPONSIBILITIES OF THE EXPERT WITNESS

1. The overriding and primary duty of an expert witness to the tribunal is to explain technical issues to the arbitrator on the matters within his expertise so that the arbitrator can understand the matter and reach a conclusion. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.
2. The Chartered Institute of Arbitrators’ guidelines of good practice for expert witnesses are as follows:

### “An expert witness:

Should bear in mind that at the hearing, his first duty will be to assist the tribunal arrive at a just decision, regardless of its effect on the interests of his client. Subject to this, he should assist his client in every possible way. He should not himself seek or advertise for appointments as an expert witness in competition with others. He should have detailed knowledge of the theory, customs and practice of the specialist field in which he is required to give evidence of opinion together with a general knowledge of the law of evidence, of the principles of damages, of professional negligence and breach of contractual duty as well as of practice in relation to the duties of expert witnesses before and during the trial or hearing. He should not refuse to disclose any relevant information known to him concerning the subject matter of his evidence. Should this information be confidential to another client, he should endeavour to obtain the

latter's consent and, at the same time, inform him that disclosure is unavoidable if the tribunal requires it. He should give opinions which are honestly held by him personally and are not merely the opinion of others except as reinforcements of his own."

### CHALLENGING EXPERT EVIDENCE

1. Attacks on the expert's credibility and integrity
2. Attacks on the expert's experience
3. Attacks on the expert's competence
4. The 'Are you up-to-date?' attack
5. That the expert witness is biased
6. That the expert witness's evidence is ubiquitous
7. That the logic of the expert evidence is flawed
8. Attacks on the expert's qualifications

In conclusion, Ir. Dr Wong gave his views of what an expert witness should have

1. A duty to ensure the court or tribunal that he is an expert in the subject matter of the dispute and a duty to communicate this knowledge through the evidence he gives, honestly and fairly.
2. A duty to his profession at all times in order to maintain the high standards that are incumbent upon him to keep.
3. A duty to his client by accepting an appointment only if he holds views which are favourable to that client.
4. A duty to himself by maintaining his personal and professional integrity.

The lecture was very informative and there was active discussion from the floor. The session concluded with the presentation of a certificate of appreciation to the speaker. ■

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Ir. Dr Doi Teik Aun is the current Chairman of Dispute Resolution Practice (DRP) Subcommittee. He is also an Advisor for Consulting Engineering Special Interest Group (CESIG) as well as that of Tunnelling and Underground Space Technical Division (TUSTD). Ir. Dr Doi is an Honorary Fellow of IEM, Fellow of the Malaysian Institute of Arbitrators and Past President and is ICE Country Representative for Malaysia. He is Organising Chairman of the International Tunnelling and Underground Space Conference in March 2015 in Kuala Lumpur as well as Chairman of the Foundation Course promoted by the International Tunnelling Association (ITA-AITES) to be held in Kuala Lumpur in February 2015. He is President of Southeast Asia Geotechnical Society (2010-2016).