

COVID 19: AN INTERNATIONAL CONSTRUCTION PERSPECTIVE – SINGAPORE

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THIS IS THE FIFTH OF OUR FIVE-PART SERIES COVERING THE ISSUES FACING THE CONSTRUCTION INDUSTRY IN FIVE DIFFERENT JURISDICTIONS ACROSS THE WORLD IN THE FACE OF THE COVID-19 PANDEMIC.

The below article was prepared by WFW & WTL.

"The clause may excuse the party from performing and allow the other party to cancel the contract."

Force Majeure and Frustration

If there is a force majeure clause in the contract

Force majeure clauses "contractually allocate the risks between the contracting parties with regard to the occurrence of future events in specific circumstances, all of which are stipulated within the clause itself."¹ Whether force majeure arises and what rights and obligations follow such an event is subject to the unique and precise language of the force majeure clause in the contract.

The parties should carefully consider the parameters of the event that could constitute force majeure and strictly comply with the prescribed procedure when invoking it, bearing in mind that the burden of proof lies on the invoking party.

Further, depending on how the clause is drafted, the invoking party may need to demonstrate:

1. how it is prevented or hindered from performing its contractual obligations in the circumstances; and
2. that reasonable steps were taken to mitigate its results such as finding an alternative subcontractor to temporarily step in and perform the required services to mitigate the losses.

When the clause is successfully invoked, it usually grants the party an extension of time to perform its obligations. Sometimes, it may excuse the party from performing and allow the other party to cancel the contract depending on the contractual and factual matrix.

Both of the commonly used standard form contracts in Singapore, namely the SIA Articles and Conditions of Building Contract (the “SIA Conditions”) at Clause 23.1(a) and the REDAS Design and Build Conditions of Contract (the “REDAS DBCC”) at Clause 16.1.2, expressly provide for force majeure as grounds for extension of time.

Another common standard form contract, the FIDIC 2017 at Clause 18, sets out provisions relating to the occurrence of “exceptional events”. The “exceptional events” provisions are substantially similar to the force majeure provisions of the previous edition of the FIDIC (being the FIDIC 1999) and the consequences (such as relief from performance, extension of time and payment of loss and expense) remain the same as the FIDIC 1999.

If there is *no* force majeure clause in the contract

Although available in very limited circumstances, the common law doctrine of frustration may come into play to discharge a party from any further contractual obligations where, after the parties concluded the contract, *“something renders it physically or commercially impossible to be fulfilled, or transforms the obligation to perform into a radically different obligation.”*²

The effect of frustration is an automatic termination of the contract by the operation of the rule of law – irrespective of the parties’ wishes.^[3] If successful, parties can turn to the Frustrated Contracts Act which sets out statutory rules on, *inter alia*, the extent to which advance payments made before the frustrating event intervened may be refunded and work done in preparation of the performance of the contract in advance of the frustrating event may be reimbursed.

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The COVID-19 (Temporary Measures) Act

The COVID-19 (Temporary Measures) Act (the “Act”) was passed in Parliament on 7 April 2020 offering temporary relief to, among others, construction and supply businesses who meet the following criteria:

- A party has undertaken to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or one party has undertaken to supply services to one or more other parties;³
- the party is obliged to perform its obligations on or after 1 February 2020 for construction and supply contracts entered into or renewed before 25 March 2020;
- The party is unable to perform a contractual obligation, and such inability “is to a material extent caused by a COVID-19 event” (“Subject Inability”); and
- The party has served a notification for relief (“Relief Notification”) in accordance with the requirements under the Act.

The effect of the Act on construction and supply contracts is that it:

- Suspends the enforcement of the parties’ obligations for six months from 7 April 2020 (or such earlier/later date that may be shortened/extended); and

- Prohibits a party from, *inter alia*:
- Commencing court and insolvency proceedings;
- Enforcing security over the immovable property as well as movable property that is used for business or trade;
- Early calling on a performance bond given under a construction contract;
- Terminating leases of non-residential premises; and
- Claiming for liquidated damages and breach of contract.

"The Act allows companies to suspend obligations [...] arising out of an inability to perform a contractual obligation caused to a material extent by a COVID-19 event that occurred on or after 1 February 2020."

Accordingly, construction and supply companies, who may otherwise be liable for damages or risk having their deposits/assets forfeited, will not be liable for liquidated damages for delays arising from lack of workforce, supplies or cash flow caused to a material extent by COVID-19 and will be able to avoid early performance bond calls.

Finally, as to how the Act interacts with other remedies, the Act expressly provides that the temporary relief will be afforded to a party *"despite any law or anything in the contract"*. Here, *"any law"* should be interpreted as all laws in Singapore save for those expressly excepted in the Act such as an action pursuant to the Frustrated Contracts Act or a force majeure clause in the contract,⁴ which will prevail over the Act.

Suspension

The parties should first consider whether the contractual terms confer suspension right to the contractor and, if so, for how long.

In line with the Singapore Government's COVID-19 circuit breaker measures, most non-essential construction sites and worksites have been suspended from 7 April 2020 to 1 June 2020 following the Building and Construction Authority (BCA) 's advisory.

Works that are deemed essential may continue during the control period. Essential works are:

- Maintenance of the structural safety and integrity of building works;
- Maintenance of security of the project site; and
- Environmental protection of the project site.

The Act allows companies to suspend obligations by retrospectively providing relief against liquidated or other damages, as well as a defence to claims for breach of contract, arising out of an inability to perform a contractual obligation caused to a material extent by a COVID-19 event that occurred on or after 1 February 2020.

Termination

As stated above, a force majeure clause, when invoked, generally allows extension of time to perform the party's obligations and there are no common law grounds to terminate for a force majeure event.

The standard form contracts provide for a number of situations in which the employer may terminate the contract. Notably, the employer may terminate if (i) the contractor has defaulted or (ii) there has not been a default by the contractor then by notice from the employer to the contractor. Where the employer terminates the contract by notice (option (ii) above, i.e. without default on the contractor's part), the standard form contracts generally also provide that the contractor shall be compensated by the employer for, *inter alia*, the loss or damages suffered by the contractor due to the termination (including loss of profit).

The SIA Conditions and REDAS DBCC do not contain express provisions setting out that the employer may terminate the contract based on force majeure, they only expressly provide for an extension of time based on force majeure. The FIDIC conditions, however, provide that either party may terminate the contract if an exceptional event causes a delay of 84 consecutive days or multiple delays which total more than 140 days.

The Act does not release the parties from their contractual obligations.

Jurisdictional considerations

The Act expressly prohibits the taking of specified actions in relation to Subject Inability including, *inter alia*:

- (i) the commencement or continuation of court and domestic arbitral proceedings; and
- (ii) the enforcement of a court judgement, domestic arbitral award or adjudication determinations under the Building and Construction Industry Security of Payment Act (Cap. 30B).

"Parties may apply for an assessor's determination to give a final and unappealable decision, but they are not allowed to be represented by advocates and solicitors."

The Act also provides that any court proceedings, domestic arbitral proceedings or such other proceedings as may be prescribed concerning Subject Inability that is pending at the time the Relief Notification is served must be stayed.

Breaching any of the prohibitions set out in the Act could result in a criminal conviction and a fine of S\$1,000. Also, any court or arbitral proceedings concerning Subject Inability must be dismissed by the relevant court or tribunal if brought about in contravention of the Act. This means that the party would lose their substantive right to enforce the contract at all, even after the temporary measures under the Act have been lifted.

The prohibition on enforcement under the Act appears to be limited to local judgments and domestic arbitral awards.

Practical advice

1) For construction and supply businesses whose contractual obligations arise from 1 February 2020 under a contract entered into or renewed before 25 March 2020 and who is unable to comply with their obligations, should:

- serve a Relief Notification on all contractual parties;
- maintain open communication with the parties;
- keep all relevant evidence showing that any defaults were caused by a COVID-19 event (e.g. correspondence exchanged with the counterparties or subcontractors leading up to the default under the contract);
- in case the parties agree to vary a contract, remember to follow the terms of the 'No Oral Modification' clause, if any. If none, ensure that the agreement is evidenced in writing; and
- where there is a dispute as to the parties' inability to perform their contractual obligations due to the COVID-19 pandemic, any party may apply for an assessor's determination to give a final and unappealable decision. However, the parties are not allowed to be represented by advocates and solicitors at proceedings before an assessor. Given that there is an inherent risk of an unfavourable outcome before an assessor, parties should carefully strategise and seek appropriate legal advice before issuing or responding to any Relief Notification.

2) For those parties whose rights and obligations accrued before 1 February 2020 or those who entered into contracts on or after 25 March 2020, it is strongly advised to carefully consider the terms of the contracts and seek legal advice if you have any doubts.

3) If the contract contains an international arbitration clause the prohibition under the Act does not appear to extend to foreign court or international arbitral proceedings and, as such, international commercial arbitrations governed by the International Arbitration Act can still be initiated or continued.

Parties who are unsure of their rights and obligations pursuant to the Act are strongly advised to seek legal advice before taking action on claims and reliefs governed by the Act.

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[1] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413

[2] *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35; *Solomon Alliance Management Pte Ltd v Pang Chee Kuan* [2019] 4 SLR 577

[3] S.2 of the Building and Construction Industry Security of Payment Act (Cap. 30B)

[4] Section 5(13) of the Act

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