



ARTICLE

COVID-19: Navigating the Contractual Remedies within Construction Contracts in Singapore

The COVID-19 pandemic has caused significant disruption and cash flow issues to many construction companies. In this article, we explore the contractual remedies available to the Contractor under the local standard forms of a contract.

Parties to construction contracts are currently concerned with the negative impacts of COVID-19 and its continuing effect on construction projects including:

- Project delays due to suspension of works as part of the nation circuit breaker measures¹ and disruption or reduced efficiency due to social distancing at sites following project re-starts;
- Additional costs incurred due to heightened workplace safety, health and environmental measures and construction of temporary workers' quarters to accommodate essential services workers during the suspension period; and
- Potential increase in compliance costs in connection with COVID-Safe Restart Criteria² which includes, but is not limited to, implementing a system to track the daily health status of workers, regular COVID-19 testing for the workforce, cohorting of workers by projects at their accommodation, costs of implementing safe management measures to minimise the resurgence of COVID-19, appointment of safe management officers and safe distancing officers and construction of onsite temporary workers' quarters.

We consider below the relief expressly available under the relevant unamended standard forms, namely the SIA Articles and Conditions of Building Contract (the "SIA Conditions"), the REDAS Design and Build Conditions of Contract (the "REDAS Conditions") and the Public Sector Standard Conditions of Contract (the "PSSCOC Conditions").

Extension of time

Force majeure

Parties are advised to review the precise construction of the force majeure clause as it defines the exact scope and ambit of the clause.³

Clause 18.2 of the REDAS Conditions defines and provides a list of force majeure events. While this appears to be an exhaustive list and does not extend to cover a pandemic such as COVID-19, the Contractor may contend that the governmental actions in response to COVID-19 constitute "embargoes" under Clause 18.2.4. On the contrary, the term force majeure is not explicitly defined in the SIA and PSSCOC Conditions. It is therefore uncertain if COVID-19

¹Construction sites were closed from 7 April to 1 June under BCA advisories dated 3 April and 2 May 2020: https://www.scal.com.sg/resources/cikles/2_%20BCA-Advisory-to-construction-industry.pdf
<https://www1.bca.gov.sg/docs/default-source/bca-restart/advisory-safe-controlled-restart-of-construction-sector.pdf>

²BCA Media Release dated 15 May 2020

³RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd [2007] 4 SLR(R) 143 at [54]

qualifies as a force majeure event under the SIA and PSSCOC Conditions. Contractors seeking to rely on force majeure have a high threshold to meet and to prove that the performance of the contract is impossible or rendered commercially impractical. Furthermore, the Contractor is obliged to undertake reasonable steps to avoid or mitigate the delay.

Shortage of manpower and materials

A similar case on “embargoes” can be raised under PSSCOC Clause 14.2(c) but this limits the claim to an embargo in Singapore. The provisions are drafted slightly differently in the SIA Conditions under Clauses 23(1)(la) and (m) which imposes the condition of foreseeability.

Contractors who significantly rely on labour and material supply from China may wish to note that the Chinese government authorities have offered force majeure certificates to Chinese companies affected by the COVID-19 pandemic. Although it claims that *“force majeure certificates have been recognized by governments...in more than 200 countries and regions around the world, and it is widely accepted overseas”*⁴, it is uncertain whether any weight will be accorded to such certificates. In the meantime, Contractors may consider collating such documents to support their extension of time claims.

Potential areas of time and cost entitlement

An entitlement to additional time does not automatically give rise to an entitlement for loss and expense. There may be scope for a Contractor to consider the following grounds of claims which permit recovery for both time and costs.

Change in statutory obligations

We examine the relevant provisions provided in the standard forms; SIA Clause 7.(1), REDAS Clause 1.12.1 and PSSCOC Clauses 7.1 and 7.2.

In REDAS, for example, adjustment of the contract sum to account for additional costs arising from changes in conditions made by relevant authorities after the tender is allowed, under Clause 21.2, while the PSSCOC Conditions imposes the condition of foreseeability of changes in statutory requirement or by relevant authorities at the time of tender.

The Contractor may contend that its obligation and its price to carry out the works, including its choice of method of working and site operations, is premised on applicable regulations and the requirements of authorities prevailing at the time of tender. As a consequence, any

change in such requirements or conditions imposed by the relevant authorities (and unforeseeable by the Contractor under the PSSCOC Conditions) will be construed as a change or a variation under the contract. It is also arguable that the compliance with travel restrictions, quarantine orders and mandatory stay at home notices, which were imposed as a result of COVID-19, fall within these contractual stipulations.

Variations

A Contractor who wishes to rely on the variation clause in the standard forms would have to overcome the hurdle of contending that the definition of the “Works” extends to include site operations and methods of working. Site operations and methods of working could be reflected in documents such as the method statement or programme. Although SIA Clause 2.(1) and PSSCOC Clause 4.2 place the risk on the Contractor, it may be arguable that the COVID-Safe Restart Criteria results in a change in the contractor’s methods of working which was not considered at the time of tender. SIA Clause 1.4(b) explicitly permits an instruction to be issued on account of variation in methods of working.

There could be limited instances where contracts are amended to give contractual effect to such documents. To demonstrate entitlement, the Contractor will be required to establish what the baseline was and what has been changed. A revised method statement or programme will support the claim in these situations.

Suspension of the works

REDAS Clause 15.2 and PSSCOC Clause 13.1 provide for suspension of the Works upon issuance of an instruction by the contract administrator. While SIA Conditions does not expressly provide for suspension of the Works by the Architect, Clause 12.(2)(i) allows a variation to be made due to *“postponement of any part of the Works, desired by the Employer.”*

What if the suspension instruction issued by the Employer was not sanctioned by the contract administrator? It is arguable that performance is physically impossible during the period from 7 April 2020 to 1 June 2020. All construction activities were “suspended” or “ceased” apart from essential activities. In this regard, the instruction received from the Employer may be treated as a deeming instruction from the contract administrator. A Contractor who wishes to make a loss and expense claim may also have to overcome the hurdle on the expression of “safety of the Works” under PSSCOC Clause 13.1(2).

⁴ China Council for the Promotion of International Trade website: http://en.ccpit.org/info/info_40288117668b3d9b017019772b5706b0.html

A snapshot of the appropriate contractual provisions discussed above is illustrated below.

List of Events and Contractual Relief	SIA (9th Edition)	REDAS (3rd Edition)	PSSCOC (2014 Edition)
<p>Force Majeure</p> <ul style="list-style-type: none"> - Time Entitlement - Loss & Expense Entitlement 	<p>Clause 23.(1)(a)</p> <p>To be pursued on common law rules</p>	<p>Clauses 16.1.2 & 18.2.4</p> <p>Unlikely that any attempts made pursuant to Clause 29.1 will succeed with force majeure being a neutral event</p>	<p>Clause 14.2(a)</p> <p>No provision</p>
<p>Labour and/or Material Shortages</p> <ul style="list-style-type: none"> - Time Entitlement - Loss & Expense Entitlement 	<p>Clauses 23.1(l) & (m)</p> <p>To be pursued on common law rules</p>	<p>Discussed above</p> <p>Discussed above</p>	<p>Clauses 14.2(c) & (e)</p> <p>No provision</p>
<p>Statutory Obligations</p> <ul style="list-style-type: none"> - Time Entitlement - Cost Entitlement 	<p>Clause 23.(1)(f) & (o)</p> <p>Clause 1.(4)(b), 7.1 & 12.(2)(g)</p>	<p>Clause 16.1.1</p> <p>Clauses 21.2, 26.1 & 29.1</p>	<p>Clauses 14.2(e)</p> <p>Clauses 7.1 & 7.2</p>
<p>Variations</p> <ul style="list-style-type: none"> - Time Entitlement - Cost Entitlement 	<p>Clause 23.(1)(f)</p> <p>Clause 1.(4)(b) & 12.(2)(g)</p>	<p>Clause 16.1.1</p> <p>Clause 21.2, 26.1, 29.1</p>	<p>Clauses 14.2(h)</p> <p>Clause 19.1(b) & 22.1(a)</p>
<p>Suspension of Works</p> <ul style="list-style-type: none"> - Time Entitlement - Cost Entitlement 	<p>Clauses 12.2(i) & 23.1(1)(p)</p> <p>Loss and expense to be pursued on common law rules</p>	<p>Clauses 15.2, 16.1.3</p> <p>Clause 29.1</p>	<p>Clauses 13.1(2) & 14.2(k)</p> <p>Clause 13.1(2) & 22.1(d)</p>

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