

# The Coronavirus (COVID-19) Outbreak

## *A contractor's guide to force majeure and its entitlement to additional time and money*

The onset of the novel coronavirus (“**COVID-19**”) has seen significant impact on the Singapore construction industry. For starters, as Singapore is heavily reliant on Chinese labour in the construction industry, various travel restrictions imposed by both the Chinese and Singapore governments which have resulted in a severe reduction of the workforce is a source of serious concern for contractors locally. For the Chinese workers allowed to enter Singapore, they may additionally be subject to Stay Home Notice<sup>1</sup> requirements, which means that they are not able to work on site for at least 14 days. The rejection of new workpass applications for foreign workers from China<sup>2</sup> has further exacerbated the problem, rendering it necessary for contractors to look for alternative sources of labour.

In addition, there have been difficulties in procuring materials and plant as a result of the lockdown of many cities in China by the Chinese government. This is likely to translate to higher costs incurred by contractors. Other causes of additional time and costs include the implementation of everyday measures on site and/or measures to manage the effects of COVID-19, such as the daily temperature taking, compliance with Stay Home Notices and the

cleaning and disinfecting of sites where there are suspected or confirmed cases of COVID-19.

On 4 March 2020, as part of the Ministry of National Development's Committee of Supply Debate,<sup>3</sup> Minister of State Zaqq Mohamad announced several support measures for construction firms in response to the COVID-19 outbreak:

- a) The Building and Construction Authority (“**BCA**”) has advised government agencies to take a sympathetic view of construction project delays and grant requests for extension of time for their completion. Further, the government has sought the support of the Real Estate Developers' Association of Singapore (“**REDAS**”) for private sector developers to take the same view as well;
- b) To ease cashflow concerns, main contractors for public sector projects can also submit progress payment claims fortnightly instead of monthly;
- c) For ongoing prefabricated prefinished volumetric construction (“**PPVC**”) projects affected by delays due to the supply of construction materials from China, BCA has allowed 13 projects to install partially

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<sup>1</sup> Immigration and Checkpoint Authority, *Updates on Border Control Measures in Response to the COVID-19 (Coronavirus Disease 2019)*, <https://www.ica.gov.sg/news-and-publications/public-education/updates-on-border-control-measures> (accessed 2 Mar 2020).

<sup>2</sup> Ministry of Manpower, *Additional measures to contain spread of COVID-19, 28 Feb 2020*, <https://www.mom.gov.sg/newsroom/press-releases/2020/0128-additional-measures-to-contain-spread-of-wuhan-virus> (accessed 2 Mar 2020).

<sup>3</sup> Ministry of National Development, *Speech by MOS Zaqq Mohamad at the Committee of Supply Debate 2020 - Continuing our Efforts to Transform the Built Environment Sector*, <https://www.mnd.gov.sg/newsroom/speeches/view/speech-by-mos-zaqq-mohamad-at-the-committee-of-supply-debate-2020---continuing-our-efforts-to-transform-the-built-environment-sector> (accessed 5 Mar 2020).

completed PPVC modules on-site first, and to install the finishing works subsequently when the delayed materials arrive;

- d) The flexibility to allow firms that have more workers from China and are facing manpower shortage to hire workers from other firms with excess foreign labour. Firms can search for eligible workers for transfer via the Foreign Construction Workers Directory System (FCWDS) online;
- e) Built Environment firms can also tap on the support packages such as the SME Working Capital Loan under the Enhanced Enterprise Financing Scheme, and the Jobs Support Scheme; and
- f) Waiver of foreign worker levies for employers with eligible foreign workers.

Against this backdrop, *Part I* of this update examines contractors' right to invoke the force majeure clause which generally excuses liability for non-performance. Will contractors be entitled to rely on such clauses as a result of the COVID-19 situation?

*Part II* of this update examines a contractor's entitlement to claim for additional time and money under the relevant provisions of the (i) Singapore Institute of Architects Articles and Conditions of Building Contracts, 9th Edition, 2010 ("**SIA Conditions**"), and (ii) Public Sector Standard Conditions of Contract for Construction Works, 7th Edition, 2014 ("**PSSCOC**"), two of the commonly used standard forms of construction contracts in Singapore.

Lastly, a checklist for contractors to consider before invoking a force majeure clause is set out at *Part III* of this update.

## Part I

### Force Majeure

Generally, force majeure clauses are drafted to enable parties to suspend the performance of relevant contractual obligations upon the occurrence of an event or certain events beyond the control of the contracting parties. In order to rely on a force majeure clause, the party seeking to rely on it will have to examine the precise language of the clause concerned and consider whether the event falls within the ambit of the force majeure clause. As held by the Singapore's Court of Appeal in **RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd** [2007] 4 SLR(R) 413 at [54]:

*"The most important principle with respect to force majeure clauses entails, simultaneously, a rather specific factual inquiry: the precise construction of the clause is paramount as it would define the precise scope and ambit of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties as far as such a clause is concerned."*

A force majeure clause operates with reference to the terms of the parties' agreement and courts will apply '*the presumption that the expression force majeure is likely to be restricted to supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility*'.<sup>4</sup>

Thus, depending on the contractual agreement between the parties, force majeure clauses may provide relief to a contractor from the performance of contract such as suspension of performance and the termination of the contract.

<sup>4</sup> **RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd** [2007] 4 SLR(R) 413 at [59].

## Can the COVID-19 situation qualify as a force majeure event?

Where the clause in question requires that the onset of event be “*beyond the control*” of one or more of the parties (or a term to this similar effect), it is arguable that even if the affected party is faced with difficulties arising from increased costs and expenses and/or the need to find alternative sources for materials or workers, this in itself may be insufficient to justify the party’s entitlement to rely on the force majeure clause.

The party seeking to invoke the force majeure clause has to show that the performance of its contract is impossible or rendered commercially impractical. In other words, there is a high burden placed on the party seeking to rely on the force majeure clause in order to relieve it from performing its contractual obligations.

Further, the party seeking to rely on the force majeure clause will have to take reasonable steps to avoid or mitigate the event in question or its consequences.<sup>5</sup> If not, it cannot be said that the occurrence of the event was beyond the control of the party in which case the force majeure clause would not apply.<sup>6</sup>

Lastly, the party seeking to rely on the force majeure clause should note whether there are any prerequisites, also known as condition precedent(s) that it has to fulfil. For example, some contracts require a party wishing to rely on the force majeure clause to give written notice to the other party of its intention to do so. Some contracts also specify other procedural requirements which should be complied with.

On this note, the China Council for the Promotion of International Trade (“CCPIT”) has also issued Force Majeure Certificates to “*partially or completely absolve parties of liability for non-performance, defective performance and late performance of contracts*”.<sup>7</sup> The effects of such certificates locally, however, is yet to be seen.

## Part II

### Examination of Relevant Clauses under SIA Conditions and PSSCOC

#### *Claims for Extension of Time*

Next, we examine a contractor’s entitlement to claim for extension of time due to COVID-19 under SIA Conditions and PSSCOC.

Both SIA Conditions and PSSCOC provide for “force majeure” as one of the grounds for extension of time claim under Clause 23.1(a) of the SIA Conditions and Clause 14.2(a) of PSSCOC respectively. However, the forms by themselves do not define what events constitute a force majeure. The court may consider that the mere mention of “force majeure” without further elaboration on its ambit as being too vague.<sup>8</sup>

Thus, in our view, a contractor cannot simply rely solely on the unamended version of Clause 23.1(a) of SIA Conditions or Clause 14.2(a) of PSSCOC to claim for extension of time. However, if parties have incorporated, for example, “epidemic” as one of the listed force majeure events in their contract, then the affected party may well be able to rely on the force majeure clause to claim for extension of time due to the outbreak of COVID-19.

<sup>5</sup> *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 at [66].

<sup>6</sup> *Ibid.*

<sup>7</sup> China Council for the Promotion of International Trade, *CCPIT Offered the First Force Majeure Certificate of Novel Coronavirus (2019-nCoV)*, [http://en.ccpit.org/info/info\\_40288117668b3d9b017019772b5706b0.html](http://en.ccpit.org/info/info_40288117668b3d9b017019772b5706b0.html) (accessed 2 Mar 2020).

<sup>8</sup> *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280 where the English courts held that the term “subject to force majeure conditions” as too vague, cited in Stephen Frust and Vivian Ramsey, *Keating on Construction Contracts (10<sup>th</sup> Edition)*, at [2-032].

That said, under the SIA Conditions, a contractor may be able to claim for extension of time on the basis of two possible grounds under Clause 23.1(l) for “**shortage of labour resulting from domestic or foreign government actions...**” and Clause 23.1(m) for the “**shortage of goods or materials ...resulting from domestic or foreign government actions, embargoes or regulations...**”. However, as these are optional clauses, a party seeking to rely on these clauses should check that these two clauses have been incorporated as part of the contract.

Finally, a party seeking reliance on these clauses should be aware that Clause 23.2 of SIA Conditions and Clause 14.3 of PSSCOC require the contractor to comply with the notification procedure as a condition precedent to any entitlement to extension of time.

#### Claims for Loss and Expense

We further understand that there is growing concern from contractors regarding their entitlement to claim for loss and expense, in addition to claims for extension of time.

The SIA Conditions does not provide an entitlement for contractors to claim for loss and expense. Hence, a contractor has to claim for any loss and expense as a claim for damages by way of an action in common law.<sup>9</sup>

In contrast, the PSSCOC expressly provides the contractor a right to recover for loss and expense under Clause 22.

“Loss and Expense” is expressly defined at Clause 1.1(q) of the PSSCOC as:

- a) the direct relevant cost of labour, Plant, materials or goods actually incurred;
- b) costs of an overhead nature actually and necessary incurred on the Site; and

- c) 15% of any such costs, to be inclusive and in lieu of profits, head office or other administrative overheads, financing charges and any other costs, loss or expense of whatsoever nature and howsoever arising.

There are nine (9) grounds which entitles the contractor to loss and expense claim under Clause 22.1:

- a) Instruction for variation;
- b) Instruction for Provision Sum Items to the extent this constitutes a variation;
- c) Failure to give possession of Site to Contractor;
- d) Suspension of work for a cause;
- e) The Contractor not having received within a reasonable time necessary drawings, instruction or other information for which prior written notice in writing had been given;
- f) An instruction issued under Clauses 3.6, 4.4, 10.4, 10.6, 18.2, 18.3, 25.1(3) [*which relate to further drawings, specifications, instructions, test, defects rectification etc.*];
- g) Unforeseeable adverse physical conditions;
- h) Acts or omissions of other contractors engaged by the employer; and
- i) Act of prevention or breach of contract by employer.

It ought to be noted that even if the effects of the COVID-19 situation fall within the ambit of a force majeure event, a contractor is unlikely to be entitled to loss and expense claim pursuant to Clause 22.1. This is because while the grounds for loss and expense claim under Clause 22.1 can be compared with those grounds for extension of time under Clause 14.2, there is a distinction to be noted that neutral-events are not grounds for

<sup>9</sup> Chow Kok Fong, *The Singapore Public Sector Construction Contract: A Commentary on the Public Section Standard Conditions of Contract (7<sup>th</sup> Edition)* (“CKF PSSCOC”), at [22.7].



loss and expense claim (e.g., ‘force majeure, ‘exceptionally adverse weather conditions’).<sup>10</sup> In other words, whilst a contractor may seek extension of time under Clause 14.2 in respect of these ‘neutral-events’, the contractor is not entitled to claim for loss and expense under Clause 22.1.<sup>11</sup>

### Halting of Construction Works

We now explore the scenario where construction works are being halted for cleaning and disinfection. A recent example is the halting of construction works at the Seletar Aerospace for cleaning and disinfection due to confirmed COVID-19 cases amongst some of the workers.<sup>12</sup> Such an order for temporary site shut down may also be made by the authorities under the Infectious Disease Act.

We go on to examine the relevant clause in relation to a potential claim for loss and expense pursuant to PSSCOC Clause 22.1(d) Suspension of Works:

*“The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by other provision of the Contract, all loss, expense, costs or damages.... affected by:*

*(d) the suspension by the Superintending Officer [(“SO”)] of any work for a cause which entitles the Contractor to recover Loss and Expense.”*

A loss and expense claim made pursuant to Clause 22.1(d) should be read in tandem with Clause 13 which provides for the terms of SO’s suspension of works. In particular, Clause 13.1

and Clause 13.2 prescribe the conditions which govern the contractor’s entitlement to be reimbursed for any loss and expense incurred in carrying out the instruction to suspend work.<sup>13</sup>

However, it ought to be noted that under Clause 13.1, the contractor is **not entitled** to loss and expense claim under the following circumstances if the instruction to suspend works is:

- a) otherwise provided for in the contract or;
- b) necessary by reason of some default on the part of the Contractor or is caused by an event which it was or would have been the Contractor’s responsibility to have overcome; or
- c) necessary for the proper execution of the Works or for the safety of the Works or any part of the Works.

While the term “safety of the Works” has not been judicially considered by the courts, it is likely that this term can cover a wide ambit of scenarios from design and construction methods to ensuring the workers’ physical well-being. In such circumstances, the contractor is unlikely to be entitled to loss and expense claim for suspension of works by the SO for the purposes of cleaning and disinfection of the site.

### Part III

#### Checklist

Whether the COVID-19 outbreak qualifies as a force majeure event will depend on the exact language of the provision in the contract. The provisions will also determine the extent of a contractor’s entitlement to, among others,

<sup>10</sup> Ibid., at [22.7].

<sup>11</sup> Ibid.

<sup>12</sup> Business Times, *Boustead Projects halts construction works after Seletar virus case*, 18 Feb 2020:

<https://www.businesstimes.com.sg/companies-markets/boustead-projects-halts-construction-works-after-seletar-virus-case> (accessed 2 Mar 2020).

<sup>13</sup> CKF PSSCOC at [22.21]-[22.23].

extension of time and/or loss of expense and suspension of performance.

Before invoking the force majeure clause, contractors should be mindful of the following considerations:

**1. Understanding the ambit of Force Majeure**

**Clause:** Is COVID-19 or its effects such as shortage of labour or materials specifically covered as a force majeure event in the contract?

**2. Bringing oneself within the ambit of the force majeure clause:** The party seeking to rely on a force majeure clause bears the burden of bringing itself within that clause. Depending on the wording of the clause, the contractor generally has to show that it could not have sourced elsewhere for its materials and labour. Generally, a mere increase in costs does not entitle a contractor to rely on the force majeure clause. The contractor has to show that its performance of the contract is rendered impossible or commercially impractical.

**3. Duty to mitigate:** The party seeking to rely on the force majeure clause has to show that it has taken reasonable steps to avoid the COVID-19 and its impact. If not, it cannot be said that the

occurrences of COVID-19 or its effects were beyond its control, rendering the force majeure clause inapplicable.

**4. Notice Requirements:** Contracts may set out notification requirements as a condition precedent to a claim for relief, for example, a claim for extension of time. Such requirements are also included in the standard forms of contracts such as the SIA Conditions and PSSCOC. Contractors should fully comply with such notice requirements as failure to comply with the same may render such notices defective<sup>14</sup>.

**5. Understand the consequence:** Parties should understand the consequences of invoking the force majeure clause as to whether that will, for example, bring an end to their obligation to perform, a temporary suspension, entitlement to extension of time, loss and expense or right to termination.

As the situation is constantly evolving, parties should always refer to the latest advisories issued by BCA, the Ministry Of Health, and other government agencies. This update is accurate as at 10 March 2020.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership whom you normally work with or any of the following partners:



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<sup>14</sup> Guenter Treitel, *Frustration and Force Majeure (3<sup>rd</sup> Edition)* at [12-047].

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