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COVID-19: Client Update (Special Issue 1)

FORCE MAJEURE UNDER THE PSSCOC

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As of the date of this article, COVID-19 has impacted many economies around the world, and the construction industry in Singapore has not been immune to its effect.

This article takes a closer look at how users may wish to approach *force majeure* under the Public Sector Standard Conditions of Contract for Construction Works 2014 (7th Ed.) (the "PSSCOC") during this uncertain period.

This article assumes that the reader has a basic degree of familiarity with the concepts of *force majeure* and the PSSCOC and will thus be focussing on the practical issues of how to operate the provisions of the PSSCOC.

FORCE MAJEURE

In general, "*force majeure*" clauses typically refer to a set of boiler-plate clauses where the contracting parties seek to deal with (and allocate) the risks for various events that are *unlikely* to occur but nonetheless are *foreseeable* (for example, an earthquake, a typhoon, wars, etc.). As such, the law relating to "*force majeure*" is highly contract dependent.

In the PSSCOC, "*force majeure*" only appears once: it is found in Cl. 14.2(a) PSSCOC, and it is not defined. So, what *is* "*force majeure*" under the PSSCOC?

DO NOT START BY FIXATING ON "FORCE MAJEURE"

Our view is that rather than asking what is "*force majeure*" under the PSSCOC, contract users should first look at what is *not* "*force majeure*" under the PSSCOC.

From a practical point of view, rather than engaging in a dispute over whether a particular situation falls within the definition of "*force majeure*" under Cl. 14.2(a) PSSCOC, it is therefore more helpful to ask if the situation falls within Cll. 14.2(b) – 14.2(q) PSSCOC. **This is because the PSSCOC appears to only envisage an extension of time as a relief for a "*force majeure*" event.**

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This being the case, if the same situation can be pigeon-holed into one or more of the grounds in Cll. 14.2(b) – 14.2(q) PSSCOC, there would be no need to define (and engage in a dispute over) the ambit of "*force majeure*".

In general, the Courts will not interpret clauses as being redundant. Any of the grounds that are covered in Cll. 14.2(b) – 14.2(q) PSSCOC would therefore not amount to "*force majeure*" under Cl. 14.2(a) PSSCOC.

There are two immediate sub-clauses, Cll. 14.2(e) and 14.2(m) PSSCOC, that are likely to be triggered due to COVID-19. This is because these two sub-clauses are most likely to be affected by governmental regulations that restrict movement or manner of work (e.g., individual distancing at the work Site, or reduced manpower to prevent crowding).

Cl. 14.2(e) PSSCOC "Compliance with the requirements of any law, regulation, by-law or public authority or public service company as stipulated in Clause 7.1."

If a Contractor must stop Works due to a legal requirement, this will likely fall within Cl. 14.2(e) PSSCOC. Such a scenario would include shutting down a construction site because all workers are subject to a Quarantine Order / Stay-Home Notice due to having come into contact with a person who has contracted COVID-19.

Cl. 14.2(m) PSSCOC "Acts or omissions of other contractors engaged by the Employer in executing work not forming part of the Contract"

If a contractor is unable to progress his Works due to another contractor being unable to complete a separate scope of works, this would fall within Cl. 14.2(m) PSSCOC.

Need to ensure that adequate precautions are taken

The above assumes a situation where the shut down / disruption is due to the fault of neither the Employer nor the Contractor.

However, if, e.g., the Site shuts down due to a failure by the Contractor (who is in control of the Site) to take adequate precautions to prevent the spread of COVID-19 within the Site, then it is likely that the Employer will not grant an extension of time, and may even look to the Contractor to indemnify the Employer against any losses suffered.

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PSSCOC users should therefore heed the latest rules and regulations promulgated by the Government and the relevant regulatory authorities.

For instance, the Building Control Authority has promulgated an advisory as early as 26 January 2020 (accessible at https://www1.bca.gov.sg/COVID-19) calling for employers and firms, especially main contractors, to adopt, among others:

1. Robust sickness surveillance process to identify and manage unwell employees; and

2. Remind employees to take note of the latest health advisories from the Ministry of Health and to adopt general precautions.

PSSCOC users would do well to refer to official websites for information on the regulations that may affect their work, given the rapidity of changes caused by COVID-19.

CL. 14.2(A) PSSCOC "FORCE MAJEURE"

Of course, if none of the other grounds in Cl. 14.2 PSSCOC can be established to support a COVID-19 related event, PSSCOC users must ask: can COVID-19 amount to "*force majeure*" under Cl. 14.2(a) PSSCOC?

Probably "*yes*". In an old English decision of *Lebeaupin v Richard Crispin and Company* [1920] 2 K.B. 714, the English court had to interpret the phrase "*subject to force majeure*", and, adopting the concept of "*force majeure*" from continental law (in particular, French law), appears to have accepted that *epidemics* would fall within the meaning of "*force majeure*".

> "The next point raised by Mr. Raeburn and Mr. Le Quesne in their able arguments turned on the words, "Subject to force majeure." This phrase "force majeure" has been introduced into many English commercial contracts within recent years. It is employed not only with increasing frequency, but without any attempt to define its meaning or any effort to co-ordinate the phrase to the other provisions of documents. It is a phrase employed in the Code de Commerce of France. Thus, for example, article 230 of that Code provides: "La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure." The meaning of the phrase as used on the Continent of Europe is discussed in Calvo's Dictionnaire de Droit International, tit. "Force Majeure," and by Dalloz, Jurisprudence Générale, tom. 24, p. 755, article "Force Majeure." A broad statement on the matter appears in Goirand's French Commercial Law, 2nd ed., p. 854. He says: "Force Majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus, war, inundations, and epidemics, are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure." This is a wide definition, but I think that it usefully though loosely suggests

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> not only the meaning of the phrase as used on the Continent, but also the meaning of the phrase as often employed in English contracts. …"

However, there has been little said in terms of English and Singapore Court decisions (as far as the authors are aware) where the Courts *expressly* state that the phrase "*force majeure*" should be interpreted to encompass epidemics.

Nonetheless, if we look at the usual events of "*force majeure*", it seems at the very least arguable that "*force majeure*" Cl. 14.2(a) PSSCOC should encompass epidemics (and pandemics), and hence, COVID-19. Epidemics are, generally, events beyond the control of the Parties to the contract.

Therefore, there is a good chance that COVID-19 will trigger claims for extensions of time made under the PSSCOC.

Just because it is a ground does not mean entitlement is shown

Of course, experienced contract users of the PSSCOC will know that just because an event can match one of the grounds in Cll. 14.2(a) – 14.2(q) PSSCOC does not necessarily mean that there is (in fact) a need for an extension of time.

For example, Cl. 14.2 *qualifies* Cll. 14.2(a) – 14.2(q) PSSCOC with the phrase "*… as may reasonably reflect delay in completion of the Works*". In general, "*delay in completion*" requires the **delay to be on the critical path**.

So, if the Temporary Occupation Permit ("TOP") for the project has been granted, and the only "*delays*" are delays to the rectification of minor defects on a hand-over punch-list, it is unlikely that this can constitute an event entitling an extension of time as such "*delays*" are unlikely to be on the critical path.

COVID-19 does not change the usual rules for applying for and granting an extension of time. We will highlight some issues to bear in mind.

Continuing delays?

What if the situation persists? What if the delays caused by COVID-19 continue to last for months?

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While Cl. 14 PSSCOC *does not* exactly specify what happens in the event of a continuing delay, PSSCOC users should note that under Cl. 23.3 PSSCOC, the PSSCOC clearly specifies that when a Contractor wants to make a claim, then "… *When the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Superintending Officer may require, send such further interim accounts giving the accumulated amount of the claims and any further grounds upon which they are based. Within 30 days of the end of the effect resulting from the event, the Contractor shall send to the Superintending Officer a final account of the claims. The obligation to give particulars of any claim for an extension of time under this Clause shall not release the Contractor from his obligations under Clause 14.3(1).*"

So, the Contractor should comply with Cl. 14.3(1) PSSCOC and give a notice to the Superintending Officer within 60 days of occurrence of the event, and continually update the Employer.

This also applies if the Contractor intends to claim for payments under Cl. 23 PSSCOC, such as a claim for Loss and Expense under Cl. 22 PSSCOC.

Do note that the phrase "*Loss and Expense*" has a specific meaning under the PSSCOC (see *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62).

Suspension for more than 90 days?

If COVID-19 leads to a prolonged suspension of the Works (or part of the Works), PSSCOC users should pay careful attention to Cl 13.2 PSSCOC, which provides as follows:

> If the progress of the Works or any part of the Works is suspended on the instruction in writing of the Superintending Officer for more than 90 days, the Contractor may, unless such suspension is otherwise provided for in the Contract, or continues to be necessary by reason of some default on the part of the Contractor, or for the proper execution of the Works, or for the safety of the Works or any part of the Works, serve a notice in writing on the Superintending Officer requiring permission within 30 days from the receipt of such notice to proceed with the Works or that part of the Works which is suspended. If such permission is not granted within such period of 30 days, the Contractor may by a further notice in writing so served elect to treat the suspension where it affects part only of the Works as an omission of such part under Clause 19.1 or, where it affects the whole of the Works, as if the Employer had at the expiry of such period of 30 days given a Notice of Termination pursuant to Clause 31.4, in which event the Contractor shall be entitled to be paid in accordance with the provisions of Clause 31.4(2).

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While it is unlikely that a suspension of the Works to comply with health and safety regulations will trigger Cl. 13.2 PSSCOC as it would unlikely be necessary for the "*safety of the Works*" (unless a minimum manpower is required for a certain scope of works to be safely carried out), PSSCOC users have to note that a prolonged suspension may result in either the Contractor triggering Cl. 19.1 PSSCOC to argue that the works had been omitted from his scope, or the Employer triggering a Termination under Cl. 31.4 PSSCOC.

Mutual termination?

While Cl. 31 PSSCOC provides for termination by the Employer, including a termination without default under Cl. 31.4 PSSCOC, it does not provide for termination by the Contractor.

So, if there is a prolonged suspension of the Works by the Employer, can the Contractor allege a repudiatory breach, especially if the Contractor is not being paid during this period?

In general, there is no implied right by the Employer to suspend the Contractor's works, and a suspension ordered in the absence of an express power may constitute a breach of contract, or even a repudiatory breach. For instance, in the Supreme Court of the Australian Capital Territory decision of *Marburg Management Pty Ltd v Helkit Pty Ltd* (1990) 100 FLR 458, the court stated that "*… there was to be implied in the contract a term that, once the respondent had been given appropriate possession of the site, it should be allowed to retain that possession and to continue work on the contract until it was completed or otherwise lawfully determined.* …"

So, if the Employer suspends the works but fails to comply with Cl. 13 PSSCOC, the Contractor may argue that there is a repudiatory breach on the Employer's part.

But Contractors should not allege repudiatory breach lightly. Further, in general, non-payment by the Employer does not constitute a valid ground for the Contractor to suspend works.

If the COVID-19 situation persists, the PSSCOC users may consider invoking Cl. 13 PSSCOC, but they should bear in mind the consequences of invoking this clause.

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Claims must be particularised

When it comes to claims for extensions of time, evidence matters. If a Contractor intends to invoke COVID-19 to claim for an extension of time, it is clearly not enough to simply assert that "*Singapore is facing COVID-19. I am claiming for 30 days EOT.*"

The Contractor must particularise his claims as required under Cl. 14.3(1) PSSCOC, with:

1. The reasons of why there will be, or may be, a delay;
2. The length of the delay;
3. The extension of time required; and
4. The impact on the construction programme.

Example – Applying for an EOT

Assuming that the delay is a delay due to a lack of workers on site due to a combination of some of the workers not being allowed to enter Singapore due to COVID-19 restrictions and some of the workers being subject to Quarantine Order / Stay-Home Notices, the following (non-exhaustive) details are relevant:

1. How many workers were on site before the relevant restrictions kicked in;
2. What was the progress of works at the material time;
3. How many workers were on site after the relevant restrictions kicked in;
4. How has the progress of works been affected;
5. What is the foreseeable number of workers available in the future; and
6. How would the (future) works be affected.

Other relevant supporting documents should also be enclosed, such as notices issued by the relevant governmental agencies, the relevant Quarantine Order/ Stay-Home Notices, etc.

Similar information would apply if the delay is caused by a shortage of materials due to, e.g., shut down of the relevant factory and/or delays caused by disruptions to the relevant supply

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chain. Emails / letters to evidence both the cause of the shut-down / disruption as well as the duration would be important to preserve and to exhibit to the relevant claim.

Adjudication

As of the date of this article, there are no indications that adjudications under the *Building and Construction Industry Security of Payment Act* (Cap. 30B, 2006 Rev. Ed.) (the "SOP Act") will be halted.

As such, "*force majeure*" claims may feature in adjudication applications. There is no reason to approach the issue of "*force majeure*" under Cl. 14.2(a) PSSCOC in manner different from a claim for an extension of time.

It is therefore important to ensure that the relevant details are adequately recorded, so that should a dispute arise, the adjudicator will be able to examine and determine the dispute with reference to contemporaneous documents.

Final dispute resolution

Remember that Adjudication Determinations have only temporary finality. If the Parties do end up in litigation or arbitration during, e.g., final accounting a few years down the road, memories of what exactly transpired during COVID-19 may have faded.

In such situations, it is all the more important for the relevant documents to be recorded properly, so that the Court / Tribunal can refer to contemporaneous documents rather than relying on the memories of witnesses.

CONCLUSION

Given that COVID-19 may last for some time, PSSCOC users would do well to pay careful attention to and familiarise themselves with the various provisions of the PSSCOC that deal with continuing events that may entitle the Contractor to claim for additional payment and extensions of time, including provisions pertaining to the suspension of the Works.

It cannot be emphasized enough that when it comes to issues of extensions of time and claims for additional payment, having the relevant supporting documents is essential. Contractors should therefore begin to build up a record of the relevant events and supporting documents which they may wish to rely upon right now, rather than wait until a dispute arise and then scramble to find the relevant documents.

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