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Introduction

The global presence of the People's Republic of China (China or PRC) in the construction space is unsurpassed. According to the Nikkei Asian Review, Chinese contractors took in nearly a quarter of international construction revenue in 2018:

- Out of the top 250 international contractors identified in reports by US industry publication Engineering News-Record, 76 are from China. Chinese contractors accounted for 24.4% of the US\$486.9 billion in revenue made by such businesses outside their home countries;
- Top Chinese contractors pulled in US\$118.9 billion in cross-border sales;
- Chinese contractors took in 60% of all cross-border construction revenue in Africa, as well as 40% in Asia outside of China; and
- Chinese players held the top spots in contracts for transport infrastructure, power generation facilities and factories

(See background as reported in Nikkei Asian Review (accessed on 7 February 2020).)

In November 2019, GlobalData reported that:

- China's main international funding agencies are funding US\$334 billion of infrastructure projects globally that are currently in all stages of development up to and including execution; and
- the total value of projects in which Chinese contractors are involved in the South and South-East Asia region totalled US\$426 billion.

These projects invariably involve the inflow of Chinese construction professionals and labour into the countries where they are located.

(See report by GlobalData (accessed on 7 February 2020).)

Since the end of 2019, the novel COVID-19 (Coronavirus) has had a tremendous impact globally. To date, the Chinese government has locked down 16 cities with the total number of people under quarantine orders being about 50 million. In Singapore, the COVID-19 has been classified as a 'dangerous infectious disease' under the Infectious Diseases Act (Cap. 137) (IDA). The WHO has also since 31 January 2020 recognised the COVID-19 outbreak as a global emergency.

In the face of the COVID-19 outbreak, the Singapore government has implemented at least 4 types of measures to

control and/or manage the outbreak: (i) the Ministry of Manpower has announced that they will reject all new work pass applications from the Chinese province of Hubei; (ii) quarantine orders have been issued for all recent travellers to Hubei; (iii) a 14-day leave of absence has been advised for all employees who have travelled to mainland China within 14 days before arriving in Singapore from 31 Jan 2020; and (iv) the Immigration & Checkpoints Authority of Singapore (ICA) has announced that all new visitors with recent travel history to mainland China within the last 14 days will not be allowed entry into or transit through Singapore (the ICA Entry Ban). Whilst it is unclear whether a leave of absence has any direct legal effect, quarantine orders come under the IDA, and will have full and direct legal effect, including fine and/or imprisonment for breach of quarantine orders. The ICA Entry Ban would similarly have legal effect.

The widespread outbreak of the COVID-19 not only causes risks to human life, but also has severe and inescapable ramifications for the construction industry. In particular, Chinese construction companies and Chinese workers are commonplace throughout Singapore. Planned projects may be delayed as a result of the COVID-19 outbreak and the ensuing government restrictions, which are all rightly implemented for the safety of public health. We certainly do not want to be at DORSCON RED.

Will Liquidated Damages (LDs) be imposed by employers as a result of the delay, or can contractors bring claims for Extension of Time (EOT)? Further and/or in the alternative, can contractors rely on *force majeure*?

Force Majeure and EOT

Force majeure has been described as “an unforeseeable event beyond the control of any of the parties to the Contract, the effect of which is to release the parties from performing their remaining obligations under the Contract.” In other words, *force majeure* clauses allow a party to suspend the performance of the relevant contractual obligations when circumstances beyond their control arise. The precise language of a *force majeure* clause is paramount, as this would define the ambit of events that could be considered *force majeure* (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413).

Two of the commonly used standard form contracts, the SIA Articles and Conditions of Building Contract (SIA Conditions) at Clause 23.(1)(a) and REDAS Design and Build Conditions of Contract (REDAS DBCC) at Clause 16.1.2, both expressly provide for *force majeure* as grounds for EOT.

SIA Conditions s 23.(1) – Extension of Time

“The Contract Period and the Date of Completion may be extended and re-calculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates **as may reasonably reflect any delay in completion** which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce the same, has been caused by:

(a) *Force Majeure*;

...”

REDAS DBCC s 16.1 – Grounds for Extension of Time

“The Contractor may apply to the Employer’s Representative for an extension of time if ... is or will be **delayed** before or after the Date of Completion by any of the following causes:

...

16.1.2 A *force majeure* event as defined in clause 18,2 below...”

Force Majeure clauses typically use the thresholds of “prevent” or “hinder” in order to connote the level of non-performance the *force majeure* event has resulted in. In the context of EOT clauses under the SIA Conditions and the REDAS DBCC, the test appears to be delay, which is a lower threshold than “prevention”, which in turn suggests impossibility. In any case, *force majeure* events which merely hinder or delay performance may entitle a contractor to EOT.

Can the COVID-19 outbreak be considered a *force majeure* event?

In *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd [2011] 2 SLR 106 (Holcim)*, the Court of Appeal had to consider how to construe a *force majeure* provision against the backdrop of the Indonesian sand ban in 2007. The Singapore Court of Appeal held at [56] that in ascertaining whether a *force majeure* clause can be invoked, consideration has to be given to “commercial practicability.” In the context of the *force majeure* clause in *Holcim*, the Court of Appeal took into consideration the “difficulties faced by the Appellant in the present overall commercial context” and that “[i]t was sufficient that the Appellant was placed in a commercially impracticable situation”.

Clause 23(1)(l) of the SIA Conditions provides for labour shortage as a ground for extension of time:

“23.(1)(l) **the shortage of labour resulting from domestic or foreign government actions, embargoes** or regulations which an employer of labour could not reasonably have foreseen at the date of the Contract, and notwithstanding the Contractor’s readiness by himself or his subcontractors direct or indirect to afford satisfactory conditions or working and pay adequate wages or other emoluments therefore;...”

On the other hand, REDAS DBCC defines *force majeure* at Clause 18.2 and the definition includes:

“*Force Majeure* event” means the following:

...

18.2.4 Industrial action by workmen, strikes, lockouts or **embargoes** affecting directly the Works.”

In *Lebeaupin v Richard Crispin & Co [1920] 2 KB 714*, the court held that *force majeure* goes beyond just Acts of God and includes “[a]ny direct legislative or administrative interference would of course come within the term: for example, an embargo.”

It remains to be seen whether government restrictions such as the ICA Entry Ban would constitute an embargo or a *force majeure* event, but a case can certainly be made for the same. That workers are banned from even entering Singapore due to a global health emergency and virus outbreak is likely to be an unforeseen event which is beyond the control of a contractor. However, are there no alternatives such that delay will inevitably ensue? Even if there is a ban or quarantine order, would such events cause critical delay? Is there an obligation to mitigate?

There are questions of fact and law to be answered but we highlight some relevant issues to be considered.

Further Considerations

The contractor may have to engage alternative sources of labour to catch up on the works even if this comes at the price of increased cost, and there is a need to review the terms of the contract to ascertain where the risk lies. The practical question that then arises is whether this is even feasible, having regard to the nature of the work and the availability of such alternative resources?

Should a contractor, regardless of the merits, issue written notices for EOT and/or claim delay-related loss and expense (L&E)? Whether a claim for EOT can be successfully made out would, of course, depend on the wording of the specific EOT clause contained in the construction contract. However, it would seem prudent to issue notices for

EOT to preserve one's position. Again, the terms of the EOT and L&E clauses will need to be carefully reviewed.

In this regard, Chinese government authorities have announced that they can issue *force majeure* certificates to Chinese companies who are struggling to comply with their contractual obligations as a result of the COVID-19 outbreak. At present, it remains an open question as to the legal effect, if any, of such *force majeure* certificates issued by the Chinese government authorities, but they can certainly be useful supporting material for any claim for *force majeure* or EOT.

Public health is no doubt important. However, one cannot ignore the real financial impact of counter-measures to deal with the COVID-19 outbreak. All stakeholders in the building and construction industry should review their contracting arrangements and see how best their interest and rights can be adequately protected.

Further Readings

- MOM's measures to contain Coronavirus (accessed on 7 February 2020)
- Issuance of Quarantine Orders (accessed on 7 February 2020)
- ICA's advisory on entry requirements into Singapore (accessed on 7 February 2020)
- Leave of Absence and Quarantine Order (accessed on 7 February 2020)
- Issuance of *Force Majeure* Certificates by Chinese authorities (accessed on 7 February 2020)

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This article has been updated with the official name "COVID-19" which was released by World Health Organisation on 11 February 2020.

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